

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DISTRICT

DAVID ALLISON DBA CHEAT CODE
CENTRAL,

Plaintiff,

v.

JEREMY N. WISE, and
WISE BUY NOW, LLC

Defendants.

Case No. 2:08-cv-00157

Judge Watson

Magistrate Judge Abel

AFFIDAVIT OF CHARLES LEE MUDD, JR.

I, Charles Lee Mudd Jr., being duly sworn, do hereby declare, testify and state as follows:

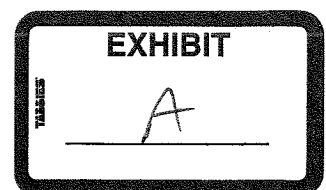
1. I am a resident and citizen of the State of Illinois.
2. I am licensed to practice law in the States of Illinois, Indiana, Connecticut, and Utah.
3. In this action, I represent the Defendants Jeremy Wise and Wise Buy Now, LLC.
4. I submit this affidavit in support of Defendant's Response in Opposition to Plaintiff's

Motion for Sanctions.

5. I provide the following statements based upon my present knowledge of the facts related to the above-captioned action and my knowledge obtained through experience with similar cases.

6. On December 2, 2008, Defendant Jeremy Wise served discovery on Plaintiff's counsel. Among the Requests for Production, Defendant Jeremy Wise requested copies of all webpages Plaintiff David Allison alleged to be infringing. On March 5, 2009, Plaintiff served written discovery responses on Defendant's counsel that included only twelve webpages containing examples of allegedly infringing cheat codes.

7. On more than one occasion, I continued to request a disclosure from Plaintiff of all allegedly infringing content so that Defendants and their counsel would be better able to focus their



discovery and defense efforts.

8. During the telephonic status conference of June 22, 2009, I requested of Plaintiff's counsel all webpages alleged to contain infringing content. Plaintiff's counsel responded that they had been produced at the outset. I disagreed. Plaintiff's counsel then indicated that the scope happened to be "substantial." I disagreed and requested specific examples. Plaintiff's counsel then directed me to the examples produced in Plaintiff's March discovery responses and confirmed for the first time that Plaintiff intended to rely on the twelve examples cited in response to written discovery. Plaintiff's accusations have always related to discreet sections of cheat codes such as these rather than wholesale mirror copying of his website.

9. Prior to the telephonic status conference of June 22, 2009, the Court held telephonic status conferences in February and April of 2009 in an effort to move the parties toward further settlement discussions. To facilitate this, the Defendants cooperated in producing additional documentation that had been requested by Plaintiff's counsel; cooperated in submitting a statement to Google, Inc. to produce documents requested by Plaintiff's counsel; and, cooperated in other efforts to enable the Plaintiff to discuss settlement.

10. Thus, prior to the telephonic status conference of June 22, 2009, the Defendants and their counsel had been diligently working to produce documents and information to Plaintiff's counsel in the hopes that the Plaintiff would be in a position to discuss settlement.

11. With limited resources, the Defendants could not employ a large-scale investigation contemporaneously with the expectation – as discussed with opposing counsel and Magistrate Judge Abel – that settlement discussions would continue. Nonetheless, Defendants' counsel did engage in discovery efforts which included, but was not limited to, investigation and review of cheat code content from Plaintiff's website and other third-party sites.

12. Subsequent to Plaintiff's revelations at the telephonic status conference of June 22, 2009, the Defendants narrowed their investigation to concentrate on the twelve examples of

other sites that contained the same cheat codes in an effort to demonstrate Plaintiff's inability to isolate damages specifically to the Defendants.

13. When it became clear that settlement discussions would not be imminent, I assessed the Defendants' financial position and the status of discovery in light of an impending fact discovery deadline of July 31, 2009.

14. Although the Defendants had hoped to avoid expensive discovery efforts by and through productive settlement discussions, I realized that settlement discussions would not occur in time to avoid expensive discovery efforts required to competently represent the Defendants. Indeed, as of June 22, 2009, there existed only slightly more than a month of fact discovery remaining. Although the Defendants were in a good position at this juncture with respect to discovery (and did not foresee the need for any extension of fact discovery), additional work would be needed prior to the end of fact discovery. For this reason, I enlisted the help of our legal team to complete our investigation and gather as much information as possible in the remaining period of fact discovery.

15. A major part of the investigation sought to document other websites containing the same cheat codes as those the Plaintiff alleged the Defendants had infringed. Due to the Plaintiff's history of litigation against third-parties for similar conduct and for the exact same claim of damages, the cheat codes at issue most likely appeared on numerous third-party websites.

