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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRS RECOVERY, INC., a Virginia Corporation; and DALE MAYBERRY, Plaintiffs, vs. JOHN LAXTON, aka johnlaxton@gmail.com; NORTHBAY REAL ESTATE, INC., Defendants. AND RELATED CROSS-CLAIMS	Case No. CV 06-07093 CW **NOTICE OF RENEWED MOTION AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: July 5, 2012 Time: 2:00 p.m. Courtroom: 2 (The Hon. Claudia Wilken)

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NOTICE OF RENEWED MOTION AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 5, 2012 at 2:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Claudia Wilken, in Courtroom 2 of the above-mentioned Court, located at 1301 Clay Street, Oakland, CA 94612, the Trustee of the Estate of Northbay Real Estate, Inc. ("Northbay"), by and through her special counsel, will and hereby does move for an order granting defendants' renewed motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) and Fed.R.Civ.P. 52(b).

Defendants move as follows:

1. To set aside the jury's verdict and judgment entered thereon on May 14, 2012, and to enter judgment in favor of defendants in accordance with defendants' motion for a judgment as a matter of law because there was no legally sufficient evidentiary basis for a reasonable jury to find for plaintiffs on essential elements of their claims; and

2. For the Court to find that there was no legally sufficient evidentiary basis for it to enter judgment for plaintiffs on essential elements of their claims that the Court determined, and for it to enter judgment in favor of defendants on such claims in accordance with defendants' motion for a judgment as a matter of law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PERTINENT BACKGROUND

At the close of evidence, defendants moved pursuant to Rules 50(a) and 52(c), Fed.R.Civ.Pro., for judgment as a matter of law ("JMOL") against plaintiffs and in favor of defendants on all of plaintiffs' claims in view of the lack of evidence establishing necessary elements of plaintiffs' claims. The Court did not rule on such motion. After the jury returned its verdict, plaintiffs purported to dismiss their claims for violations of California Business and Professions Code section 17200 ("Section 17200").

Defendants hereby renew their JMOL motion pursuant to Fed.R.Civ.Pro. 50(b) and Fed.R.Civ.Pro. 52(b).

A. Plaintiff Mayberry's Claims

This action concerns plaintiffs' claims relating to the alleged conversion of two domain names, RL.com and MAT.net. Prior to trial, the Court ruled that in 2005 plaintiff Dale Mayberry ("Mayberry") purportedly assigned to plaintiff CRS Recovery, Inc. ("CRS") all of his claims and rights to RL.com. Docket No. 323. During his trial testimony, Mayberry confirmed that he made this assignment.

In his complaints herein, Mayberry sought relief only relative to MAT.net.[1] As he acknowledged at trial, Mayberry recovered MAT.net before trial.

Plaintiffs did not adduce any evidence during trial of any damages or harm Mayberry purportedly sustained as to either RL.com or MAT.net. In fact, plaintiffs dismissed or abandoned their claims for any and all damages.

B. Plaintiffs' Conversion Claim

Through their claim for conversion plaintiffs sought to obtain the right to ownership of the

[1] For the reasons set forth in the papers they filed in support of their March 20, 2012 motion to dismiss for lack of jurisdiction (Docket Nos. 260-63, 273-75), defendants do not in any manner concede that either plaintiff had standing. To the contrary, defendants continue to contend that neither plaintiff had standing, and, accordingly, the Court lacked jurisdiction.

domain RL.com. According to recent California state law, however, a domain name does not constitute intangible personal property that may be subject to a conversion claim.

Furthermore, plaintiffs presented no evidence during trial of a demand made on behalf of plaintiff CRS. As set forth above, and as the Court has ruled, Mayberry assigned all of his rights and interest in RL.com to CRS in mid-2005. The only evidence presented by plaintiffs at trial of a "demand" made to either defendant for a return of RL.com was embodied in Mr. Lau's and Mr. Laxton's testimony about: (1) a brief telephone conversation that Mr. Lau, and his co-CRS shareholder, attorney Stevan Lieberman, placed to Mr. Laxton using Mr. Lieberman's cell phone during a domain name conference on or about January 31, 2006; and (2) a follow-up letter dated February 27, 2006 (plaintiffs' Trial Ex. 84).

