

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|----------------------------------|---|-------------------------------|
| JEREMY SCHOEMAKER, |) | |
| |) | Case No. 8:09cv441 |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | REPORT OF PARTIES' RULE 26(f) |
| DAVID SULLIVAN, individually and |) | PLANNING CONFERENCE |
| d/b/a BIG BLUE DOTS, |) | |
| |) | |
| Defendant. |) | |

Counsel for the parties met on June 9, 2010 by telephone. Representing Plaintiff Jeremy Schoemaker was Patrick S. Cooper of Fraser Stryker PC, LLO; representing Defendant David Sullivan were John Sharp of Baird Holm, LLP, and Grant Fairbairn and Paul Thomas of Fredrikson & Byron, P.A.¹ The parties discussed the case and jointly (except as noted below) make the following report:

I. Initial Matters:

A. Jurisdiction and Venue:

1. Jurisdiction: The Court denied Defendant's Motion to Dismiss for lack of personal jurisdiction. Defendant has asserted a personal jurisdiction defense in his Answer.
2. Venue: Not disputed.

B. Immunity: The Defendant will not raise an immunity defense.

C. If either jurisdiction or venue is being challenged, or if a defense of immunity will be raised, state whether counsel wish to delay proceeding with the initial phases of discovery until those issues have been decided, and if so: Not applicable.

D. Rule 11 Certification: As a result of further investigation as required by Fed. R. Civ. P. 11, after filing the initial pleadings in this case, the parties agree that the following claims and defenses raised in the pleadings do not apply to the facts of

¹ The parties stipulate that Sullivan is the sole member of Big Blue Dots, LLC ("BBD"), that BBD was not served with the Summons and Complaint, and that BBD was not named as a party to this lawsuit.

this case, and hereby agree the court may dismiss or strike these claims and defenses at this time (an order adopting this agreement will be entered).

Not Applicable.

II. Remaining Claims and Defenses:

A. Plaintiff's Claims, Elements, Factual Application: The elements of the plaintiff's remaining claims and the elements disputed by the defendant are as follows. For each claim, list and number each substantive element of proof *and* the facts plaintiff claims make it applicable or established in this case (DO NOT repeat boilerplate allegations from pleadings):

1. COUNT ONE: Copyright Infringement

Elements: (1) Plaintiff is the owner of a registered copyright;
(2) Defendant used Plaintiff's mark in his advertisements.

Plaintiff's Factual Application: Defendant used Plaintiff's copyrighted photograph in his internet advertisements to promote a credit card scam, whereby consumers paid a nominal shipping and handling fee for an online money-making kit, but they received nothing of value and were later charged substantial recurring fees on their credit card. Plaintiff is presently aware that infringing advertisements appeared on www.world-jobs-report.com and www.sandiego-herald.com, and will conduct discovery to determine whether Defendant committed additional infringements on other web sites. See Complaint for further details.

Of these elements, Defendant disputes the following numbered elements:

(1) Defendant is without information sufficient to form a belief as to the truth or falsity of Plaintiff's claim that he is owner of a registered copyright in the photograph depicted in the Complaint's Exhibit A (hereinafter, the "photograph-at-issue"). Defendant will need discovery to determine whether Plaintiff is the actual owner of the copyright and thus has standing to bring Count One.

(2) Sullivan admits that BBD briefly used the photograph-at-issue in thumbnail form in an advertisement on a website, but denies that its use was intentional copyright infringement or was part of a scam. Sullivan denies that he used the photograph-at-issue for any purpose. All actions at issue in this lawsuit relating to the photograph-at-issue were taken by BBD.

2. COUNT TWO: Invasion of Privacy (Neb. Rev. Stat. § 20-202)

- Elements:
- (1) Defendant exploited Plaintiff, or Plaintiff's name, picture, portrait or personality for advertising or commercial purposes.
 - (2) Plaintiff was damaged as a result of Defendant's conduct.

Plaintiff's Factual Application: Defendant used Plaintiff's copyrighted photograph in his internet advertisements to promote a credit card scam, whereby consumers paid a nominal shipping and handling fee for an online money-making kit, but they received nothing of value and were later charged substantial recurring fees on their credit card. Plaintiff is presently aware that infringing advertisements appeared on www.world-jobs-report.com and www.sandiego-herald.com, and will conduct discovery to determine whether Defendant committed additional infringements on other web sites. Defendant's conduct caused consumers to believe Defendant's scam was affiliated with or approved by Plaintiff. See Complaint for further details.

