UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22674-Civ-JORDAN/Torres

DELL INC.; AND ALIENWARE CORPORATION,

Plaintiffs,

vs.

BELGIUMDOMAINS, LLC; CAPITOLDOMAINS, LLC; DOMAINDOORMAN, LLC; NETRIAN VENTURES LTD.; IHOLDINGS.COM, INC.; JUAN PABLO VAZQUEZ a/k/a JP VAZQUEZ, an individual; and DOES 1 – 10;

Defendants.

PLAINTIFFS' MOTION FOR SANCTIONS, INCLUDING THE ENTRY OF A DEFAULT JUDGMENT

I. INTRODUCTION

On November 9, 2007, Plaintiffs Dell Inc. and its wholly owned subsidiary, Alienware Corporation (collectively "Plaintiffs") executed a seizure of business records and computer files at the home of Defendant Juan Pablo Vazquez a/k/a JP Vazquez and served Defendants[1] with the Complaint, *Ex Parte* Temporary Restraining Order and Preliminary Injunction ("TRO"), *Ex Parte* Seizure Order, Accelerated Discovery and Order Sealing the File ("Seizure Order"), and Plaintiffs' First Request For Production Of Documents. The TRO specifically restrained and enjoined Defendants from "destroying, altering, secreting, transferring, or otherwise disposing of any records of their business activities, whether on paper, or in electronic format." TRO ORDER, ¶ 1, pp. 22-23.

[1] BelgiumDomains, LLC; CapitolDomains, LLC; DomainDoorman, LLC; Netrian Ventures LTD.; and iHoldings.com, Inc. are collectively referred to as Defendants. Plaintiffs' Motion For Sanctions is not directed to Defendant Juan Pablo Vazquez a/k/a JP Vazquez.

During this seizure, Plaintiffs advised Defendants that Plaintiffs would forensically copy[2] the servers Defendants use in their business which were located at the Miami, Florida facility operated by Internap Network Services Corporation. [Declaration Of David J. Steele In Support Of Plaintiffs' Motion For Sanctions, Including The Entry Of A Default Judgment ("Steele Decl.") ¶ 3]. Three days later, on November 12, 2007, Plaintiffs' attorney contacted Richard Baron, attorney for Mr. Vazquez and President of Defendant iHoldings.com, Inc.,[3] to arrange for inspection of these servers by the Court-approved Forensic Expert. [Steele Decl. ¶ 4]. The same day, and in violation of the TRO and the Federal Rules of Civil Procedure, Defendants selectively, intentionally and permanently erased information from five servers using an electronic data "shredding" software called BCWipe. [Declaration Of James Stanford Wilson In Support Of Plaintiffs' Motion For Sanctions, Including The Entry Of A Default Judgment ("Wilson Decl."), ¶¶ 20, 21].

Plaintiffs filed their Complaint under seal and moved for a TRO and Seizure Order because they feared that evidence of Defendants' wrongdoing, most of which is stored electronically on Internet accessible servers, might be destroyed if Defendants had notice. Notwithstanding the protections of the TRO and the ability to seize business records and computer files at Mr. Vazquez' home, Plaintiffs' worst fears have been realized. Since Defendants intentionally destroyed evidence in bad faith, to the prejudice of Plaintiffs, the Court should impose the "ultimate sanction" of default judgment under the Court's inherent powers and Rule 37 of the Federal Rules of Civil Procedure.

II. STATEMENT OF FACTS

On November 12, 2007, three days after they were served with the Complaint, TRO, Seizure Order and Request For Production Of Documents, information contained on nine of Defendants' password protected servers was deleted. [Wilson Decl. ¶¶ 19, 22]. Defendants

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[2] Under the terms of the Seizure Order, the Court approved the use of NetEvidence, Inc. to act as the Forensic Expert. Seizure Order, ¶¶ 8-13.

[3] Defendant iHoldings.com, Inc. is a dissolved Florida corporation.

were responsible for this deletion because these servers were only accessible to the Defendants and their authorized agents. [Wilson Decl. ¶¶ 8-11]. Defendants, who had remote access to the servers, used a software tool called BCWipe to permanently and selectively delete information on at least five servers.[4] [Wilson Decl. ¶ 20]. The deletion was no accident; rather, the use of BCWipe reflects a desire by Defendants to "confidently erase files that can never be recovered." [Wilson Decl. ¶ 20].

