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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE

Respectfully submitted,

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Plaintiff Broadspring, Inc. respectfully submits this reply memorandum in further 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

Defendants' opposition does not dispute any of the following facts set forth in Broadspring's moving papers: (1) Congoo has an official policy requiring its employees to create Yahoo! Instant Messenger ("IM") accounts for internal communications; (2) Congoo's employees used IMs to communicate about Broadspring and the publishers at issue in this case; (3) Cosentino used an IM to send Nashed a link to the Squidoo Lens right after he updated it to mirror Nashed's email of March 2; (4) since March 25, Defendants have been subject to a Court Order mandating that they preserve all "instant messaging"; and (5) despite all of this, three key custodians from Congoo's business development team—*i.e.*, the personnel directly responsible for competing with Broadspring for publishers—did absolutely nothing to preserve their IMs.

Even more troubling, Defendants' memorandum in opposition contained a materially false representation of fact, and, at Broadspring's insistence, they were forced to belatedly disclose that they did not, as represented, first inform their counsel of the existence of responsive IMs in late September (Def. Mem. 5), but rather counsel have been fully aware of them since the outset of this case. (Their letter vaguely references "Spring" (ECF No. 146), but it was actually early April.) Yet, no one did anything to ensure that Cosentino, Kane or Wagner were preserving their IMs, even after Defendants and their counsel made these very same assurances to the Court to induce it not to order imaging. And, Defendants inexcusably delayed producing Nashed's

responsive IMs—which Defendants and their counsel had known about for five months—until the end of September. These facts cry out for significant sanctions.

ARGUMENT

Defendants do not deny that they were under a duty to preserve the IMs; rather, they argue that their spoliation was not willful and that Broadspring cannot prove the relevance of the IMs they destroyed. These arguments ring hollow and do nothing to rebut the case for sanctions.

I. Defendants Do Not Dispute They Spoliated IMs with a Culpable State of Mind

Defendants spend much of their energy arguing that the spoliation was not willful, and all but concede that it was at least negligent. Indeed, Defendants hardly even contest that their spoliation was grossly negligent. This is a significant concession, because under controlling Second Circuit precedent, even ordinary negligence constitutes "a culpable state of mind," and gross negligence will "frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the 'relevance' factor)." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108, 109 (2d Cir. 2002). Defendants' reliance on the proposed amendment to Rule 37(e) (Def. Mem. 2, 12 n.10, 14 n.11) is therefore wholly misplaced. A proposed rule amendment that has not been, and may never be, adopted cannot overrule the Second Circuit. *See Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 504 n.51 (S.D.N.Y. 2013) ("the proposed rule is irrelevant for purposes of this motion.").

In any event, the circumstances here establish far greater culpability than negligence. Although Defendants accuse Broadspring of "repeatedly mischaracteriz[ing] facts" (Def. Mem. 9), the Cosentino deposition testimony cited in Broadspring's opening memorandum (at 10-11) speaks for itself:

Q. When you were told to preserve documents, why didn't you take any steps to modify your Yahoo IM settings so that Yahoo Instant Messages would in fact be saved?

A. The definition of 'preserve' is to maintain in its original state. That's the definition of 'preserve.'

(Katz Decl. Ex. 16, p. 25:13-20.) This is an admission that Cosentino chose not to change his IM settings based on nothing more than semantic pedantry; in other words, he was looking for an excuse not to change the settings, and thought he had found one in the "definition of 'preserve.'"

Furthermore, the testimony cited by Defendants does not support their contention that they were laboring under a "misunderstanding as to the ability to record IMs and not a conscious choice to not record IMs." (Def. Mem. 9.) Defendants rely on Cosentino's testimony that, after realizing "it wasn't saving and that we should actually change something to start recording something," he ***and Nashed*** "looked into it" and "I Googled how it worked, how Yahoo instant messengers worked, and I found out that there is in fact a setting that you can change. And I looked for it and I found it, and then ***we changed it.***" (*Id*. 9-10 (emphasis added).)[1] This testimony smacks of fabrication. Recall that Nashed preserved his IMs ***by changing his Yahoo! settings before this action commenced***. Thus, Nashed was already fully aware "that there is in fact a setting that you can change," and he knew all along how to change it. He and Cosentino would have had no need to fumble around on the internet searching for these answers.

