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September 13, 2016

VIA EMAIL
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Maria Crimi Speth, Esq.
Laura Rogal, Esq.
Jaburg & Wilk, P.C.
3200 N. Central Avenue, 20th Floor
Phoenix, AZ 85012

Re: Powell v. Powell, Case No. 2:16-cv-02386 (D. Ariz.)

Dear Ms. Crimi Speth and Ms. Rogal:

We have received and reviewed your September 9 letter, and we continue to be surprised by the recklessness through which you and your client are pursuing this matter.

I am particularly disappointed that you would misrepresent our telephone conversation in an attempt to excuse the sanctionable filing of your Complaint. During our conversation, you asked me to provide any information that might dispel your client's desire to steal the HeidiPowell.com domain name based on the inaccurate belief that: (i) Mr. and Mrs. Powell were not using the domain name; and (ii) vast numbers of fans of Plaintiff were mistakenly visiting HeidiPowell.com. I mentioned, yet again, that Mr. and Mrs. Powell have no obligation to provide Plaintiff with any information given the untenable nature of the Complaint. As you well know, it is a plaintiff's obligation to only assert claims that are supported by facts, and it is not a defendant's burden to disprove wild, unsupported theories.

Contrary to your assertion, I did not state that my "clients lack the technology knowledge to obtain emails or other evidence from before 2011." What I did indicate is that Mr. and Mrs. Powell do not have easy access to email records from over 5 years ago, which is not unusual. As a professional courtesy, I also explained how you could have viewed publicly available technical configurations for the HeidiPowell.com domain name to confirm the inaccuracy of your belief (and statements in the Complaint) that the domain name was "not associated with any services such as email or a website containing content, up until approximately May 21, 2016."

Your statement that such records only show email capability, not email usage, is yet another transparent attempt to shift the burden of this litigation to Mr. and Mrs.

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Powell in light of the absence of any actual facts or law supporting Plaintiff's claim. As I stated during our call, old email records showing use of the HeidiPowell.com domain name by Mr. and Mrs. Powell over the last 10+ years are available from the relevant ISPs, and we will produce such records, if necessary, as part of the sanctions and/or reverse domain name hijacking proceedings. Again, as a professional courtesy, I provided you with evidence of the very minimal traffic to the HeidiPowell.com domain name. Given your distortion of the implications of this data and our telephone conversation, this will be the last such professional courtesy.

Moreover, nothing in your letter changes the fact that the two claims asserted in your Complaint lack any legal foundation. This is not a close case. We are confident that the Court will have no difficulty finding both that your client has engaged in reverse domain name hijacking and that sanctions are appropriate given the frivolous nature of the Complaint.

Despite your reliance on overturned case law, the fact remains that it is the law in the Ninth Circuit that bad faith is measured at the time of the original registration. The case that you cite for a contrary proposition—*DSPT International*—was overruled in *GoPets*, as clearly stated by this Court in another reverse domain name hijacking case. *See AirFX.com v. AirFX, LLC*, No. CV 11-01064-PHX-FJM, 2013 WL 857976, at *2 (D. Ariz. Mar. 7, 2013) (explaining that *GoPets* "made it clear that a company's re-registration of a domain name that was first registered 'long before [trademark owner] registered its service mark' did not violate the ACPA, because the re-registration 'was not a registration within the meaning of § 1125(d)(1)'"). There is simply no credible argument that *GoPets* is not dispositive of the Plaintiff's claims. The ACPA interpretation theory that you are apparently now advocating was specifically addressed and disposed of by the Ninth Circuit's *GoPets* decision, which came after all of the cases that you cite from other Circuits and had the benefit of considering the analysis therein. Thus, the existence of decisions from other Circuits does not mitigate the Rule 11 issues from the filing of the Complaint.

Even if our clients' actions or intentions sometime after they registered the domain name were relevant, there is no evidence of bad faith at any time. Simply stating that there is bad faith does not make it true, and it is not a defendant's burden to

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disprove bad faith. Plaintiff must possess a factual basis before asserting any claim, and must establish specific bad faith intent to profit to win an ACPA claim.

The single purported example of bad faith that you only now cite—an alleged $50,000 offer from our clients—does not prove anything. As a legal matter, the "mere offer to sell a domain name to a mark owner" is not sufficient to indicate bad faith. *See* H.R. Rep. No. 106-464, at 11 (1999). As a factual matter, our clients never made a bona fide proposal to sell the domain name. Not surprisingly, your client now appears to be misrepresenting a 2012 conversation between Mr. Powell and a broker from GoDaddy who was harassing Mr. and Mrs. Powell on behalf of an undisclosed party.

Finally, it belies belief that you and your client continue to refuse to acknowledge that it was reasonable for our clients to register a domain name that corresponds directly to Mrs. Powell's name for her personal use. Notwithstanding your assertion that the safe-harbor should be used sparingly, you cite no case in which a person who registered a domain name that corresponds to his or her legal name was not entitled to the safe harbor.[1] The case law and legislative history cited in our prior correspondence and the Rule 11 motion demonstrate that our clients' registration of a domain name corresponding to Mrs. Powell's name is protected by the safe harbor, rendering any other argument irrelevant.

With regard to your offer to dismiss the lawsuit, as you are aware, I originally reached out to you on August 15 to advise you of the deficiencies in the Complaint and demand that you dismiss the Complaint with prejudice by August 24, 2016. You did not. Mr. and Mrs. Powell have now expended considerable time and energy in relation to the Complaint, the Rule 11 Motion, the Answer and Counterclaims, as well as reviewing and responding to your communications—all to obtain dismissal of a Complaint that never should have been filed in the first instance. Nevertheless, in the interest of resolving this matter and allowing our clients to move on with their lives, we will agree to a stipulated dismissal of the claims and counterclaims *with prejudice*.

[1] In *Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*, the domain registrant did not establish "Sporty's Farm" until nine months *after* registering the sportys.com domain name. *Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc.*, 202 F.3d 489, 494 (2d Cir. 2000).

Please provide us with a draft stipulated dismissal with prejudice at your earliest convenience. If you have not dismissed your claims by 5:00 p.m. EDT on September 15, 2016, we will continue to vigorously defend this case, including a pursuit of Rule 11 sanctions and a judgment of reverse domain name hijacking.

Sincerely,

/s/ David E. Weslow

David E. Weslow

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