UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROADSPRING, INC., Plaintiff, v. CONGOO, LLC, doing business as ADIANT and ADBLADE, ASHRAF NASHED, RAFAEL COSENTINO and DOES 1-10, Defendants.	13 Civ. 1866 (JMF)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE

Respectfully submitted,

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Plaintiff Broadspring, Inc. ("Broadspring") respectfully submits this memorandum in support of its motion for sanctions due to spoliation of evidence by Defendants Congoo, LLC, doing business as Adiant and Adblade ("Congoo"), Ashraf Nashed and Rafael Cosentino (collectively, "Defendants").

PRELIMINARY STATEMENT

This case began in March of this year with an emergency motion by Broadspring seeking to compel Defendants to preserve evidence going forward, and to conduct forensic imaging to facilitate recovery of any evidence they had already deleted. Defendants assured the Court—again and again—that no such imaging was necessary because Defendants would comply with their obligation to preserve. In reliance on those representations, the Court declined to order imaging, but did enter a preservation order for the duration of this litigation, which expressly required preservation of instant messages.

In October, while Defendants were in the midst of finally making a proper document production, they were forced to disclose that three custodians, including named defendant Rafael Cosentino, consciously chose not to suspend the automatic deletion function of their Yahoo! Instant Message ("IM") accounts, despite the fact that Defendants regularly communicate about Broadspring via IM, and even used IM to communicate about the Squidoo Lens. As a result of this willful spoliation, these three custodians' responsive IMs will never see the light of day or the inside of a courtroom. Therefore, Broadspring respectfully requests that Defendants be sanctioned—specifically, that the jury receive an adverse inference charge and that Broadspring be reimbursed for its reasonable attorneys' fees and expenses incurred in (i) seeking the preservation order, (ii) pursuing the spoliated IMs, and (iii) prosecuting this motion.

FACTS

I. Broadspring's Pre-Suit Preservation Demands and Defendants' Cavalier Attitude Toward Their Duty to Preserve

Broadspring learned of the Squidoo Lens on or about March 10, 2013. At that time, it suspected, but did not yet have proof, that Defendants authored the Lens. Broadspring accordingly wrote to Defendants on March 12 to advise that Broadspring believed they were behind the scheme, and to demand not only that Defendants cease and desist, but also that they comply with their document preservation obligations, including the duty to preserve electronic evidence. (Declaration of Joshua B. Katz in Support of Plaintiff's Motion for Sanctions Due to Spoliation of Evidence, dated December 18, 2013 ("Katz Decl."), Ex. 1.) The letter cited relevant case law, spelled out in detail the steps that should be taken to preserve electronically stored information ("ESI"), and requested prompt confirmation that Defendants would comply. (*Id*.)

Rather than confirming that Defendants would comply with their duty to preserve ESI in the face of threatened litigation, Defendants' counsel at the time simply stated, "I am not in a position to respond to your allegations and demands until I have a full opportunity to review this matter in further detail. I expect to complete my investigation in the next few days, at which point I will contact you accordingly." (*Id*. Ex. 2.) Broadspring's counsel replied the same day and implored Defendants to confirm that they would preserve essential ESI while counsel conducted his "investigation," but counsel refused even to confirm that Defendants were aware of, and would comply with, this basic obligation. (*Id*.)

Meanwhile, Broadspring received information from Squidoo that someone using an Internet Protocol address located within the vicinity of Defendants' offices had attempted to delete the Squidoo user profile associated with the Lens. Broadspring accordingly sent another preservation demand letter, this time accompanied by a draft complaint and a warning that it would be filed if Defendants did not confirm they were complying with their preservation obligations by close of business the next day. (*Id*. Ex. 3.) Incredibly, counsel responded that Defendants were "under no obligation to comply" with Broadspring's demand for preservation. (*Id*. Ex. 4.)

II. Broadspring's Emergency Motion and the "So Ordered" Preservation Stipulation

Broadspring commenced this action on March 20—the same day it received Defendants' letter disclaiming any "obligation to comply" with their preservation obligations. Broadspring simultaneously filed an emergency motion seeking*, inter alia*, an order requiring Defendants to preserve ESI, including forensic imaging of Defendants' computers. (ECF Nos. 3-5.) During the briefing on Broadspring's emergency motion, the parties entered into a stipulation with respect to the preservation of evidence pending a decision on the motion. This Court "so ordered" the stipulation on March 25, 2013. (ECF No. 10.)

