

Court file number

ONTARIO
SUPERIOR COURT OF JUSTICE

CU-09-386251

BETWEEN:

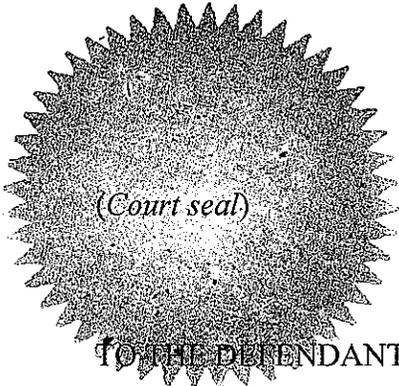
Network Technologies Polska Jasinski Lutoborski Sp.J.

Plaintiff

and

ehotel AG

Defendant



NOTICE OF ACTION

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date:

01 Sept. 2009

Issued by

Local registrar

M. Sagaria
Registrar

393 University Avenue
10th Floor
Toronto, Ontario

TO: **ehotel AG**
Greifswalder StraBe 207
10405 Berlin
Germany

CLAIM

1. The Plaintiff's claim is for:
 - a) A Declaration that the Plaintiff is the rightful owner of the domain name, EHOTEL.COM, as against the Defendant;
 - b) An interim, interlocutory, and permanent injunction restraining the Defendant from taking any steps to cause the domain name, EHOTEL.COM to be transferred away from the Plaintiff;
 - c) Damages for interference in contractual relations, interference with business interests, aggravated damages, exemplary damages, and/or Reverse Domain Name Hijacking, in the amount of \$1,000,000.00;
 - d) Pre-judgment interest and post-judgment interest on the above amounts pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and all amendments thereto;
 - e) Such further and other relief as may be permitted by this Honourable Court; and
 - f) Costs of the action on a substantial indemnity basis, together with GST.

2. The Plaintiff is a registered company under the laws of Poland.

3. The Defendant is a corporation incorporated pursuant to the laws of Germany.

4. The Defendant and its predecessors in interest have used the mark, EHOTEL (the "Mark") in Poland since in or about 2001. On or about March 5, 2003, the Defendant and/or its predecessor(s) in interest registered the domain name, EHOTEL.COM (the "Domain Name"), in compliance with all Internet Corporation for Assigned Names and Numbers ("ICANN") policies, rules and procedures.

5. Since the date of registration of the Domain Name, the Plaintiff and/or its predecessors in interest have used the domain name in compliance with all ICANN policies, rules, and procedures. In particular, the Plaintiff and/or its predecessors in interest have used the Domain Name in good faith and in connection with legitimate interests in the Domain Name.
6. The Domain Name was registered prior to the Defendant acquiring any trademark rights in Poland or in the European Community in connection with the Mark or anything similar.
7. Pursuant to ICANN's Uniform Dispute Resolution Policy ("UDRP"), the Defendant had no grounds to obtain the transfer of the Domain Name away from the Plaintiff and to itself.
8. Nevertheless, on or about June 15, 2009, the Defendant commenced an administrative procedure through ICANN's UDRP in order to have the Domain Name transferred to itself (the "UDRP administrative process"). On or about August 5, 2009, an administrative panelist ordered that the domain name be transferred away from the Plaintiff and be given to the Defendant (the "Administrative Panelist Decision").
9. Pursuant to the terms and conditions of the UDRP administrative process that the Defendant expressly agreed to prior to commencement, either of the parties are expressly permitted to take the dispute to court for independent determination at any stage, and the

court decision will be binding and have priority over the UDRP administrative process.

Accordingly, having commenced the within court proceeding, the Plaintiff is entitled in law, to a hearing de novo.

10. In the alternative, the decision transferring the domain name away from the Plaintiff was patently unreasonable and entirely insupportable on the facts or law, and therefore the Plaintiff seeks judicial review of the Administrative Panelist Decision.
11. In commencing the UDRP administrative process, the Defendant expressly submitted and contractually agreed to the jurisdiction of the Ontario courts for any challenge to a decision transferring the domain name from the Plaintiff to the Defendant. Furthermore, the domain name registrar for the Domain Name, Tucows, will only lock the domain name and suspend the transfer process, if such a court proceeding is brought within the Province of Ontario.
12. The Defendant's actions in commencing the UDRP administrative process when it had no valid and bona fide claim to the Domain Name as against the Plaintiff, constituted interferences with the Defendant's contractual relations and business interests, and the Plaintiff has suffered damages as a result, including but not limited to inability to deal with the Domain Name, loss of revenues, loss of opportunity, tarnishment of title to the Domain Name, and out of pocket expenses, for which the Defendant is liable.
13. Furthermore, the Defendant commenced the UDRP administrative process knowing full

well that it had no valid claim to the Domain Name as against the Plaintiff, or alternatively, ought to have known, and as such its actions constituted an attempt at Reverse Domain Name Hijacking, which is tortious conduct deserving of this Honourable Court's censure, and thereby entitling the Plaintiff to damages.

