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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOMINIC MORGAN,

Plaintiff,

v.

DR. HERBERT NEVYAS and
DR. ANITA NEVYAS-WALLACE,

Defendants.

CIVIL ACTION

Case No.:

COMPLAINT

COMPLAINT FOR DECLARATORY RELIEF

1. This is an action for declaratory relief in which a dissatisfied consumer seeks to protect his right to use the domain names “nevyaslasik.com,”

“herbertnevyaslasik.com,” and “anitanevyaslasik.com” as the Internet addresses for web sites criticizing two well-known lasik surgeons who, the consumer believes, botched his lasik surgey and are responsible for his having become legally blind. Herbert Nevyas and his daughter, Anita Nevyas-Wallace brought and won a claim against Dominic Morgan under the Uniform Domain-Name Dispute-Resolution Policy (“UDRP”). However, such rulings are subject to de novo review in the federal courts under principles of federal law, and Morgan now asks this Court to declare that defendants are in violation of the reverse domain name hijacking provisions of the Anticybersquatting Consumer Protection Act (“ACPA”), 15 U.S.C. § 1114(2)(D)(v), because Morgan’s domain name does not violate the Nevyases’ rights under the trademark laws, and because any trademark claims are forbidden by the First Amendment.

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction under 15 U.S.C. §§ 1114(1), 1114(2)(D)(v) and 1121, and 28 U.S.C. §§ 1331, 1337 and 1338.

3. The Court has personal jurisdiction of defendants, because defendants maintain an office in New Jersey and because both defendants consented to jurisdiction in New Jersey.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(1) and (c), because defendants maintain an office in Marlton, New Jersey, operate an interactive web site on the Internet through which they market services to New Jersey residents, and have consented to jurisdiction in the court where Morgan lives; Morgan lives in New Jersey.

PARTIES

5. Plaintiff Dominic Morgan is a citizen of New Jersey who has established web sites criticizing Herbert Nevyas and Anita Nevyas-Wallace for how they treated him while he was their patient, and who registered the domain names “nevyaslasik.com,” “herbertnevyaslasik.com,” and “anitanevyaslasik.com”.

6. Defendants Herbert Nevyas and Anita Nevyas-Wallace are lasik surgeons with offices in Pennsylvania and New Jersey.

FACTS

Technical Background

7. The Internet is an informal, worldwide network of networked computers, linked together for the purpose of automated communication between members of the networks. Every computer connected to the Internet is assigned a numeric address (akin to a telephone number and area code), that the other computers on the Internet use to route messages to that computer. This numeric address (called an IP address)

is in the form of four sets of three digit numbers with each number being 255 or less; i.e. 123.255.001.213. Thus, an IP number usually identifies a particular computer or Internet web site.

8. Because these long numbers are difficult for people to remember, the Internet authorities also assign alphanumeric addresses, like “xyz.com” to each numeric IP address. These alphanumeric addresses are referred to as “domain names.” Internet users normally use the domain name to identify a particular web site by use of the domain name, rather than the numeric IP address, because it is easier to remember. The process of translating a domain name into an IP number is handled by a system of computers on the Internet known as the Domain Name System (“DNS”).

9. Each domain name must be unique, because each IP address is unique, and because the computers using the Internet must be able to look up, in a table maintained online, the IP address for a specific domain name whenever the sender of a message uses only the domain name.

10. The World Wide Web user can enter a domain name into his browser software, and his computer will automatically send out the necessary messages requesting information from the computer on which the desired web site is maintained. In other words, the user will be taken to the site maintained at that domain name. (More precisely, a request will be made to the computer on which the site is maintained, and it

will send the web page requested to the user who entered the domain name.) The returned information is then presented in graphic form on the initiator's computer screen.

11. The domain name can be entered into the browser software by typing the name into a window of the browser, or by clicking on an Internet hyperlink. Domain names can also be identified for future access through the creation of "bookmarks" or "favorites" in the browser software, or by the owners of other web pages who place such links in their pages, or by using Internet search engines or directories that return hyperlinks to sites that may be identified by a search of their databases.

12. Anyone can register a domain name that has not already been registered by filling out a few forms on the Internet. Once a name is registered, it exists as an informational entry on a particular computer known as the DNS root server. Until a web site has been created under that domain name, however, typing the domain name into one's browser will return only an error message.

13. A web site is a page or collection of pages that may have text, graphics, sounds or animation on them. Usually there is only one web site under a given domain name.

14. After registering a domain name, the name's owner can elect to sell it, can create web pages (a website) that individuals on the internet can access, or can do nothing with it. If he creates a web page or pages under the domain name, then the user

who visits that domain name will be able to view those pages. The pages will be accessible to anyone in the world with access to the Internet; thus domain names are neither territorial nor are they geographic designations.