Defendants, by these actions, not only violated the terms of the TRO but, in spoliating evidence, have engaged in discovery abuses in violation of the Federal Rules of Civil Procedure. Defendants' destruction of evidence, unfortunately, is consistent with Defendants' extensive track record of deceptive conduct. For example, Defendants use a number of offshore shell entities, fictitious businesses and personal names to conceal their true identities. TRO FINDINGS OF FACT, ¶¶ 14-15, p. 4. Defendants use these shell entities, fictitious businesses and personal names to "register hundreds of thousands of domain names every day, and to move these domain names back and forth among themselves to avoid having to pay registration fees and to avoid detection by trademark owners and others." TRO FINDINGS OF FACT, ¶ 22, p. 6. In fact, since the existence of these offshore entities created the risk that Defendants "may destroy or move evidence" overseas (TRO CONCLUSIONS OF LAW, ¶ 46, p. 22), the Court issued the TRO enjoining Defendants or their agents from destroying any potential evidence.

In addition, Defendants are in the process of dissolving their Florida LLC businesses and moving their assets out of the country. Documents produced by The Internet Corporation for Assigned Names and Numbers ("ICANN") show that Defendants are currently attempting to transfer their ICANN Registrar businesses to the British Virgin Islands.[5] Moreover, Defendant

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[4] It should be noted that the servers were rebooted on Nov. 12, 2007 for the first time in at least 100 days, and activity logging was also being deleted on many of the servers. [Wilson Decl. ¶¶ 16, 18].

[5] Applications to transfer the Registrar businesses were filed by Defendant Netrian Ventures LTD with ICANN. *See* paragraphs 3-5 of the December 21, 2007 Declaration of David J. Steele in Support of Plaintiffs' Opposition To Defendants' Emergency Motion To Modify Preliminary Injunction Or Increase Bond By Defendants Belgiumdomains, LLC, Capitoldomains, LLC,

Netrian Ventures LTD ("Netrian") also has applied to operate another registrar, CaribbeanNames LTD, which would also be located in the British Virgin Islands. [Dec. 21, 2007 Decl. of Steele ¶6, and Exhibit 5 to the Dec. 21, 2007 Decl. of Steele.]

Furthermore, even though Netrian is the managing member of three Florida limited liability companies and is listed in documents filed with the Florida Department of State's Office as the Corporate Manager for Defendants BelgiumDomains, CapitolDomains, and DomainDoorman, Netrian is now claiming that there "is no personal jurisdiction over it in the State of Florida (or anywhere in the U.S.)." Defendants' Motion to Dismiss p. 1, n 1. Netrian's representation (or, more accurately, misrepresentation) sheds light on the tactics that Defendants will employ to shield their assets and avoid the authority of the Court.

Finally, Defendants failed to respond to written discovery and failed to appear at their Rule 30(b)(6) depositions. Plaintiffs have filed a motion to compel and seek sanctions against the Defendants for these discovery abuses.

III. LEGAL ANALYSIS

A. The Court Has The Power To Issue The "Ultimate Sanction" Of Default Judgment As To Liability

Federal courts have the inherent power to regulate litigation and to impose sanctions on parties who litigate in bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-51 (1991). Courts impose sanctions for discovery abuses in order "to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Flury v. Daimlerchrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). The Court's "inherent power to sanction is used most frequently where a party commits perjury or destroys or doctors evidence." *Quantum Communs. Corp. v. Star Broad., Inc,* 473 F. Supp 2d 1249, 1268 (S.D. Fla. 2007) .