Of these elements, defendant disputes the following numbered elements:

- (1) Sullivan admits that BBD briefly used the photograph-at-issue in thumbnail form in an advertisement on a website, but denies that it intentionally "exploited Plaintiff, or Plaintiff's name, picture, portrait or personality for advertising or commercial purposes." Sullivan denies that he used the photograph-at-issue for any purpose. All actions at issue in this lawsuit relating to the photograph-at-issue were taken by BBD.
- (2) Defendant denies that Plaintiff has suffered damage.

3. COUNT THREE: Consumer Protection Act (Neb. Rev. Stat. §59-1601 *et seq.*)

- Elements:
- (1) Defendant engaged in acts that constitute unfair competition or deceptive acts or practices;
 - (2) Defendant's conduct had an impact, directly or indirectly, upon the people of the State of Nebraska;
 - (3) Plaintiff was damaged by Defendant's conduct.

Plaintiff's Factual Application: Defendant used Plaintiff's copyrighted photograph in his internet advertisements to promote a credit card scam, whereby consumers paid a nominal shipping and handling fee for an online money-making kit, but they received nothing of value and were later charged substantial recurring fees on their credit card. Plaintiff is presently aware that infringing advertisements appeared on www.world-jobs-report.com and www.sandiego-herald.com, and will conduct discovery to determine whether Defendant committed additional infringements on other web sites. Defendant's conduct caused consumers

to believe Defendant's scam was affiliated with or approved by Plaintiff. See Complaint for further details.

Of these elements, defendant disputes the following numbered elements:

- (1) Sullivan admits that BBD briefly used the photograph-at-issue in thumbnail form in an advertisement on a website, but denies that it used the photograph-at-issue to promote a credit card scam. Sullivan denies that he used the photograph-at-issue for any purpose. All actions at issue in this lawsuit relating to the photograph-at-issue were taken by BBD.
- (2) Sullivan denies that BBD's innocent use of the photograph-at-issue had any impact on the people of Nebraska.
- (3) Defendant denies that Plaintiff has suffered damage.

4. COUNT FOUR: Uniform Deceptive Trade Practices Act (Neb. Rev. Stat. §§ 87-301 *et seq.*)

- Elements:
- (1) Defendant passed off his goods and/or services as those of Plaintiff; or
 - (2) Defendant caused a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval of his goods and/or services; or
 - (3) Defendant caused a likelihood of confusion or misunderstanding as to affiliation, connection or association with Plaintiff; or
 - (4) Defendant used a scheme to defraud by obtaining money through the use of false pretenses.

Plaintiff's Factual Application: Defendant used Plaintiff's copyrighted photograph in his internet advertisements to promote a credit card scam, whereby consumers paid a nominal shipping and handling fee for an online money-making kit, but they received nothing of value and were later charged substantial recurring fees on their credit card. Plaintiff is presently aware that infringing advertisements appeared on www.world-jobs-report.com and www.sandiego-herald.com, and will conduct discovery to determine whether Defendant committed additional infringements on other web sites. Defendant's conduct caused consumers to believe Defendant's scam was affiliated with or approved by Plaintiff. See Complaint for further details.

Of these elements, defendant disputes the following numbered elements: (1) – (4) Sullivan admits that BBD briefly used the photograph-at-issue in thumbnail form in an advertisement on a website, but denies that it used the photograph-at-issue to promote a credit card scam or to pass off its goods or services as being those of Plaintiff. Sullivan denies that BBD’s innocent use of the photograph-at-issue caused any confusion or involved false pretenses. Sullivan denies that he used the photograph-at-issue for any purpose. All actions at issue in this lawsuit relating to the photograph-at-issue were taken by BBD.

B. Defenses. The elements of the remaining affirmative defenses raised by the pleadings are as follows: List each affirmative defense raised or expected to be raised by the defendant(s), the substantive elements of proof for it, *and* how the defendant claims the facts of this case make such defense applicable or established. (DO NOT repeat boilerplate allegations from pleadings or deny matters on which plaintiff has the burden of proof):

1. First Defense: Innocent Intent

Elements: (1) Defendant was not aware,
(2) and Defendant had no reason to believe his acts constituted an infringement of Plaintiff’s rights,
(3) therefore, the Court in its discretion may reduce any award of statutory damages.

Factual Application: Sullivan admits that BBD briefly used the photograph-at-issue in thumbnail form in an advertisement on a website, but denies that its use was intentional copyright infringement or was part of a scam. BBD received the advertisement from a third-party and did not know who Plaintiff was at the time. The thumbnail form of the photograph-at-issue in the advertisement did not contain a notice of copyright when it was accessed by BBD. As soon as BBD was notified of the issue, it ceased using the photograph-at-issue. Sullivan denies that he used the photograph-at-issue for any purpose. All actions at issue in this lawsuit relating to the photograph-at-issue were taken by BBD.