According to the trial testimony of Mr. Lau and Mr. Laxton, and as shown by Trial Exhibit 84, the "demands" (to the extent they could be so characterized) were made only on behalf of Mayberry. As Mr. Lau conceded during trial (and as Mr. Laxton confirmed), no mention was made of CRS or of the fact that CRS was Mr. Mayberry's purported assignee in either the January 31, 2006 phone call or in the February 27, 2006 letter. Indeed, the letter states that "it is ***unequivocal*** that Mr. Mayberry ***is*** the rightful owner of the domain name RL.COM," and that the letter should be a "notice of Mr. Mayberry's claim to the RL.COM domain." Trial Ex. 84 (emphasis added). Thus, no demand was made on behalf of the party – CRS – claiming the right to possession of the "property" at issue, *i.e.*, RL.com.

C. Plaintiffs' Section 17200 Claim

In their Second Amended Complaint, plaintiffs assert defendants violated Section 17200 based on the following allegations:

> 35. As above alleged, the defendants committed a series of criminal acts, constituting violations of California Penal Code ("CPC") § 470(b)(Forgery), CPC § 474 (Forgery by telephone or telegraph), CPC § 530 (False personation), and CPC § 470(c)(Falsification of official record). These unethical, criminal and immoral acts were committed in order to effect the theft of personal property of plaintiffs, to wit, the domains RL.Com and MAT.Net.
>
> 36. Defendants have engaged in actions violative of the laws, policies, business norms and ethics of the State of California by committing the following unlawful acts: (1) Misrepresenting their authority to dispose of the property of another;

> (2) Aiding in the sale and disposition of criminally-acquired assets, (3) Aiding, abetting and profiting from the commission of felonious acts.

See Docket No. 51, ¶¶ 35-36.

At trial, plaintiffs adduced no evidence that defendants engaged in a business practice of any sort with respect to their acquisition of RL.com. Plaintiffs also failed to present any evidence whatsoever that defendants engaged in any unlawful, fraudulent or unfair business practices, as alleged and as defined by Section 17200, with respect to their acquisition of RL.com.

II. APPLICABLE STANDARDS

Federal Rule 50(a) provides in pertinent part that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may. . . (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed.R.Civ.P. 50(a). Federal Rule 52(c) provides that "[i]f a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed.R.Civ.P. 52(c).

Federal Rule 50(b) provides as follows:

> If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law.

Fed.R.Civ.P. 50(b).

Federal Rule 52(b) provides that "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Fed.R.Civ.P. 52(b).

III. ARGUMENT

For the reasons set forth below, separately and severally, the Court should set aside the verdict and judgment entered thereon on May 14, 2012, and, to the extent it determined plaintiffs'

Section 17200 or any other claim, find that plaintiffs failed to establish such claim(s). Concomitantly, the Court should enter judgment in favor of defendants in accordance with defendants' motion for a judgment as a matter of law.

A. Plaintiff Mayberry Had No Remaining Stake In This Case And Lacked Standing

"It is axiomatic that standing under Article III of the United States Constitution is a threshold requirement in every civil action filed in federal court. U.S. Const., art. III, § 2, cl. 1; *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 11, 118 S.Ct. 1772, 141 L.Ed.2d 1 (2004) ('In every federal case, the party bringing the suit must establish standing to prosecute the action.'). To satisfy the standing requirement of Article III, there must be the 'irreducible constitutional minimum' of an injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)." *In re Flash Memory Antitrust Litigation*, Case No. C 07-0086 SBA, 2010 WL 2465329, at *2 (N.D. Cal. 2010).