Where a party can show that his opponent has destroyed evidence in bad faith, it is within a court's inherent power to grant a final judgment on the merits against the destroying party. *See*

Domaindoorman, LLC, Netrian Ventures, LTD., and iHoldings.com, Inc. ("Dec. 21, 2007 Decl. of Steele"). Copies of Defendants' applications to transfer were previously filed with the Court as Exhibits 2-4, to the Dec. 21, 2007 Decl. of Steele.

e.g. Flury, 427 F.3d at 944 (granting dismissal as sanction where plaintiff failed to allow inspection of the automobile that was the subject of the lawsuit prior to its salvage and destruction); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984) (having determined that Piper intentionally destroyed documents to prevent their production, the entry of a default is the appropriate sanction."), *aff'd in relevant part by* 775 F.2d 1440 (11th Cir. 1985); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131 (S.D. Fla. 1987) (granting default judgment stating: "we have no doubt as to the Defendant's willfulness in destroying documents pertinent to [Plaintiff's] Complaint and Request for Production"); *Wm. T. Thompson v. General Nutrition Corp.,* 593 F.Supp. 1443, 1455 (C.D. Cal. 1984) (default judgment entered because defendant had "knowingly and purposefully" permitted its employees to destroy key documents depriving plaintiff of access to important evidence needed to build its case).

Federal courts also have power to grant sanctions against a disobedient party under the Federal Rules of Civil Procedure. For example, Rule 37(d)(3) of the Federal Rules of Civil Procedure empowers the court to enter default judgment (under Rule 37(b)(2)(A)(vi)) if a party fails to respond to a Request for Inspection of Documents under Rule 34. "The analysis under *Rule 37,* however, is essentially the same" as the Court's inherent authority to impose sanctions against the disobedient party. *Telectron,* 116 F.R.D. at 128.

The ultimate sanction of default "represents the most severe sanction available to a federal court, and therefore should only be exercised when there is a showing of bad faith and where lesser sanctions will not suffice." *Flury,* 427 F.3d at 944. Several courts, however, have granted the ultimate sanction of default or dismissal against parties who have intentionally destroyed electronic evidence after a complaint has been filed and when inspection by a forensic expert is imminent. *See Mauricio A. Leon, M.D. v. IDX Systems Corporation,* 464 F.3d 951, 959 (9th Cir. 2006) (affirming the dismissal of plaintiff's claims where plaintiff ran a "wiping program" eliminating over 2,200 files from his employer-issued laptop after he had filed his employment discrimination action); *Ameriwood Industries, Inc. v. Paul Liberman et. al.*, 2007 U.S. Dist. LEXIS 74886 at *10 (E.D. Mo. 2007) (entering default judgment against defendants

who used a "scrubbing" program called "Window Washer" to permanently overwrite data on their employer-issued laptops days before they were to allow plaintiff's expert to copy the hard drives); *Charles A. Krumwiede v. Brighton Associates, L.L.C.*, 2006 U.S. Dist. LEXIS 31669 at *26 (N.D. Ill. 2006) (entering default judgment against defendant who deleted and overwrote forensic meta-data on his employer-owned laptop in the timeframe between the court's order to produce it and the actual production a day later); *Kucala Enterprises, LTD. v. Auto Wax Company*, 2003 U.S. Dist LEXIS 8833 at *5 (N.D. Ill. 2003) (dismissing plaintiff's claims with prejudice where plaintiff used a program called "Evidence Eliminator" to permanently overwrite and delete data on his own desktop computer between midnight and four o'clock in the morning on the day the computer was to be inspected by defendant's computer specialist); *Communications Center, Inc v. Matthew J Hewitt,* 2005 U.S. Dist. LEXIS 10891 at *5 (E.D. Cal. 2005) (striking defendants answer and entering default judgment where defendant used software called "Evidence Eliminator" to destroy data on numerous hard drives after the court ordered production of mirror images of the data contained therein); *In re Krause*, 367 B.R. 740, 768 (Bankr. D. Kan. 2007) (entering partial default judgment against defendant for his use of the wiping software "GhostSurf 2006" immediately prior to turning over his computers and after learning that the Court had ordered their production); *Century ML-Cable Corporation v. Conjugal Partnership*, 43 F. Supp 2d 176, 184 (D.P.R. 1998) (entering default judgment against a defendant who destroyed his laptop in violation of a temporary restraining order prohibiting destruction of any records or computers).

The Court should impose the "ultimate sanction" of default judgment because Defendants intentionally destroyed electronic data in their possession using a computer "wiping" program like the computer programs discussed above. Since Plaintiffs are prejudiced by Defendants' intentional conduct, and "lesser sanctions would not serve [the Court's] punishment-and-deterrence goals" (*Telectron,* 116 F.R.D. at 131), the entry of default judgment against Defendants is appropriate.

