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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205687
Party	Defendant Echl, Inc.
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Submission	Response to Board Order/Inquiry
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Date	12/30/2015
Attachments	Notification of Final Diposition of Civil Matter.pdf(802165 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Trademark Opposition of Mark: ORLANDO SOLAR BEARS Serial No. 85421579, 85421538 Published: February 21, 2012	)	
DAVID D'AMATO Opposer,	)	Opposition No.: 91205687 (parent) 91206135
ECHL, INC. Applicant.	)	

NOTIFICATION OF FINAL DISPOSITION OF CIVIL MATTER

Pursuant to the Board's request of November 9, 2015, Applicant, through its attorney submits the following notification of final disposition in the civil matter (Case No. 6:15-cv-00826), between Opposer and Applicant (and other third parties of interest) in the United States District Court for the Middle District of Florida. The civil matter, originally captioned Case No. CV1: 13-cv-00646 in the United States District Court for the Western District of New York, was transferred to the United States District Court of the Middle District of Florida by order dated May 7, 2015.

The United States District Court of the Middle District of Florida granted Applicant/Defendants' motion to Dismiss Plaintiff/ Opposer's claim and motion for sanctions on December 14, 2015 (the "Order"). The Order dismissing the action is

attached hereto as Exhibit A. In the Order, the United States District Court of the Middle District of Florida found that the Opposer acted in bad faith in pursing the lawsuit and that Opposer filed fabricated and forged affidavits in the lawsuit.

The United States District Court of the Middle District of Florida issued the Judgment in the civil action in favor of Applicant/ Defendants on December 15, 2015. The Judgement is attached hereto as Exhibit B.

In light of the United States District Court of the Middle District of Florida's Order and Judgment in the civil action, Applicant hereby requests that the Opposition action be dismissed and the Applications at issue move to registration.

This the 30th of December, 2015.

Respectfully submitted,
Hendrick Bryant Nerhood Sanders & Otis, LP

/s/Kenneth C. Otis
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID D'AMATO,

Plaintiff,

v. Case No: 6:15-cv-826-Orl-40TBS

ECHL, INC., ORLANDO PRO HOCKEY OPERATIONS, LP, JASON SIEGEL, BOB OHRABLO, and JOE HALESKI,

Defendants.
_____/

ORDER

This cause comes before the Court on Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 41(b) (Doc. 70), filed July 29, 2015, and on the Court's Order to Show Cause to Plaintiff, David D'Amato, why sanctions should not be imposed for Plaintiff's fabrication of material evidence in this case and violation of Federal Rule of Civil Procedure 11(b), (Doc. 85), issued November 10, 2015. Plaintiff, acting *pro se*, has not responded to either the motion or the Order to Show Cause. Upon consideration, the Court grants Defendants' motion, sanctions Plaintiff, and awards Defendants reasonable attorneys' fees and costs.

I. BACKGROUND

On July 29, 2015, Defendants filed a motion to dismiss Plaintiff's Complaint after discovering that Plaintiff had fabricated material evidence in this case. (Doc. 70). Specifically, Defendants claimed that Plaintiff forged witness and Notary signatures on falsified "Declarations" executed by Glenn Theobald and Alan Kratman to substantiate Plaintiff's alleged ownership of the Solar Bears trademark and fabricated federal tax forms

attached to those Declarations. (*Id.* at pp. 1–2; Docs. 70-1, 70-2, 70-3). In the motion, Defendants also requested that the Court award them attorneys' fees and costs which they incurred in connection with the defense of this frivolous lawsuit. (Doc. 70, p. 7).

Plaintiff originally initiated this action through counsel in the Western District of New York. (Doc. 1). The Complaint alleged various state and federal claims for trademark infringement, unfair competition, trademark dilution, copyright infringement, and fraudulent registration. As explained by Defendants in their motion to dismiss, in response to Defendants' discovery requests, Plaintiff produced Declarations from Mr. Kratman and Mr. Theobald. (Doc. 70, p. 2). Each Declaration stated that Mr. Kratman and Mr. Theobald had paid royalties to Plaintiff for use of the Solar Bears trademark and attached IRS 1099-Misc forms to substantiate the payments. (*Id.*). Defendants then filed the Declarations with the district court in New York in support of a motion to transfer venue. While Plaintiff, at that time acting *pro se*, opposed the motion to transfer, at no time during the consideration of the motion to transfer did Plaintiff inform the district court in New York that the Declarations were forgeries. The New York district court, in part relying on the Declarations, transferred the case to this Court on May 22, 2015. (Doc. 47).

