

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

REZA GANJAVI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 06 C 4189
)	
JEREMY C. SMITH, CINDY SMITH,)	
TODD TIPTON, WILLIAM D.)	Judge Gettleman
JENNINGS, DOES 1-3,)	
)	Magistrate Judge Denlow
Defendants.)	

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT JEREMY C. SMITH'S COMBINED 12(b)(1) AND 12(b)(6) MOTIONS DISMISS
PLAINTIFF'S THIRD AMENDED COMPLAINT**

NOW COMES the Plaintiff, Reza Ganjavi, by and through his attorney, Khoi Dang-Vu, and for his Memorandum of Law in Opposition to Defendant Jeremy C. Smith's Combined Motions to Dismiss Plaintiff's Third Amended Complaint, states as follows:

On February 23, 2007, Defendant Jeremy C. Smith filed a Combined Motion to Dismiss Plaintiff's Third Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In summary, Defendant Jeremy C. Smith argues (1) that Plaintiff's federal question claims under the Copyright Act and Lanham Act are invalid on their face; and (2) that Plaintiff's claim of diversity jurisdiction does not meet the \$75,000 amount in controversy requirement. For the reasons set forth below, Defendant's motion should be denied.

I. Plaintiff Has Pled Sufficient Facts Setting Forth Grounds for Federal Question Jurisdiction

With respect to the first argument, Defendant, without any elaboration, simply urges this Court to dismiss Plaintiff's claims under 15 U.S.C. Sec. 1125 based on Defendant's unsupported and cursory

factual contention that Jeremy C. Smith “did not 'register, traffic in, or use' any domain names that were identical or confusingly similar to any trademarks of Plaintiff,” despite allegations in Plaintiff's Third Amended Complaint to the contrary.¹

As Defendant Jeremy C. Smith acknowledges in his Memorandum of Law in support of his Combined Motion to Dismiss, for the purpose of evaluating a Rule 12(b)(6) motion to dismiss, the factual allegations of the challenged complaint are assumed to be true. Only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief, should the complaint be dismissed. Lutrell v. O'Connor Chevrolet, Inc., 2001 WL 1105125 at *2 Case No. 01 C. 979 (N.D. Ill., Sept. 19, 2001)(cited by Defendant Jeremy C. Smith in his Memorandum, page 2). In light of the standard enunciated in Lutrell, Defendant Jeremy C. Smith's attempt to dismiss Plaintiff's Third Amended Complaint by raising unsupported factual contentions which should be left for the determination of the fact finder rather than determined in considering a motion to dismiss, are entirely inappropriate.²

1 Count 2 of Plaintiff's Third Amended Complaint alleges no fewer than seven acts attributed to the Defendants which would, by themselves, be sufficient to confer federal subject matter jurisdiction pursuant to the Lanham Act, including that, on or about August 4, 2005, and on or about September 11, 2005, the named Defendants set up and published mock websites strongly resembling Plaintiff's registered websites in name, design and content. *Cf.* Defendant's Memorandum, page 4, which, without any evidential basis or explanation, asks this Court to simply accept Defendant's factual contention that that Jeremy C. Smith “did not 'register, traffic in, or use' any domain names that were identical or confusingly similar to any trademarks of Plaintiff.”

2 Defendant does not, and cannot, argue that Plaintiff has failed to state sufficient factual allegations upon which federal jurisdiction under the Lanham Act can be founded. In fact, Defendants did indeed register the domains, though not with a master registry of domain names, but with a sub-registry which was still a process of registration, and then proceeded to advertise and use those

II. It Does Not Appear to a Legal Certainty that Plaintiff's Claim for Relief is Less than the Jurisdictional Amount

With respect to Defendant's second argument, it is well settled that the rule governing dismissal for want of jurisdiction in cases brought in the federal court is that the sum claimed by the plaintiff controls if the claim is apparently made in good faith. St. Paul Mercury Indemnity Company v. Red Cab Company, 58 S.Ct. 586, 303 U.S. 283, 82 L.Ed. 845 (1938). In order to dismiss a case for lack of jurisdiction, it must appear to a legal certainty that the plaintiff's claim is really for less than the jurisdictional amount. Id. The party asserting jurisdiction typically satisfies this requirement whenever, as in the present case, the complaint alleges that the claim exceeds the jurisdictional minimum, as long as the claim is made in good faith. Gibbs v. Buck, 307 U.S. 66, 83 L.Ed. 1111, 59 S.Ct. 725 (1939); Wenning v. Jim Walter Homes, Inc., 606 F.2d 784, 785 n.1 (7th Cir. 1979). Once the propriety of the amount in controversy is challenged, the party seeking to invoke the subject matter jurisdiction of the federal courts can prove its existence under the by merely showing that it does not appear to a legal certainty that the claim for relief is for less than the statutorily prescribed jurisdictional amount. Id. In the present case, Defendant has not alleged, nor does Defendant have any basis to allege that Plaintiff's contention that that his claim exceeds the jurisdictional minimum for diversity jurisdiction was made in bad faith.

In determining whether a plaintiff's claim meets the jurisdictional minimum for diversity jurisdiction, exemplary and punitive damages may be included in assessing the amount-in-controversy requirement if they are recoverable under the governing law of the forum state along with reasonable attorneys' fees, if permissible, as an element of damages either under a statute or the equitable powers of the court. See Jeffries v. Silvercup Bakers, Inc., 434 F.2d 310 (7th Cir. 1970) (punitive damages);

domains.

Ross v. Inter-Ocean Insurance Co., 693 F.2d 659 (7th Cir. 1982) (attorneys' fees). Defendant's contend that Plaintiff is barred from recovering attorney's fees under the Copyright Act and under 15 U.S.C. Sec. 114(1); however, fails to address that Plaintiff could potentially recover his attorney's fees under any of the other fourteen counts of the Third Amended Complaint. Moreover, given the egregious nature of the actions perpetrated by the Defendants against Plaintiff, the possibility of punitive damages under any of the sixteen counts is not unrealistic. This possibility is wholly ignored by Defendant in his motion.

For the above reasons, Defendant Jeremy C. Smith's Combined Motions to Dismiss Plaintiff's Third Amended Complaint should be denied.

WHEREFORE, for the above and foregoing reasons, Plaintiff, Reza Ganjavi, respectfully requests that this Court enter an Order denying Defendant Jeremy C. Smith's Combined Motions to Dismiss and any and all other such relief as this court deems just and equitable.

Dated: March 19, 2007

Respectfully submitted,
Reza Ganjavi
by: /s/ Khoi Dang-Vu

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