The so ordered stipulation requires the parties to "take all reasonable steps to preserve and retain" all documents and ESI "that may be discoverable in this action." (*Id*. ¶ 1.) To avoid any doubt, it also specifically requires preservation of all "personal and business webmail accounts, ***instant messaging*** and online communications services and social media and user generated content related to this dispute including, but not limited to, Skype, Twitter, Facebook, LinkedIn, Squidoo, forums, chat rooms, webinars and blogs." (*Id*. ¶ 2(c) (emphasis supplied).)

Finally, the stipulation expressly requires that all "software or policies that provide for the automatic deletion of computer files shall be immediately disabled and discontinued." (*Id.* ¶ 3.)

In opposition to Broadspring's motion, Defendants submitted a declaration by defendant Nashed. In it, he represented: "I instructed Congoo's employees not to delete, and to preserve, all documents and communications (electronic, such as emails and texts, and hard-copy) relating to, concerning, and relevant to the allegations in the Complaint." (ECF No. 17, ¶ 10.) Nashed also submitted a "supplemental" declaration at oral argument on April 9. In that declaration, Defendants once again assured the Court that:

> Congoo has not intentionally or negligently deleted, and has preserved, all documents and communications relating to, concerning, and relevant to this action. On or about March 12, 2013, after receiving a letter from Plaintiff's attorney, I spoke with the individuals at Congoo who perform business development with publishers, who are the entities from which Congoo purchases space on their websites, and directed them to preserve all documents, including electronic communications, concerning or related to Broadspring. To my knowledge, all such material has in fact been preserved.

(ECF No. 22, ¶ 2.)

III. The Court's Denial of Forensic Imaging Based on Defendants' Representations

As noted, the Court heard argument on Broadspring's motion on April 9, 2013. During argument, Broadspring's counsel noted: "If we imaged the computers now, we have a much better chance of being able to recover anything that was deleted. If we learn four, five months from now in discovery things were deleted, I understand there is a much lower probability of recovering anything that was lost." (ECF No. 56, Tr. 4:24–5:5.) Defendants' counsel, however, reiterated their position that there was no need to grant Broadspring's request for forensic imaging because everything would be preserved: "[W]ith respect to forensic imaging, as the

Court has recognized, Congoo and the other defendants stipulated to a preservation order that was entered into by the parties, that was so ordered by the Court." (*Id*., Tr. 13:2-5.) Counsel continued:

> Mr. Nashed who is the princip[al] of Congoo, the chief operating officer -- and plaintiff went to great lengths to point out in their reply that he had not stated that, upon learning of the case, that he put a litigation hold in place. In fact, what Mr. Nashed did, was he advised the individuals who worked with the publishers, which are Mr. [K]ane and Mr. Cosentino to not delete, remove anything from their computers, to keep it all. He went and spoke to them, personally, to ensure that no information relevant to this case would be deleted.

(*Id*., Tr. 15:18–16:2.) The Court denied Broadspring's motion for forensic imaging, but extended the so ordered preservation stipulation for the duration of the action. (ECF No. 24.) As the Court recently observed, the forensic imaging prong of the motion was denied "based, in large part, on their representation that everything would be preserved." (ECF No. 67, Tr. 18:16-18.)

IV. Defendants' Belated Revelation that IMs Were Not Preserved

On September 24, 2013, Defendants sent a letter advising "we recently learned that one of the individual defendants possesses IMs that may include responsive documents … . We expect to produce additional responsive material this week." (Katz Decl. Ex. 5.) The letter made no mention of any preservation issue with respect to IMs. Broadspring replied the next day and requested confirmation "that all responsive Instant Messages in the possession of any other defendant (including, in the case of Congoo, its agents and employees) are being collected and produced. Please also confirm that such Instant Messages were preserved in accordance with the so-ordered preservation stipulation." (*Id*. Ex. 6.)