To have and maintain standing, the party must establish he has been injured in fact. Absent such injury, there is no case or controversy. Similarly, "a plaintiff's stake in the litigation must continue throughout the proceeding." *Williams v. Boeing Co.*, 517 F.3d 1120, 1128 (9th Cir. 2008). *See also Alvarez v. Lake County Bd. of Supervisors*, Case No. CV 10-1071 NJV, 2010 WL 3619558, at *7-*8 (N.D. Cal. Sept. 13, 2010) (plaintiffs lacked standing to pursue an inverse condemnation claim after they returned the property to the seller and no longer owned the property).

Mayberry's claims were, as he conceded, moot. Indeed, the Court ruled before trial that Mayberry assigned all of his rights and title to RL.com to CRS in July 2005. Mayberry also acknowledged in his trial testimony that he recovered MAT.net. Finally, plaintiffs not only withdrew their claims for damages, but also presented no evidence of damages at trial. In short, it is indisputable that before the case was submitted to the jury Mayberry no longer had any stake in the case whatsoever.

In view of the foregoing, there was no basis for the jury to find in favor of plaintiff

Mayberry on any claims. For the same reasons, the Court could not have found in favor of Mayberry on any claim or ordered any relief in his favor on any claim. Accordingly, judgment must be rendered against Mayberry and in favor of defendants on ***all*** of Mayberry's claims.

B. Plaintiffs Could Not Establish Their Conversion Claim, As Domain Names Do Not Constitute Intangible Personal Property That Can Be Subject To Conversion Under California Law

To establish a claim for conversion, "a plaintiff must show 'ownership or right to possession of property, wrongful disposition of the property right and damages.'" *E.g., Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003). In *Kremen*, the Ninth Circuit determined that a domain name constituted intangible personal property that could be subject to a conversion claim. *Id.* at 1030. In so ruling, however, it did not find any California case squarely addressing the issue. *Id.* at 1031. Instead, after the California Supreme Court declined its request to answer the question,[2] the Ninth Circuit attempted to predict how the California courts would resolve it and then determined the question itself. *Id.*

As shown by the California Court of Appeal recent decision in *In re Forchion*, 198 Cal.App.4th 1284, 1308-09 (Cal. App. 2011), however, under California law,[3] a domain name is not property that may be converted. The Ninth Circuit's contrary prediction and determination were, therefore, erroneous. In particular, the court in *In re Forchion* strongly suggested that if it were to squarely decide the issue, it would find, as have other jurisdictions, that a domain name does *not* constitute a property right:

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[2] The *Kremen* court posed the following query to the California Supreme Court:

> "Is an Internet domain name within the scope of property subject to the tort of conversion?
>
> (a) For the tort of conversion to apply to intangible property, is it necessary that the intangible property be merged with a document or other tangible medium?
>
> (b) If the answer to Question (a) is "yes," does the tort of conversion apply to an Internet domain name, or, more specifically, is an Internet domain name merged with a document or other tangible medium?"

Kremen v. Cohen, 325 F.3d 1035, 1038 (9th Cir. 2003).

[3] In the appeal of this matter, the Ninth Circuit determined that California law applies to the claims at issue. *CRS Recovery v. Laxton*, 600 F.3d 1138 (9th Cir. 2010).

