



Monday, July 20, 2009

Hon. Judge Judith Eiler
King County District Court – Seattle Division
516 Third Ave., Room E-341
Seattle WA 98104

via: Fax 206-296-0910



re: **Plaintiff's Opposition to Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted.**

Council for Refractive Surgery Quality Assurance v. Brent Hanson
Case: 85-11924

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Judge Eiler,

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The Council for Refractive Surgery Quality Assurance is the Plaintiff in small claims court case 85-11924. Defendant has submitted to the court Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted. By this notice Plaintiff objects to Defendant's motion on the grounds stated herein.

Introduction

Plaintiff is a California nonprofit patient advocacy organization that publishes a website at usaeyes.org. Defendant maliciously purchased the Internet domains usaeyes.info, usaeyes.net, and usaeyes.biz. Plaintiff successfully gained control of these domains through the Uniform Domain-Name Dispute-Resolution Policy (UDRP), which is an administrative process of the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is a nongovernmental corporation that controls the purchase, registration, and transfer of all Internet domain names worldwide. In this case, Plaintiff seeks from Defendant costs associated with processing the UDRP.

On 12 February 2009 in open hearing with this Court, Defendant served upon Plaintiff his Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted. As this was the first service of this motion, Plaintiff moved for a continuance, which was granted by the Court. No hearing date is set at this time.

Defendant's Arguments Are Not Germane

In his motion, Defendant states "A UDRP proceeding must be submitted for arbitration to either the World Intellectual Property Organization (WIPO) or the (National Arbitration Foundation)." This statement is inaccurate on one important germane issue; the UDRP is not arbitration.

In *Dluhos v. Strasberg*, 321 F.3d 365 (3rd Cir. 2003), the Court of Appeal provided that "the UDRP's unique contractual arrangement renders the [Federal

Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq.] provisions for judicial review inapplicable.” The Court based its decision on two arguments: “[f]irst, the UDRP obviously contemplates the possibility of judicial interventions, as no provision of the policy prevents a party from filing suit before, after or during the administrative proceedings...The UDRP was intended to ensure that the parties could seek independent judicial resolution of domain name disputes, regardless of whether its proceeding reached a conclusion...Second, because the trademark holder...is not required to avail itself of the dispute resolution policy before moving ahead in the district court, these proceedings do not qualify as the type that would entail a court’s compelling party participation prior to independent judicial review -- thus removing the proceeding from the warmth of the FAA blanket... [a]ccordingly, we hold that UDRP proceedings do not fall under the Federal Arbitration Act.”

Further, in *Parisi v Netlearning Inc.*, 139 F. Supp. 2d 745 (E.D. Firb. 2001), the Court found “The mandatory administrative proceedings under the Uniform Domain-Name Dispute Resolution Policy were not arbitrations subject to the Federal Arbitration Act. 9 U.S.C.S. § 1 et seq. Therefore the FAA’s restrictions on judicial review of arbitration awards did not apply to civil actions”.

Defendant’s reference to *Seattle School District No. 1 v. The State of Washington*, 90 Wn.2d 476, 540 (1978) and *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277 (1994) do not apply. In both cases the party had sought and gained judicial proceeding, and then sought a second judicial proceeding for the recovery of costs and fees. In this instant case, no judicial proceeding has occurred as the UDRP is not a judicial intervention as affirmed by *Dluhos v. Strasberg* and *Parisi v Netlearning Inc.*

Summary

Defendant’s motion is not based upon accurate facts. Defendant states a UDRP is an arbitration, when it is not. Defendant’s citations are not germane in that each relate to a party seeking a second judicial proceeding for recovery of costs and fees relating to a first judicial proceeding. In the instant case, Council for Refractive Surgery Quality Assurance v Hanson Case: 85-11924 is the first and only judicial proceeding of the issues before this court. Defendant’s argument that this Court has no authority to grant an award of Plaintiff’s costs and fees because of a prior arbitration proceeding in which Plaintiff was not given such an award is without merit and does not stand upon the facts.

Action Requested

Plaintiff respectfully requests this Court deny Defendant’s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted.

Thank you in advance for your consideration.


Glenn Hagele
Executive Director

cc: Brent Hanson, PMB 4737, PO Box 257, Olympia, Washington