On September 25, 2015, the Court held an evidentiary hearing on Defendants' motion to dismiss to investigate the serious allegations asserted by Defendants. Plaintiff was notified of the hearing but failed to appear. (Doc. 79). The Court received testimony from Mr. Glenn Theobald, who is employed as the Chief Deputy and legal counsel for the Martin County Sheriff's Office. Mr. Theobald testified that he has never had a business relationship with Plaintiff and has never participated in a business that sells items bearing the Solar Bears logo—contradicting the forged Declaration filed by Plaintiff in this action.

Mr. Theobald examined documents submitted by Plaintiff in support of the litigation and testified that the documents, including the IRS Form 1099-Misc documents, are forgeries. Mr. Kratman, a Sergeant with the Miami-Dade Police Department who was unable to attend the evidentiary hearing, executed a sworn affidavit affirming that he never signed the Declaration forged by Plaintiff and has never had any business dealings with Plaintiff. (Doc. 70-1). Additionally, Mr. Raymond Tersigni, the police officer who allegedly notarized the declarations, affirmed that he never notarized the documents. (Doc. 70-3).[1]

II. STANDARD

The Eleventh Circuit has articulated a two-part analysis that a district court should undertake in determining whether an action should be dismissed as a sanction. First, "[t]here must be . . . a clear record of willful conduct," and second, there must be a "finding that lesser sanctions are inadequate." *Zocaras v. Castro*, 46 F.3d 479, 483 (11th Cir. 2006).

III. DISCUSSION

The Court finds that it possesses the authority under Federal Rule of Civil Procedure 41(b) and the inherent authority to dismiss the Complaint with prejudice due to Plaintiff's fraudulent conduct. *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985). First, there is a clear record of misconduct by Plaintiff. Plaintiff knowingly submitted two forged Declarations with forged Notary signatures and falsified federal tax forms to support his claims against Defendants. Further, lesser sanctions are inappropriate in the instant case. Since the filing of Defendants' motion to dismiss revealing Plaintiff's fraud

[1] The Court admitted as evidence at the hearing the Declarations filed by Defendants in connection with the motion to dismiss.

on the Court, Plaintiff has not responded to the Defendants or the Court's Orders and has clearly abandoned his claims. Moreover, a lesser sanction would not suffice for such a flagrant fraud on the Court. As a matter of public policy, the Court will not tolerate such conduct from litigants who appear before it. As the Eleventh Circuit has stated, "Dismissal with prejudice is . . . an extreme sanction, but it is justified in extreme circumstances." *Zocaras*, 465 F.3d at 485. Defendants' motion to dismiss is due to be granted and the Complaint dismissed with prejudice.

IV. ATTORNEYS' FEES AND COSTS

As a final matter, the Court notes that on November 10, 2015, the Court issued an Order to Show Cause to Plaintiff setting forth the fraudulent conduct described herein and informing Plaintiff that the Court intended to award Defendants their attorneys' fees and costs as a sanction for Plaintiff's misconduct. The Court explicitly ordered Plaintiff to respond in writing to explain his conduct and demonstrate why such sanctions were unwarranted or excessive. Plaintiff has not responded to the Order to Show Cause and the time for doing so has passed.

"Courts have the inherent authority to control the proceedings before them, which includes the authority to impose 'reasonable and appropriate' sanctions." *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1335 (11th Cir. 2002) (per curiam). In order to exercise its inherent authority to impose sanctions, "a court must find that the party acted in bad faith." *Id.* Here, it is clear that Plaintiff acted in bad faith in pursing this lawsuit. Both Mr. Kratman and Mr. Theobald testified that the Declarations were falsified, and these Declarations are the only evidence that Plaintiff has produced to support his assertion that he used the trademarks at issue in commerce. (Doc. 70, p. 6).