> "Property is an abstract concept 'commonly used to denote everything which is the subject of ownership.' The law characterizes property as a bundle of rights, which includes the rights of use, exclusion, and alienation. Domain name registrants seemingly appear to possess all three component rights. Upon closer analysis of the formation of domain names, however, it becomes apparent that a domain name is not property, but rather the product of a contract for services between the registrant and the registrar.
>
> "A domain name does not exist until it is registered. To secure the creation, registration, and use of a domain name, one must first assent to the registrar's contract. In addition to the payment of a small fee, the contract requires a potential registrant to agree to (1) provide and maintain current and accurate identifying information; (2) indemnify the registrar; and (3) abide by an alternative dispute resolution policy. In exchange, the registrar obligates itself to establish and maintain ... the domain name ... so it can operate as a functional Internet address. The registrar is obligated to provide services *only so long as the registrant continues to pay a periodic renewal fee and is otherwise not in breach. Once the contract terminates, the registration expires and the domain name effectively becomes nonexistent—returning to the public domain for anyone to register.* Accordingly, '[t]he nature of a domain name, technically and simply, is a reference point in a computer database.... It is created by the registration process before which it does not exist, and it has no utility or function separate and apart from the [contractual] Internet services provided by registrars....' "(Note, *Kremen v. Cohen: The "Knotty" Saga of Sex.Com* (2004) 45 Jurimetrics J. 75, 84–85, fns. omitted, italics added; *id.* at pp. 84–91 [consensus among courts nationwide is that domain name is a product of contract for services, not property owned by registrant, with notable exception of Ninth Circuit decision in *Kremen v. Cohen* (9th Cir.2003) 337 F.3d 1024]; *Network Solutions, Inc. v. Umbro Intern.* (2000) 259 Va. 759, 529 S.E.2d 80, 85–86 [domain name is a product of contract for services]; but see Note, *You Can Have It, But Can You Hold It?: Treating Domain Names as Tangible Property* (2010–2011) 99 Ky. L.J. 185, 191–209 [most reasonable approach is to treat domain name as tangible property rather than as a product of services contract or intangible property]; Note, *Regulating the Domain Name System: Is the ".Biz" Domain Name Distribution Scheme an Illegal Lottery?* (2003) 2003 U.Ill.L.Rev. 245, 269–273 [domain name constitutes property].)

In re Forchion, 198 Cal.App.4th 1284, 1308-09 (Cal. App. 2011) (emphasis original).

Defendants submit that, in view of the California Court of Appeal decision in *In re Forchion*, 198 Cal.App.4th 1284, as a matter of law RL.com is not a property right that could have been the subject of a conversion claim under California law and, therefore, no reasonable jury could have found in favor of plaintiffs on their conversion claim.

Indeed, "[t]he task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980). "Where the state's highest court has not decided an issue, the task of the federal courts is

to predict how the state high court would resolve it." *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *modified at* 810 F.2d 1517 (9th Cir. 1987). "In assessing how a state's highest court would resolve a state law question — absent controlling state authority — federal courts look to existing state law without predicting potential changes in that law." *Ticknor v. Choice Hotels Internat'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001).

"When the California Supreme Court has not spoken, California Courts of Appeal decisions are data for determining how the highest California court would rule." *Scandinavian Airlines Systems v. United Aircraft*, 601 F.2d 425, 427 (9th Cir. 1979). "In cases where the highest appellate court of the state has not spoken, well-considered dicta should not be ignored." *Gee*, 615 F.2d at 861. Moreover, "when the intermediate appellate courts of the state have spoken to [an] issue, [a federal court] shall give great weight to their determination about the content of state law, absent some indication that the highest court of the state is likely to deviate from those rulings." *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007).

Based on the foregoing, judgment must be rendered against plaintiffs and in favor of defendants on plaintiffs' conversion claim.

C. Judgment As A Matter Of Law Is Separately Warranted On Plaintiffs' Conversion Claim Because Plaintiffs Presented No Evidence That A Demand Was Made By CRS Recovery.

One of the essential elements of a claim for conversion is that a demand for return of the property be made by the one with the right to possession of that property. *See* CACI 2100, Judicial Council of California Jury Instructions, Database (April 2012). The Court so instructed the jury. Docket No. 337 at 6:21-22. The only evidence of a "demand" made to either defendant for a return of the "property" at issue in this case, RL.com, was in early 2006, in a phone call placed to defendant Laxton on January 31, 2006 and in a follow up February 27, 2006 letter (Trial Ex. 84). As confirmed by the trial testimony of Messrs. Lau and Laxton, as well as the above-referenced letter, the "demands" were only made on behalf of plaintiff Mayberry. At the time of such "demands," Mayberry apparently was ***not*** the one entitled to possession of RL.com.