15. Users often rely on the domain name as a mnemonic device to remember sites that they wish to revisit.

16. As a result of the unique nature of domain names, there can only be one “jets.com,” and thus one owner of “jets.com” in the entire world. Thus Boeing, Embraer, nozzle manufacturers, fans of a current New York football team, dealers in aircraft, fans of a former Winnipeg hockey team, fans of the “white” gang in West Side Story, aircraft enthusiasts, the Junior Engineering Technical Society, Jet’s Pizza Company, mathematicians, and others can only own this domain name if they were the first to register it. Someone who decides after the date of first registration that he or she wants that domain name must either hope that the original registrant fails to renew the registration, or must try to obtain it from the original registrant, either through negotiation or through legal proceedings.

17. Various persons who want to use the Internet to communicate information about particular subjects seek to register domain names reflecting those subjects. Commonly, a commercial enterprise wants a domain name that embodies its own name or the name of one of its products. But other people who desire to talk about products

and companies also seek domain names embodying that topic. And, people who did not have a desire to talk about a subject, but anticipated that others **might** want a particular name in order to have a handy way to reference their web pages about that subject, also seek to be the first to reserve domain names identifying particular topics.

18. The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit corporation that manages the DNS, pursuant to agreements with the Department of Commerce, and that accredits registrars through which domain names can be registered. As part of the accreditation by ICANN, registrars are required to follow the Uniform Domain-Name Dispute-Resolution Policy (often referred to as the “UDRP”). Under the UDRP policy, most types of trademark-based domain-name disputes must be resolved by agreement, court action, or an “administrative proceeding” before a registrar will cancel, suspend, or transfer a domain name.

19. It is the domain name complainant that chooses which provider of UDRP services will be selected for any given case. As a result, a UDRP provider whose panelists are insufficiently favorable to complainants will go out of business, while a UDRP provider whose panelists more reliably rule in favor of complainants will thrive.

20. The outcome of the UDRP administrative proceeding is binding only if no judicial review is sought. If judicial review is sought, the UDRP provides that the court’s

review of whether a domain name violates the complainant's trademark rights is de novo, without any deference to the UDRP administrative panel.

21. If a respondent loses the UDRP proceeding, his domain name is transferred to the complainant unless the respondent institutes litigation within 10 business days.

UDRP paragraph 4(k) states:

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision.

The Parties' Respective Web Sites

22. On September 1, 2000, defendants, seeking to establish a presence on the Internet, registered the domain name nevyas.com and created a web site to promote their services. At the time they registered that domain name, other domain names that incorporated or resembled their last name, including the domain names "nevyaslasik.com," "herbertnevyaslasik.com," and "anitanevyaslasik.com," were also available, but defendants chose not to register them.

23. Defendants do not have any registered trademarks in the name "Nevyas."

24. In April 1998, defendant Anita Nevyas-Wallace performed lasik surgery on Morgan, assisted by her father, defendant Herbert J. Nevyas. Morgan's eyesight worsened. Morgan sued the Nevyases for malpractice, but an arbitrator ruled against him.

25. In 2002, Morgan created a web site at www.lasiksucks4u.com, to warn other prospective patients about the dangers of lasik surgery. At that web site, Morgan recounted his own experiences in detail and posted documents and photographs pertaining to his own experience, information about the problems suffered by other patients, studies of effective and problematic lasik surgery, and other materials. The Nevyases sued Morgan (and his lawyer) for defamation in the Court of Common Pleas for Philadelphia County over the contents of the [lasiksucks4u](http://www.lasiksucks4u.com) web site; that case is still pending.

26. In February 2009, Morgan registered the domain names "nevyaslasik.com," "herbertnevyaslasik.com," and "anitanevyaslasik.com" for the purpose of creating web sites specifically devoted to expressing his negative opinions about defendants. Morgan chose those domain names because they represented the subject or title of his intended web sites. Morgan thereafter posted web sites about defendants on the Internet, using the domain names "nevyaslasik.com," "herbertnevyaslasik.com," and "anitanevyaslasik.com."

27. Morgan's web sites are completely non-commercial, existing for the sole purpose of expressing his views about defendants. No products or services are sold or offered for sale through the web sites.

28. Morgan does not use the domain names "herbertnevyaslasik.com," "nevyaslasik.com," or "anitanevyaslasik.com" in the ordinary course of trade. In fact, Morgan has no ordinary course of trade; he lives on social security disability income as a result of his failed lasik surgery.

29. Morgan does not make use in commerce of the domain names "nevyaslasik.com," "herbertnevyaslasik.com," or "anitanevyaslasik.com."

30. Morgan does not use the domain names "herbertnevyaslasik.com," "nevyaslasik.com," or "anitanevyaslasik.com" in connection with his own goods, services, or commercial activities.

31. At no time did Morgan offer the domain names "nevyaslasik.com," "herbertnevyaslasik.com," or "anitanevyaslasik.com" for sale, or hint that he had any interest in selling the domain names.