B. Defendants Destroyed Evidence Willfully and in Bad Faith in Violation of a Court Order

Destruction of evidence qualifies as willful spoliation to support a finding of bad faith if the party has some notice that the documents were potentially relevant to the litigation before they were destroyed. *Leon v. IDX,* 464 F.3d at 959. "A formal discovery request is not necessary to trigger the duty to preserve evidence." *Krumwiede v. Brighton,* 2006 U.S. Dist. LEXIS 31669 at *22. Nonetheless, in this case the Defendants were served with the TRO specifically mandating the preservation of evidence ***and*** Plaintiffs' First Request For Production Of Documents ***before*** Defendants destroyed evidence.

The TRO expressly and specifically enjoins Defendants and their officers, agents, servants, employees and attorneys from

> destroying, altering, secreting, transferring, or otherwise disposing of any records of their business activities, whether on paper, in electronic format, or on any other medium, and including without limitation all accounting records and all logs or other documents relating to selecting, registering, trafficking in, monetizing, releasing, assigning, renewing, deleting, transferring, using, and maintaining the domain names listed in Paragraph 122 of Plaintiffs' Complaint ("Confusingly Similar Domain Names") or any domain name that is a counterfeit of or confusingly similar to Plaintiffs' Marks or any other trademarks owned by Plaintiffs.

TRO ORDER, ¶1, pp. 22-23. On November 9, 2007, Defendants were served with the TRO and Plaintiffs' First Request For Production Of Documents. Plaintiffs' document requests sought the production of documents relating to the registration, trafficking in and monetization of each domain name in which Defendants (or their shell entities, fictitious business and personal names) were the registrant.

Despite having notice of the TRO and Plaintiffs' Document Requests on November 9, 2007,[6] the Defendants on November 12, 2007, intentionally, selectively and permanently deleted

[6] David Steele, attorney for Plaintiffs, also advised Mr. Vazquez on November 9, 2007 that Plaintiffs would coordinate the forensic copying of Defendants' servers the following week. [Steele Decl. ¶ 3].

data on nine password-protected servers that were only accessible to the Defendants and their authorized agents. Defendants deleted data from five servers using data "shredding" software that is designed to evade forensic data recovery techniques. The deletion of data from Defendants' servers was no accident because of the software used and the timing of the deletion. The deliberate and intentional use of wiping software has repeatedly been considered persuasive evidence of the user's bad faith. *In re Krause, 367 B.R.*. at 768; *Leon v. IDX,* 464 F.3d at 959; *Kucala v. Auto Wax*, 2003 U.S. Dist LEXIS 8833 at *18.

Defendants' deletion of information from their servers expressly violated the terms of the TRO. Furthermore, Defendants' actions violated their discovery obligations to respond to Plaintiffs' document requests. In light of Defendants' actions on November 12, 2007, Defendants have demonstrated "a flagrant disregard for the court and the discovery process [such that] dismissal is not an abuse of discretion." *Aztec Steel Co. v. Florida Steel Corp.,* 691 F.2d 480, 481 (11th Cir. 1982).

C. Spoliation of this Evidence is Highly Prejudicial to Plaintiffs' Claims

Defendants did not destroy evidence on all 22 of their servers. Rather, for some reason, Defendants chose to delete data from only nine of their servers. Although it is impossible to know exactly what was erased, there must have been a reason why Defendants selected to erase data from those servers. "The preservation of relevant evidence cannot be selective, saving evidence favorable to the party's case while destroying evidence favorable to the party's opponent." *In re Krause*, 367 B.R. 740, 765. *See Communications Center, Inc v. Matthew J Hewitt,* 2005 U.S. Dist. LEXIS 10891 at *8 (the finder of fact "can no longer weigh conflicting evidence because [defendant] has ensured whatever evidence on certain of defendant's computers that may have been favorable to plaintiff will never see the light of day").

The Court should, therefore, presume that the evidence was selected for deletion because it would have supported Plaintiffs' positions that (a) Defendants are both the registrar and the registrants of over 1,100 domain names that infringe and dilute, and are counterfeits of, Dell's service marks and trademarks arguments or damage Defendants' defenses, and (b) Defendants

are alter egos of each other who conceal their true identities by using numerous shell-entities, fictitious business and personal names to register their domain names. Of course, since Defendants have failed to produce ***any*** documents in response to Plaintiffs' document requests, the Court should presume that Defendants have destroyed all responsive and relevant documents.