Of these elements, plaintiff disputes the following elements: All.

2. Second Defense: Lack of Personal Jurisdiction

Elements: Defendant asserts that the Court lacks specific or general personal jurisdiction over Defendant. The basis for the Court’s exercise of personal

jurisdiction was the *Calder* effects test. Discovery will reveal that Defendant did not know who Plaintiff was or where he lived at the time BBD used the photograph-at-issue and did not direct any action at the State of Nebraska.

Of these elements, plaintiff disputes the following elements: All.

3. Third Defense: Unclean Hands

- Elements:
- (1) Plaintiff cannot obtain relief if he has acted inequitably, or if
 - (2) he has acted unfairly, or if
 - (3) he has acted dishonestly as to the controversy in issue.

Factual Application: Plaintiff has repeatedly alleged that Defendant has engaged in a credit card scam and has sought to deceive residents of Nebraska. Upon information and belief, Plaintiff has engaged in precisely the types of acts that it now claims are a scam. Indeed, upon information and belief, the photograph-at-issue appears to be fake. Plaintiff apparently has a history of posting photo-shopped photographs on his website.

Of these elements, plaintiff disputes the following elements: All.

III. Amending Pleadings; Adding Parties:

- A. The plaintiff does not know at this time whether he will seek to amend pleadings or add parties. If necessary, plaintiff may file the necessary motion to add parties or amend pleadings by August 13, 2010.
- B. The Defendant does not know at this time whether he will need to amend pleadings or add parties. If necessary, Defendant may file the necessary motions to add parties or amend pleadings by August 13, 2010.
- C. Plaintiff will not move for class certification.

IV. Dispositive Motion Assessment:

- A. The following claims and/or defenses may be appropriate for disposition by early motion to dismiss: None.
- B. The following claims and/or defenses may be appropriate for disposition by summary judgment or partial summary judgment: Plaintiff believes that the liability portions of most, if not all, of his claims may be appropriately decided

pursuant to a motion for summary judgment, but discovery is necessary to determine which claims are appropriate for dispositive motion practice. The damages aspect of Plaintiff's claims will be decided by the jury. Defendant disagrees that Plaintiff's claims are appropriate for summary judgment, given that Sullivan did not use the photograph-at-issue for any purpose, Defendant has affirmative defenses that bar Plaintiff from recovery, and several of Plaintiff's claims contain elements that turn on fact specific issues, such as the intent of BBD (which is not a party to this lawsuit) in using the photograph-at-issue.

- C. The discovery necessary to determine whether to file dispositive motions on such claims and/or defenses is: Written discovery and a limited number of depositions. Plaintiff believes it can be completed, at the earliest, by September 10, 2010. Defendant believes that discovery will take longer than three months. Discovery will likely take six to eight months and may involve third-party discovery because Plaintiff has alleged consumer confusion. Defendant is entitled to explore Plaintiff's allegations.

V. Settlement:

A. Status/Assessment of Settlement Discussions. Counsel state:

There have been no efforts taken yet to resolve this dispute.

This dispute has been the subject of efforts to resolve it prior to filing in court; after court filing, but before the filing of this report. Those efforts consisted of: written demands to the Defendant; exchange of settlement proposals by counsel during various telephone conferences.

Counsel believe that with further efforts in the *near* future, the case can be resolved, and the court is requested to delay entering an initial progression order for _____ days to facilitate immediate negotiations or mediation. Defendant's counsel will report to the court by letter at the end of this period on the status of such discussions.

___ Counsel have discussed the court's Mediation Plan and its possible application in this case with clients *and* opposing counsel. Mediation ___ will be appropriate in this case at some point; ___ will not be appropriate because:

_____.

___ This case can be settled, but settlement is not very likely, and negotiations will be difficult because: _____.

___ This case will not be settled because: _____.

B. Next Step. The *minimum* discovery needed to conduct further settlement discussions is: By Plaintiff(s): written discovery and Defendant's deposition.

This discovery will be completed at the earliest by September 24, 2010, and plaintiff will then communicate to defendants a written, updated settlement proposal.

By Defendant: written discovery and Plaintiff's deposition.

VI. Discovery Plan: The parties submit the following plan for their completion of discovery:

A. Subjects for Discovery (i.e., factual issues that discovery may resolve): By Plaintiff: The scope and extent of Defendant's use of Plaintiff's copyrighted photograph; the identity of other persons involved in the infringements; Defendant's profits attributable to the infringements; factors related to statutory damages; and Defendant's affirmative defenses.