During a subsequent telephone call on October 1, Defendants' counsel casually dropped a bombshell. Counsel revealed that certain unidentified custodians had not, in fact, preserved their

IMs. The next morning Broadspring wrote to demand details about the scope and extent of this failure to preserve, and also demanded that the relevant devices immediately be forensically imaged. (*Id*. Ex. 7.) Defendants' response revealed that counsel had known about the spoliation issue since at least September 19, and that custodians Rafael Cosentino, Ian Kane and Jack Wagner had all failed to preserve their Yahoo! IMs. (*Id*. Ex. 8.) Eventually Defendants agreed to perform forensic imaging. However, because almost six months had elapsed, they were unable to recover any responsive IMs. (*Id*. Ex. 9.)

At a conference on October 16, the Court directed Broadspring to "file any motion for spoliation sanctions by the deadline for summary judgment motions." (ECF No. 60.)

ARGUMENT

In the Second Circuit, a "party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002)).

"If these elements are established, a district court may, at its discretion, grant an adverse inference jury instruction insofar as such a sanction would 'serve[] [the] threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in

the absence of spoliation.'" *Id*. at 161 (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001)) (brackets in original).

All three elements are indisputably present here, and Defendants' conduct cries out for an adverse inference sanction, as well as an award of attorneys' fees and expenses.

I. Defendants Were Obligated to Preserve the IMs

It is beyond dispute that Defendants' duty to preserve was triggered no later than March 12, 2013. A party threatened with a lawsuit is required to preserve potentially relevant evidence, since the "obligation to preserve evidence arises … when a party should have known that the evidence may be relevant to future litigation." *Fujitsu Ltd. v. Fed'l Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). The scope of the duty is coextensive with the scope of discovery under Rule 26(b)(1), and thus "extends to information that is relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the action." *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 194-95 (S.D.N.Y. 2007) (quotation omitted) Here, Defendants were threatened with litigation on March 12, 2013, when Broadspring first wrote and specifically demanded preservation of evidence relevant to Broadspring's anticipated lawsuit. (Katz Decl. Ex. 1.) More important, as of March 25, Defendants were subject to a comprehensive Court-ordered preservation stipulation, which continues in force to this day. (ECF Nos. 10, 24.)

Nor can there be any doubt that Defendants were under a duty specifically to preserve their IMs. This Court's preservation order expressly required preservation of "instant messag[es]." (ECF No. 10, ¶ 2(c).)

Moreover, Defendants were well aware that IMs play an important role in Congoo's business. Ian Kane, Congoo's Director of Publisher Relations whose Yahoo! IM handle is

"ian@congoo," testified that when he started at Congoo he was instructed by Nashed to create a Yahoo! IM account. (Katz Decl. Ex. 10.) As Kane explained, all Congoo employees are required to use Yahoo! IM in order to facilitate work-related communications. (*Id*. 146:3-19.) And the IMs produced from the files of Nashed confirm that Defendants use IM for significant business-related discussions, including many discussions about Broadspring (and its web site, Howlifeworks.com, frequently referred to as "HLW" in the IMs). (*Id*. Ex. 11.)

Not only were Defendants aware of the importance of IMs generally, they were also fully aware that IMs play a vital role in this case. One of the main arguments Defendants raised in opposition to Broadspring's motion for forensic imaging was the notion that Cosentino's creation of the Squidoo Lens was a frolic completely unrelated to his role as Congoo's co-founder and Senior Vice President for Business Development. Nashed's declarations in opposition were calculated to leave the Court with the impression that Nashed (and Congoo) knew nothing about the Squidoo Lens until Broadspring wrote to Congoo about it on March 12. His declarations averred, in pertinent part:

- "I had no role in the preparation or posting of the Squidoo Lenses. The posts were not prepared, authorized or posted by myself or Congoo. In fact, the claim that Congoo played a role in posting the Lenses is refuted by the fact that Congoo's Adblade is not even the highest rated of the ad networks discussed in the lenses … ." (ECF No. 17, ¶ 15.)