16. Between June 24 and June 26, 2009, Mr. Jeremy Wise determined that cheat codes contained on the twelve webpages from www.cheatcc.com produced by the Plaintiff appeared in a nearly identical form on the third-party website www.gamewinners.com.

17. For many of the cheat codes on www.gamewinners.com, www.gamewinners.com attributes authorship to the individual who originally submitted the cheat code to www.gamewinners.com. This attribution uses the author's screen name associated with his or her profile on www.gamewinners.com. This also provides an email address associated with the author.

18. With respect to the cheat codes contained on the twelve webpages from www.cheatcc.com produced by the Plaintiff, the same cheat codes appeared on www.gamewinners.com with authorship attributed to specific individuals.

19. Mr. Jeremy Wise began emailing these individuals - the putative authors – through their profile information listed on the website. He inquired whether they had authored the cheat code associated with their screen name.

20. For some, Mr. Jeremy Wise never received a response. Many of the cheat codes had been posted nearly three years ago or longer. Other individuals responded, but thought that Mr. Wise's emails may be a hoax.

21. However, several responded promptly stating that they were the authors of the cheat codes.

22. Upon receiving these responses, Defendants' counsel began communicating with these individuals to confirm their original authorship and that the content had not come from www.cheatcc.com.

23. In stark contrast to merely finding the same cheat codes elsewhere on the Internet, we had suddenly – and surprisingly – found original authors of the cheat codes appearing on www.cheatcc.com that the Plaintiff claimed he had authored.

24. Up until the end of discovery on July 31, 2009, we continued our communications with the authors of the cheat codes, confirming their authorship and knowledge about the cheat codes. We also sought statements via affidavit or declaration. In some instances, individuals did not respond further when prompted to sign an affidavit. Others agreed to do so. Given that some of the individuals lived in foreign countries, it was a difficult process. Nonetheless, we continued to investigate the matter further.

25. Our communications with these individuals continues as we gather statements and confirm the knowledge possessed by them.

26. It is clear from their statements obtained from the individuals identified on www.gamewinners.com that the Plaintiff is not the author of the allegedly copyrighted content at issue in this matter. There was no indication prior to June 24, 2009, that these potential witnesses and the information they possess existed.

27. On July 24, 2009, local counsel for Defendants informed Plaintiff's counsel that the Defendants intended to amend their initial disclosures identifying additional witnesses and documents.

28. On July 25, 2009, the Defendants filed the notice of deposition for Plaintiff David Allison. Although the Plaintiff had long indicated their intent to depose Jeremy Wise for purposes of furthering settlement, the Plaintiff had not yet noticed any depositions.

29. On July 27, 2009, Plaintiff's counsel complained about the noticed deposition of David Allison. Counsel for Defendants indicated that we would be willing to reschedule the deposition to an agreeable date.

30. On July 28, 2009, local counsel for Defendants again informed the Plaintiff's counsel via electronic mail that the Defendants intended to amend their initial disclosures identifying additional witnesses and documents.

31. On July 28, 2009, Plaintiff's counsel requested additional documents from the Defendants that the Defendants agreed to produce, which they did.

32. On July 28, 2009, Plaintiff's counsel sent an email to Defendants' counsel that read in part:

Also, can you clarify the nature of the amended disclosures so we can decide if discovery deadlines need to be extended? I don't think we need to formally amend the scheduling order for the depositions alone as long as we all agree to that extension, but if there will be significant new areas requiring additional written discovery we will need to amend and can discuss the appropriate timeframe.


33. On July 29, 2009, Plaintiff's counsel indicated that they would inform Defendants' counsel on or before July 31, 2009 on whether Plaintiff's counsel believed an extension of fact

discovery would be needed.

34. Plaintiff's counsel later indicated that they declined such an extension and refused the offer by Defendants' counsel to agree to such an extension.

35. The Defendants were the only parties to notice a deposition prior to the end of fact discovery. Apart from the individuals at issue with the Plaintiff's motion for sanctions, the parties have an informal agreement to notice and take fact depositions subsequent to the end of fact discovery.

Dated this 26 day of August, 2009.



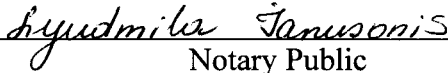
Charles Lee Mudd, Jr.

STATE OF Illinois)

)SS:

COUNTY OF Cook)

The foregoing AFFIDAVIT OF CHARLES LEE MUDD JR. has been subscribed and sworn to me before this _____ day of August 2009, by Charles Lee Mudd Jr.



Notary Public

My Commission Expires: 7-31-2012