Nor does Cosentino win any points for his testimony that he "looked to see if there was anything, and there was no program set to automatically go through the computer, like a

[1] Despite the fact that both Defendants and their counsel were fully aware that there were responsive IMs in early April (ECF No. 146), this "change" did not take place until late September. (Def. Mem. p. 12.) Changing those settings near the end of discovery was doing far to little far too late.

defragmentation program." (Def. Mem. 10.) He testified that he did that only as a general reaction to being instructed to suspend any automatic deletion programs. (Katz Reply Decl. Ex. 18, p. 21:13-23:6.) This token effort does not come close to satisfying a litigant's duty to "suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Pension Comm. v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (quotations omitted). What is more, counsel were also aware of the existence of responsive IMs since early April (ECF No. 146), but failed to ensure their preservation, despite the fact that Defendants induced the Court not to order imaging by assuring everything would be preserved.

Similarly, Defendants contend that Kane, too, did not preserve his IMs because he failed to appreciate the deep mysteries of changing one's Yahoo! settings. (Def. Mem. 10.) But like Cosentino, Kane's testimony about why he failed to preserve his IMs speaks for itself:

Q. [P]rior to Mr. Nashed directing you in the past couple of months to start preserving instant messages, were you preserving your instant messages?

A. No.

Q. Why not?

A. I don't view instant messages as being a document.

Q. Did you ever ask anyone whether instant messages were documents?

A. No.

Q. Did you ever ask anyone whether you had to preserve instant messages?

A. No.

(Katz Decl. Ex. 17, p. 143:5-18.) Given this testimony, it is sheer sophistry to contend "that there was a lack of understanding as to the ability to record IMs and the difference between ensuring files were not auto-deleted (which all custodians did) and changing settings (of which Kane testified he was not aware) to preserve otherwise ephemeral IMs." (Def. Mem. 10.) Nowhere in Kane's testimony does he state that he did not know it was possible to record IMs. (*See generally* Katz. Reply Decl. Ex. 19.)

More fundamentally, Defendants' effort to carve out an "ephemeral communication" exception from their duty to preserve blithely ignores this Court's Order. The so ordered preservation stipulation (which counsel for the parties jointly drafted) expressly requires preservation of all IMs; the order does not say "preserve IMs unless you unilaterally decide they are too ephemeral." Thus, this motion is not, as Defendants would have it (Def. Mem. 14), about a "failure to record" their IMs (a euphemism they employ a stunning 34 times in their 19-page brief). It is about Defendants' failure to make any effort to preserve a form of ESI that they agreed and were ordered to preserve. As this Court pointed out in October: "If they didn't preserve it, and if it turns our there are emails and IMs and other things that either were deleted, destroyed, not preserved or whatever category you want to put it in, they may well have a problem." (ECF No. 67, p. 18:19-22.)

Anyway, IMs are not "ephemeral." They are no different from any other type of ESI that must be preserved and produced in discovery; that is why the vendor they engaged in October was able to recover almost 5,000 pre-2011 IMs from the slack space, despite Defendants' failure to change their settings. (Katz Decl. Ex. 9.)

In sum, this case is nothing like *Oce N. Am., Inc. v. Brazeau*, 2010 U.S. Dist. LEXIS 25523 (N.D. Ill. Mar. 18, 2010), in which the individual defendant "assumed InfoPrint treated Same Time messages like emails, which are stored on its server," and "once he discovered that he could, and would have to, change the program's default settings to save his Same Time messages, defendant says he promptly did so." *Id*. at *18. Neither Cosentino nor Kane nor Wagner has ever testified that they assumed the IMs were being stored on Congoo's server. And Defendant Nashed, the CEO of Congoo who repeatedly assured the Court that he personally would make sure all relevant ESI is preserved (ECF No. 17, ¶ 10; No. 22, ¶ 2), was fully aware that it was necessary to set the Yahoo! software to preserve IMs. That knowledge must be imputed to Congoo and its custodians.[2]

II. The IMs Were Relevant and Their Spoliation is Prejudicial to Broadspring

Contrary to Defendants' arguments (Def. Mem. 2, 15), Broadspring does not rely solely on the presumption of relevance that arises from gross negligence or willfulness (although that presumption certainly applies here). Broadspring's moving papers set forth ample circumstantial evidence (at 8-10) from which a jury could infer that the spoliated IMs contained communications between and among Cosentino, Kane and Wagner about the Squidoo Lens, as well as Defendants' related schemes to disseminate false statements about Broadspring to publishers. *Residential Funding Corp.*, 306 F.3d at 109 n.4 ("a court's role in evaluating the