As a result of Defendants' conduct, Plaintiffs have been prejudiced. In analyzing whether a party is prejudiced by the spoliation of evidence by the other party, Courts look "to whether the [spoiling party's] actions impaired [the non-spoiling party's] ability to go to trial or threatened to interfere with the rightful decision of the case." *Leon v. IDX,* 464 F.3d at 959. *See Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 354 (9th Cir. 1995) (prejudice found when plaintiff's concealment of document forced the defendant "to rely on incomplete and spotty evidence" at trial); *Fleury,* 427 F.3d at 946(prejudice found when the plaintiff, the only party in a position to preserve the central evidence in the case, failed to do so); *Krumwiede v. Brighton*, 2006 U.S. Dist. LEXIS 31669 at *30 ("a party suffers prejudice due to spoliation of evidence when the lost evidence prevents the aggrieved party from using evidence essential to its underlying claim.").

Furthermore, Defendants will not be able to "fix" the problem by providing "substitute" copies of the data. Defendants' destruction of evidence severely damages their credibility with Plaintiffs and the Court; therefore, any purported copies of the missing data offered by Defendants will not be sufficiently trustworthy to be admitted into evidence. In addition, under the best evidence rule, admission of copies is forbidden where the party has destroyed or lost the originals in bad faith. Fed. R. Evid. 1004(1). Finally, because the data that was erased was located on servers owned and operated exclusively by Defendants, it is highly unlikely that copies of the bulk of the missing data can be procured from third party sources.

D. No Lesser Sanction than Default Judgment Will Serve The Punishment and Deterrence Goals

The Supreme Court held that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize

those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976). The "ultimate sanction" of default is appropriate in this case because Defendants' spoliation of evidence was in bad faith and prejudicial to Plaintiffs. No alternative, lesser sanction will accomplish the "triple objectives" of fairly compensating Plaintiffs for the prejudice worked upon it by Defendants, punishing Defendants for their misconduct, and "deterring future similar acts of willful disregard for the rules of discovery." *Telectron,* 116 F.R.D. at 135. Furthermore, a court is not required to first impose less drastic sanctions. *Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825 F.2d 1136, 1138-39 (7th Cir. 1987).

The Court should be mindful that Defendants consist of numerous ICANN-accredited registrars who have engaged in an unlawful, elaborate, profitable and deceptive scheme. A lesser sanction, such as the adoption of an inference that the destroyed server evidence was damaging to Defendants, likely cannot even make Plaintiffs whole. Where the evidence destroyed is the roadmap detailing the operations of Defendants' unlawful scheme and the record of Defendants' communications, an adverse inference cannot undo the prejudice to Plaintiffs. Such a ruling will reward Defendants for the fraud they have perpetrated on this Court by granting them a better litigation position as a result of their destructive act. Thus, "no sanction short of default is available to return the parties to the position they would have been but for the deliberate destruction by [defendants] of evidence potentially favorable to the plaintiff." *Communications Center,* 2005 U.S. Dist. LEXIS 10891 at *8.

In a case involving an Internet industry where word travels at high speed, this Court must send a message to those who will look to the outcome of this litigation in devising a strategy for the future. If these cybersquatters can gain a litigation advantage by destroying evidence, there will be no reason for their compatriots to avoid such conduct in the future.

IV. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court impose the "ultimate sanction" of default judgment of liability against Defendants. Upon the granting of the Motion, Plaintiffs will submit a brief in support of its claims for damages, attorneys' fees, and costs.

CERTIFICATE OF COMPLIANCE

Counsel for Dell certifies that they have conferred with Defendants who may be affected by the relief sought in this Motion in a good faith effort to resolve the issues raised therein and have been unable to do so. Fed. R. Civ. P. 37(a)(5)(A)(i) and 37(d)(1)(B); S.D. Fla. L.R. 7.1.A.3. and 26.1.I.

Dated: January 5, 2008

Respectfully submitted,

/s/ Mimi L. Sall

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Mimi L. Sall

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