By Defendant: Written discovery and Plaintiff's deposition regarding his claims, his alleged damages, and Defendant's affirmative defenses; third-party discovery regarding allegations made by Ralph Ruckman in his declaration in opposition to Defendant's motion to dismiss; third-party discovery of the consumers allegedly confused by BBD's temporary use of the photograph-at-issue; and third-party discovery regarding Plaintiff's own practices regarding the alleged credit card scam and the authenticity of the photograph-at-issue.

B. Agreed Discovery Procedures:

1. Unique Circumstances. The following facts or circumstances unique to this case will make discovery more difficult or more time consuming:
N/A.
2. Electronic Discovery Provisions: Counsel have conferred regarding the preservation of electronically produced and/or electronically stored information or data that may be relevant--whether privileged or not--to the disposition of this dispute, including:
 - (a) The extent to which disclosure of such data should be limited to that which is available in the normal course of business, or otherwise;
 - (b) The anticipated scope, cost, and time required for disclosure of such information beyond that which is available in the normal course of business;
 - (c) The format and media agreed to by the parties for the production of such data or information as well as agreed procedure for such production;
 - (d) Whether reasonable measures have been implemented to preserve such data;
 - (e) The persons who are responsible for such preservation, including any third parties who may have access to or control over any such information;
 - (f) The form and method of notice of the duty to preserve;
 - (g) Mechanisms for monitoring, certifying, or auditing custodial compliance;
 - (h) Whether preservation will require suspending or modifying any routine business processes or procedures, records management procedures and/or policies, or any procedures for the routine destruction or recycling of data storage media;
 - (i) Methods to preserve any potentially discoverable materials such as voice mail, active data in databases, or electronic messages;
 - (j) The anticipated costs of preserving these materials and how such costs should be allocated; and
 - (k) The entry of and procedure for modifying the preservation order as the case proceeds.

The parties agree that:

 X No special provisions are needed in respect to electronic discovery. The court should order protection and production of such information in accordance with its usual practice.

_____ The following provisions should be included in the court's scheduling order:

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3. Disclosures required by Rule 26(a)(1), including a statement of how each matter disclosed relates to the elements of the disclosing party's claims or defenses will be completed by June 25, 2010.
 4. Discovery will be conducted in stages or otherwise restricted, as follows: Not applicable.
 5. 30 Is the maximum number of interrogatories, including sub-parts, that may be served by any party on any other party.
 6. 5 Is the maximum number of depositions that may be taken by plaintiffs as a group and defendants as a group.
 7. Depositions will be limited by Rule 30(d)(1).
 8. If expert witnesses are expected to testify at the trial, counsel agree to at least identify such experts, by name and address, (i.e., without the full reports required by Rule 26(a)(2)), by August 31, 2010.
 9. The parties stipulate that they will be required to give at least 5 days' notice of their intention to serve records/documents or subpoenas on third parties, to enable court consideration of them, if necessary, prior to issuance.
 10. Other special discovery provisions agreed to by the parties or suggested by either party are: None.

VII. Consent to Trial Before Magistrate Judge:

The parties do not consent to trial before a magistrate judge.

VIII. Trial Scheduling:

- A. Plaintiff now anticipates that the case can be ready for trial by November, 2010. Defendant believes that discovery will take longer than three months, and may be followed by summary judgment motions. Thus, Defendant anticipates that the case can be ready for trial by February 2011.

B. Counsel think that the trial of this case, if necessary, will require approximately three (3) trial days.

C. Jury Trial:

1. _____ Having previously demanded jury trial, the plaintiff now waives jury trial. Defendant will file a demand for jury trial within 30 days of the Court's ruling on the pending Motion to Dismiss or Stay Case, in the absence of which jury trial will be deemed to have been waived.
2. _____ Having previously demanded jury trial, the defendant now waives jury trial. Plaintiff will file a demand for jury trial within _____ days of the filing of this report, in the absence of which jury trial will be deemed to have been waived.
3. _____ The parties disagree on whether trial by jury is available in this case. A motion to strike the _____'s demand for jury trial will be filed no later than _____.
4. X Each of the parties demands trial by jury.

IX. Other: Other matters to which the parties stipulate and/or which the court should know or consider: _____

Dated this 10th day of June, 2010.

JEREMY SCHOEMAKER,
Plaintiff

DAVID SULLIVAN,
Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the counsel listed below:

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