- "Upon learning of Broadspring's claims, I did, however, attempt to determine if anyone at Congoo had anything to do with posting the Squidoo Lenses at issue in this action. I learned that one of Congoo's employees (not Eric Clark) had created the Squidoo Lenses. That employee, who is involved in purchasing space from publishers, advised me that he had acted alone in creating and posting the Squidoo Lenses, and had not been asked by anyone at the Congoo to create and post the Squidoo Lenses. The employee's actions were not authorized or directed by Congoo, its management, or myself personally." (*Id*. ¶ 16.)

- "I did, however, speak with Rafael Cosentino, who advises me that he created the Squidoo Lenses on his own on an account that he created prior to being at Congoo." (ECF No. 22 ¶ 5.)

These representations were misleading, if not perjurious. In fact, Nashed knew about the Squidoo Lens no later than February 23, when Cosentino e-mailed him a link to the Lens. (Katz Decl. Ex. 12.) Nashed even wrote back that day, congratulating Cosentino on his "ingenious" scheme. (*Id*.) More important, Nashed played a major role in refining the Broadspring section of the Lens. On March 2, Nashed sent a lengthy e-mail about Broadspring to Cosentino and two other Adblade executives. The substantive text of the e-mail concluded with the directive that "our publishers should know about their background." (*Id*. Ex. 13.) Cosentino immediately went to work copying Nashed's March 2 e-mail into the Broadspring entry in the Lens. When he was finished the following morning, the "downside" section of the Broadspring was revised to read:

> Downside: A simple Google search shows that Broadspring was formerly Mindset Interactive, a notorious spyware company. Mindset was eventually shut down by the FTC in 2005 and Sanford Wallace, their founder, known as "Spamford Wallace" was banned from online activity for 5 years. In Nov 2006, Broadspring's shareholders then launched a notorious ringtones company, New Motion dba Atrinsic. Atrinsic has $17mm in financing (from various unknown investors), became public through a shady reverse-merger. They settled 3 years ago with 6 million users scammed: http://www.ftc.gov/os/caselist/0423142/wallacefinaljudgment.pdf

This passage was copied almost verbatim from Nashed's March 2 email. (*Compare id*. Ex. 13 *with* Ex. 14.) Then, on March 4, Cosentino sent Nashed a link to the Lens he revised at Nashed's direction. That link was transmitted ***by Instant Messenger!*** (*Id*. Ex. 15.) This demonstrates not only that Nashed was involved in the creation and dissemination of the false statements about

Broadspring, but also that Defendants knew Cosentino communicated about the Squidoo Lens via IM. As such, Defendants clearly were obligated to preserve their IMs.

II. The IMs Were Destroyed With a Culpable State of Mind

The foregoing discussion about the significance of IMs to Congoo's business generally and this case in particular negates any contention that Defendants did not act with a culpable state of mind. Defendants were plainly on notice that their IMs were important and relevant to this case. Indeed, for purposes of spoliation sanctions, "the 'culpable state of mind' factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or ***negligently***." *Residential Funding Corp.*, 306 F.3d at 109 (emphasis in original) (quotation and brackets omitted).

"The intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful." *Sekisui Am. Corp. v. Hart*, 2013 U.S. Dist. LEXIS 115533, *21 (S.D.N.Y. Aug. 15, 2013) (quotation and brackets omitted). Further, "the law does not require a finding of malevolence to constitute willfulness in the context of spoliation," *id*. at *26, and "even a good faith explanation for the willful destruction of ESI when the duty to preserve has attached does not alter the finding of willfulness." *Id*. at *31. Cosentino and Kane did not even attempt a "good faith explanation" for their conduct, and their deposition testimony leaves no doubt that their spoliation was intentional and hence willful.

Cosentino admitted that his failure to preserve was not due to any mistake or inadvertence, but rather was a conscious decision. He testified that he took no steps to suspend the automatic deletion function on his Yahoo! IM account because his "definition of 'preserve' is to maintain in its original state," and the original state of his account was automatic deletion.

(Katz Decl. Ex. 16.) As Cosentino explained, "I had no knowledge that I should have changed the setting to begin recording something which had never been recording before." (*Id.*) Of course, this Court's "so ordered" preservation stipulation expressly requires that all "software or policies that provide for the automatic deletion of computer files shall be immediately disabled and discontinued" (ECF No. 10, ¶ 3), and Cosentino's violation of that Court Order is inexcusable.