32. Morgan's web sites are plainly adverse to defendants. No person visiting any of the web sites could believe that either Anita Nevyas-Wallace or Herbert J. Nevyas owns or endorses the web sites. Any person visiting any of the web sites would recognize, from the very first instant that he or she viewed the site, that it is a web site

that criticizes Anita Nevyas-Wallace or Herbert J. Nevyas or both of them, rather than one allied with or sponsored by Anita Nevyas-Wallace or Herbert J. Nevyas.

33. To ensure a lack of confusion, Morgan's web site displays a prominent banner headline denouncing the Nevyas lasik practice: "Why I do not recommend Anita Nevyas" on the home page at anitanevyaslasik.com, "Why I do not recommend Herbert Nevyas" on the home page at herbertnevyaslasik.com, and "Why I do not recommend Nevyas Eye Associates" on the home page at nevyaslasik.com. Because these denunciations are at the top of the page, they are the first thing the viewer sees when accessing the home pages of Morgan's web sites.

34. Plaintiff has no intent to profit from any Internet traffic intended for defendants' web site. Plaintiff also has no intent to profit from Internet traffic intended for his own web site: nothing is for sale on plaintiff's web site and no donations are solicited on plaintiff's web site.

35. To the extent that the domain names "nevyaslasik.com," "herbertnevyaslasik.com," and "anitanevyaslasik.com" are similar to the name Nevyas or to any trademark rights that defendants have in the Nevyas name, Morgan makes fair use of that trademark for the purpose of denominating the subject of the web site and the target of his criticism.

Defendants' Assertion of Trademark Rights

36. On July 6, 2010, defendants initiated a UDRP complaint with the National Arbitration Forum (“NAF”) against Morgan. The UDRP complaint asserted that Morgan’s use of domain names that incorporated defendants’ surname violated their trademark rights in that name.

37. Defendants’ unsworn UDRP complaint contained the following assertion:

Respondent’s websites also contain links to other websites featuring the services of other lasik surgeons and doctors with similar ophthalmology practices. Respondent’s websites track the number of clicks to each competitive website, suggesting that Respondent may be profiting from this confusion and traffic to his website by obtaining clickthrough fees.

(citations omitted)

38. Morgan’s response to the UDRP complaint specifically denied that defendants’ surmise about click-through fees was correct.

39. Morgan does not gain any revenue from viewers clicking on links on his web site.

40. In a decision dated August 26, 2010, the NAF panelist ruled that Morgan’s domain name violated defendants’ trademark rights, and ordered that the domain name be transferred. The panelist characterized the statement in defendants’ complaint about click-through fees as an “allegation” and Morgan’s denial as an “allegation,” but then proceeded to issue a decision on the assumption that defendants’ allegation was true. Morgan was notified of the decision on August 30, 2010.

CAUSES OF ACTION

41. Plaintiff maintains that his current and prior uses of the domain name have at all times been perfectly legal. Defendants assert that plaintiff's actions were illegal.

42. Defendants' actions have given rise to an actual and justiciable controversy pursuant to 28 U.S.C. § 2201 et seq.

43. Defendants have engaged in reverse domain name hijacking in violation of the Anticybersquatting Protection Act, 15 U.S.C. § 1114(2)(D)(v).

44. Plaintiff therefore seeks a declaratory judgment that he has neither infringed nor diluted any trademark nor falsely designated any origin, and that he is not in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114, and that he is not in violation of Section 43 of the Lanham Act, subsections (a), (c) or (d), 15 U.S.C. §§ 1125(a), (c) or (d).

45. Plaintiff further seeks a declaratory judgment that any claims that defendants might have had under federal or state trademark laws are barred by the First Amendment and by principles of fair use, including nominative use and parody.

WHEREFORE, plaintiff prays the court to enter a judgment in favor of plaintiff, Dominic Morgan, and against defendants Anita Nevyas-Wallace and Herbert J. Nevyas, as follows:

A. Declaring that plaintiff's domain names "herbertnevyaslasik.com," "nevyaslasik.com," and "anitanevyaslasik.com," plaintiff's use of the domain names, and plaintiff's use of his web sites do not violate defendants' rights under the Lanham Act or other trademark law;

B. Declaring that the decision providing for transfer of registrations of the domain names "anitanevyaslasik.com," "herbertnevyaslasik.com," and "nevyaslasik.com," is null and void and without any force or effect;

C. Declaring that plaintiff's use of the domain name "nevyaslasik.com," "herbertnevyaslasik.com," and "anitanevyaslasik.com" is fair use and protected under the First Amendment, and does not infringe on any of defendants' marks;

D. Declaring that defendants are not entitled to an injunction against plaintiff using the domain name "nevyaslasik.com," "herbertnevyaslasik.com," and "anitanevyaslasik.com," or operating the Web sites located at the urls: "www.nevyaslasik.com," "www.herbertnevyaslasik.com," and "www.anitanevyaslasik.com";

F. Awarding plaintiff his costs and reasonable attorney fees in this matter; and

G. Awarding such other relief as may be just and proper.

Respectfully submitted,

BARRY, CORRADO, GRASSI & GIBSON, PC

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