[2] Defendants try to change the subject by suggesting "it is notable that Plaintiff did not produce any IMs … ." (Def. Mem. 10.) Defendants were desperate for any leverage to use against Broadspring and spent a significant amount of time in discovery probing Broadspring's preservation efforts. As reflected by their inability to raise any such issue, they came up empty handed. Plain and simple, Broadspring did not produce IMs because, unlike Defendants, its personnel do not use IMs.

'relevance' factor in the adverse inference analysis is limited to insuring that the party seeking the inference had adduced enough evidence of the contents of the missing materials such that a reasonable jury could find in its favor"). It is now undisputed that Cosentino used IM to communicate about the Lens with his CEO, and that Defendants and their counsel have known about this since the very beginning of the case. Yet even the March 4 IM in which Cosentino sent the link to Nashed was not produced until the end of September. *See id*. at 110 ("purposeful sluggishness" in producing documents supports inference that documents are harmful to producing party).

Relatedly, Defendants' repeated refrain (relevance is invoked no fewer than eight times) that the IMs could not be relevant unless they contained direct communications with publishers is nonsensical. Under that warped logic, Defendants would be free to destroy the March 2 email in which Nashed emailed Cosentino what would become the text of the "downside" section of the Broadspring entry of the Lens, and the March 4 IM in which Cosentino sent Nashed a link to the revised Lens. In fact, the litigants' internal communications are often the most revealing documents in a case. Notably, although Defendants proffer declarations averring that they do not use IM to communicate with publishers, nowhere do Nashed, Cosentino, Kane or Wagner deny that they use IM to communicate with each other about Broadspring and the publishers for which the parties compete. In short, Defendants have offered nothing that rebuts the presumption of relevance that arises from either gross negligence or willfulness. *See, e.g., Pension Comm.*, 685 F. Supp. 2d at 468-69 (explaining ways spoliator might rebut presumption).

And Defendants' suggestion that the relevance of the spoliated documents must be proven by deposition testimony (Def. Mem. 15) is especially disingenuous. Kane and Cosentino

repeatedly dissembled throughout their depositions, denying everything unless confronted with a document. Kane in particular developed a severe case of "litigation amnesia." In a deposition that lasted less than three hours, he answered "I don't recall" more than 150 times, including, for example, in response to questions asking him to identify the publisher accounts he currently manages as Congoo's Director of Publisher Relations. (Katz Reply Decl. Ex. 19, p. 13:22-14:9.) Kane even feigned memory loss when asked to name a single publisher with which he worked during the week prior to his deposition. (*Id*., p. 15:1-7.) Significantly, Kane also played the "I don't recall" game when asked how and when he learned about the Squidoo Lens. (*Id*., p. 21:17-24:13.)

Likewise, Cosentino lied throughout his deposition, including testifying that he had never been a party to a lawsuit before when in fact he had twice been a plaintiff, and testifying that his only brush with the law was for "marijuana possession" when in fact he has multiple felony convictions, including for possession of in excess of 50 pounds of marijuana, and a conviction for using someone else's name to commit credit card fraud. (*Id*. Ex. 20, pp. 43:14-55:20 and *infra*.) The false and evasive deposition testimony of both Cosentino and Kane only underscores the prejudice Broadspring has suffered by not having access to their and Wagner's IMs.

III. Broadspring is Entitled to an Adverse Inference and Attorneys' Fees

Defendants offer no argument against an adverse inference beyond repeating their argument that the spoliation was unintentional and asserting that the spoliated IMs must be irrelevant because they were not communications with publishers. These arguments are refuted above. Defendants also incorrectly state the standard for awarding attorneys' fees. (Def. Mem. 18.) In fact, "[e]ven when a court denies other requested relief, it may still impose monetary

sanctions for spoliation and other discovery misconduct." *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 32211, *27 (S.D.N.Y. May 23, 2006). Defendants' misconduct has imposed significant costs on Broadspring, and Defendants should be held accountable.

CONCLUSION

Broadspring respectfully submits that its motion for sanctions due to spoliation of evidence should be granted.

Dated: New York, New York
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