According to the Court's ruling and Lau's testimony, Mayberry had assigned all of his rights to RL.com to CRS months before.

Since plaintiffs failed to establish an essential element of their conversion claim, *i.e.*, a demand for return of the property made by the one with the right to possession of that property, judgment must be entered against them and in favor of defendants as a matter of law on such claim, even assuming a domain name constitutes property that can be the subject of a conversion claim.

D. Plaintiffs' Declaratory Relief Claim Fails As A Matter Of Law, As It Is Predicated On Plaintiffs' Conversion Claim, As To Which Judgment Must Be Entered In Favor Of Defendants

"A particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy." *Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1251 (9th Cir. 1987). The predicate for or substance of plaintiffs' declaratory relief claim was their conversion claim. Because judgment must be rendered against plaintiffs and in favor of defendants on plaintiffs' conversion claim, judgment must also be rendered against plaintiffs and in favor of defendants on plaintiffs' declaratory relief claim.

E. Plaintiffs Adduced No Evidence That Defendants Engaged In A Business Practice Involving RL.com Let Alone One That Was Unlawful, Fraudulent Or Unfair As Defined By Section 17200.

To establish a Section 17200 claim, a plaintiff must establish that the defendant engaged in a business practice that was unlawful, fraudulent or unfair. Cal. Bus. & Prof. Code § 17200; *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal.App.4th 861, 878 (Cal.App. 1999). There is no vicarious liability, as such, under Section 17200, and the liability of each defendant "must be predicated on his personal participation in the unlawful practices." *See People v. Toomey*, 157 Cal.App.3d 1, 14 (Cal.App. 1985); *Emery v. Visa Int'l Service Ass'n*, 95 Cal.App.4th 952, 960 (Cal.App. 2002).

Furthermore, in the commercial context, "unfairness" is narrowly defined:

> We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of

> an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 187 (Cal. 1999).

Plaintiffs adduced no evidence establishing that either defendant engaged in a business practice with respect to RL.com, or any evidence establishing that any such business practice with respect to RL.com was unlawful, fraudulent or unfair as defined by Section 17200, and as plaintiffs alleged in their complaint. Nor did plaintiffs present any evidence to establish any element of defendants' alleged aiding and abetting liability.

In view of the above, the Court must make findings that there was a complete failure of proof necessary for plaintiffs to establish their 17200 claims.[4] The Court also must enter judgment against plaintiffs and in favor of defendants pursuant to Fed.R.Civ.P. 52(b) as to plaintiffs' Section 17200 claims.

Alternatively, in light of plaintiffs' purported dismissal of their Section 17200 claims *after* the jury returned its verdict and before the Court ruled on such claims (which was a nonjury claim) – as well as in view of the fact that plaintiffs dismissed the same claims in 2008 – the Court should amend the judgment to reflect that such claims have been dismissed with prejudice. *See Williams v. Ford Motor Credit Co.*, 627 F.2d. 158, 159-60 (8th Cir. 1980) (abuse of discretion to permit dismissal without prejudice when dismissal sought after trial and as JNOV motion was pending); Fed.R.Civ.P. 41(a) ("if the plaintiff previously dismissed any federal - or state - court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits"). In other words, even if the Court determines not to grant defendants' instant JMOL, plaintiffs' dismissal of their Section 17200 claims must be deemed to have been with prejudice and/or plaintiffs must be otherwise foreclosed from undertaking to retry

[4] Defendants' proposed findings of fact and conclusions of law on plaintiffs' Section 17200 claim, as required for the issuance of judgment as a matter of law under Fed.R.Civ.P. 52(c), were previously filed by defendants (on April 17, 2012). Docket No. 300.

them under any circumstance.[5]

IV. CONCLUSION

For all of the foregoing reasons, judgment as a matter of law must be entered against plaintiffs and in favor of defendants on all of plaintiffs' claims.

Dated: May 31, 2012

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[5] The same result should obtain as to plaintiffs' wrongful interference claims, which they have also previously dismissed multiple times.