Kane's explanation as to why he chose not to preserve his IMs was similarly feeble. He testified that he did not preserve them because he was instructed to preserve "documents" and "I don't view instant messages as being a document." (Katz Decl. Ex. 17.) According to Kane, "document" means "emails" and "contracts" and nothing else. (*Id.*) He did not bother asking anyone whether his absurdly crabbed interpretation of the duty to preserve was accurate. (*Id.*)

III. The IMs Were Relevant and Broadspring is Prejudiced by Their Spoliation

As Judge Scheindlin recently explained, the law in the Second Circuit is clear that wilful spoliation, by itself, is enough to establish both relevance and prejudice:

> When evidence is destroyed intentionally, such destruction is sufficient evidence from which to conclude that the missing evidence was unfavorable to that party. As such, once wilfulness is established, no burden is imposed on the innocent party to point to now-destroyed evidence which is no longer available because the other party destroyed it. Rather, the "risk that the evidence would have been detrimental rather than favorable [to the spoliator] should fall on the party responsible for its loss." To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it "would allow parties who have destroyed evidence to profit from that destruction." Prejudice is presumed for the purposes of determining whether to give an adverse inference instruction when, as here, evidence is willfully destroyed by the spoliating party.

Sekisui Am. Corp. v., 2013 U.S. Dist. LEXIS 115533, *35-36 (quoting and citing *Residential Funding Corp.*, 306 F.3d at 108-09). Gross negligence is also sufficient to presume relevance and prejudice. *See, e.g., Arista Records LLC v. USENET.com, Inc.*, 633 F. Supp. 2d 124, 141 (S.D.N.Y. 2009) ("when evidence is destroyed in bad faith or with gross negligence, that alone has been found to be sufficient to support an inference that the missing evidence would have been favorable to the prejudiced party, and thus relevant."). Accordingly, because (i) Defendants' spoliation was intentional, (ii) Defendants regularly use IMs to communication about matters pertinent to this action, and (iii) one of the few remaining IMs is a "smoking gun" (Katz Decl. Ex. 14), the Court should presume that the countless destroyed IMs were relevant to this case and that Broadspring is prejudiced by their absence.

IV. Broadspring Should be Granted an Adverse Inference and Attorneys' Fees

Having established that Defendants wilfully destroyed evidence, it follows that an adverse inference charge is appropriate. The Second Circuit has explained that the "adverse inference rule is supported by evidentiary, prophylactic, punitive, and remedial rationales." *Kronisch v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998). "The evidentiary rationale derives from the common sense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction." *Id.* "The prophylactic and punitive rationales are based on the equally commonsensical proposition that the drawing of an adverse inference against parties who destroy evidence will deter such destruction, and will properly place the risk of an erroneous judgment on the party that wrongfully created the risk." *Id.* (quotation omitted). "Finally, courts have recognized a remedial rationale for the adverse inference—namely, that an adverse inference

should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." *Id.* Accordingly, the Court should charge the jury that Defendants wilfully destroyed evidence, and that the jury should infer that the destroyed evidence would be unfavorable to Defendants.

In addition, Broadspring should be awarded its reasonable attorneys' fees and expenses, which courts routinely order in connection with successful spoliation motions. *See, e.g., Sekisui Am. Corp.*, 2013 U.S. Dist. LEXIS 115533, *40 (awarding fees in connection with successful adverse inference motion); *Whitney v. JetBlue Airways Corp.*, 2009 U.S. Dist. LEXIS 118323, *5 (E.D.N.Y. Oct. 30, 2009) ("Rule 37 provides for the imposition of 'reasonable expenses, including attorney's fees,' caused by the spoliation, unless the court finds that 'other circumstances make an award of expenses unjust.'"). Broadspring respectfully requests reimbursement of the fees and expenses it incurred in connection with (i) seeking the preservation order, (ii) pursuing the spoliated evidence, and (iii) prosecuting this motion.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant Broadspring's motion for sanctions due to Defendants' spoliation of evidence.

Dated: New York, New York
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