Having found that Plaintiff acted in bad faith having given Plaintiff an opportunity to explain his behavior, and Plaintiff having failed to respond, the Court finds that sanctions are due to be imposed against Plaintiff in the form of payment of reasonable attorneys' fees and costs to Defendants.

At the close of the evidentiary hearing on Defendants' motion to dismiss, the Court requested that Defendants submit an affidavit setting forth the attorneys' fees and costs expended to date in defending this lawsuit. On November 5, 2015, Mr. Gregory W. Herbert, a Shareholder of Greenberg Traurig, P.A. and counsel for the Defendants, submitted a detailed affidavit in which he addressed the hourly rate charged by each attorney who performed work on this case, the experience and qualifications of each attorney, and the fact that the rates charged by each attorney is customary for their geographical locale and experience level. (Docs. 83, 83-1). Mr. Herbert also attached the billing records and bills of cost for the Court's review. After thorough review, the evidence submitted by Defendants has established that the rates charged by the law firms and the attorneys and the number of hours expended in the defense of this litigation were both necessary and reasonable.

More specifically, the Court finds the hourly rates to be reasonable in light of the skills required to perform the requisite legal services, the likelihood that the acceptance of this particular employment would preclude other employment by the lawyers, the time limitations imposed by the client, the nature and length of the professional relationship with the client, the experience, reputation and ability of the lawyers and paralegals performing these services, and the fee customarily charged in the locale for similar legal services. The Court has considered each of these factors in determining a reasonable

hourly rate. The Court places significant weight upon the factors related to the skill, experience, reputation, and ability of counsel for Defendants in determining the reasonable hourly rate. Accordingly, the Court awards Defendants $216,310.50 in attorneys' fees.

Similarly, the Court has reviewed the invoices reflecting costs incurred by Defendants, and the Court finds these costs were reasonable and necessary to the defense of this case. The Court therefore awards $5,007.85 in costs as well. Defendants are entitled to a total award of $221,318.35 in fees and costs.

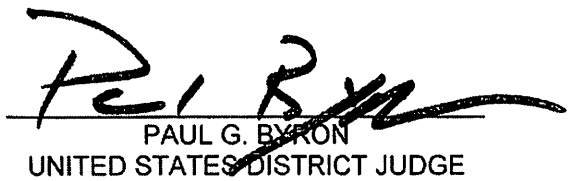
V. CONCLUSION

For the aforementioned reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Pursuant to Federal Rule of Civil Procedure 41(b) and the Court's inherent authority, Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 41(b) (Doc. 70) is **GRANTED**.
2. Plaintiff, David D'Amato, is **SANCTIONED**. Plaintiff is **DIRECTED** to pay Defendants' attorneys' fees in the amount of $216,310.50 and costs in the amount of $5,007.85 for a total award of $221,318.35.
3. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendants and against Plaintiff in the amount of $221,318.35 with interest thereon at the legal rate as provided by law.
4. The Complaint (Doc. 1) is **DISMISSED WITH PREJUDICE**.
5. After entering judgment consistent with this Order, the Clerk of Court is

DIRECTED to close the case.

DONE AND ORDERED in Orlando, Florida on December 14, 2015.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID D'AMATO, an individual residing in New York and successor in interest to Champion Graphics, Inc.,

Plaintiff,

v. **Case No: 6:15-cv-826-Orl-40TBS**

ECHL, INC., a New Jersey corporation, ORLANDO PRO HOCKEY OPERATIONS, LP, a Florida limited partnership, JASON SIEGEL, BOB OHRABLO, and JOE HALESKI,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendants, ECHL, Inc., Orlando Hockey Operations, LP, Jason Seigel, Bob Ohrablo and Joe Haleski, and against the Plaintiff, David D'Amato, in the amount of $221,318.35 with interested thereon at the legal rate as provided by law, for which sum let execution issue.

Date: December 15, 2015

SHERYL L. LOESCH, CLERK

s/M.A.Pleicones, Deputy Clerk