14. The Plaintiff states that he is entitled to serve this Notice of Action and subsequent Statement of Claim on the Defendant pursuant to Rule 17.02 of the *Rules of Civil Procedure*, because;

- a) Pursuant to Rule 17.02(a), the claim is in respect of personal property located in Ontario, i.e. the Domain Name registered with Tucows;
- b) Pursuant to Rule 17.02(c)(i), the claim is in respect of the interpretation, rectification, enforcement or setting aside of a deed, contract, or other instrument in respect of personal property in Ontario;
- c) Pursuant to Rule 17.02(f)(ii) the claim is in respect of contracts, i.e. the Domain Name Registration Agreement and the ICANN UDRP, which provide that they are to be governed by or interpreted in accordance with the laws of Ontario; and
- d) Pursuant to Rule 17.02(f)(iii) the parties to the ICANN UDRP have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract.

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LSUC # 417400
Solicitors for the Plaintiff

Date of issue: September 1, 2009

Network Technologies Polska Jasinski Lutoborski Sp.J. v. eHotel

Court File No.

CJ-09-386251

ONTARIO SUPERIOR COURT OF JUSTICE

Commenced at Toronto

NOTICE OF ACTION

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Solicitor for the Plaintiffs

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NETWORK TECHNOLOGIES POLSKA JASINSKI LUTOBORSKI SP.J.

PLAINTIFF

-and-

EHOTEL AG

DEFENDANT

STATEMENT OF CLAIM

Notice of Action issued on September 1, 2009.

1. The Plaintiff claims:

- a) A Declaration that the Plaintiff is the rightful owner of the domain name, EHOTEL.COM, as against the Defendant;
- b) An interim, interlocutory, and permanent injunction restraining the Defendant from taking any steps to forcibly cause the domain name, EHOTEL.COM, to be transferred away from the Plaintiff;
- c) Damages for interference in contractual relations, interference with business interests, aggravated damages, exemplary damages, and/or Reverse Domain Name Hijacking, in the amount of \$250,000.00;
- d) Pre-judgment interest and post-judgment interest on the above amounts pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and all amendments thereto;
- e) Such further and other relief as may be permitted by this Honourable Court; and
- f) Costs of the action on a substantial indemnity basis, together with GST.

2. The Plaintiff is a registered partnership of Cyprian Lutoborski and Michal Jasinski, under the laws of Poland, with an office located in Konstancin-Jeziorna, Piaseczno County, Poland (the "Partnership"). Mr. Lutoborski and Mr. Jasinski are individual residents of Piaseczno County, Poland.
3. The Defendant is a corporation incorporated pursuant to the laws of Germany.
4. Since in or about 2001, the Plaintiff has used the name, EHOTEL in connection a small hotel called, EHOTEL ZAKOPANE – JASINOWKA, in Poland.
5. On or about March 5, 2003, Cyprian Lutoborski registered the domain name, EHOTEL.COM (the "Domain Name") on behalf of the Plaintiff Partnership.
6. The Domain Name was registered in accordance and in compliance with all policies, rules, and regulations governing the registration of Internet domain names, as established by the authority that governs the registration of Internet domain names, the Internet Corporation for Assigned Names and Numbers ("ICANN").
7. The Domain Name was registered in good faith by Mr. Lutoborski on behalf of the Partnership, as at the time that he registered the Domain Name there were no registered trademarks for EHOTEL or anything similar in Poland.
8. Furthermore, at the time that the Domain Name was registered, neither Mr. Lutoborski nor his partner, Michal Jasinski, were aware of anyone elsewhere in the world having

exclusive rights in Poland over the term, EHOTEL, such that it would prevent the registration and use of the Domain Name by the Partnership.

9. In particular, when the Domain Name was registered, i.e. on or about March 5, 2003, it was *prior* to the Defendant acquiring any trademark rights in Poland or in the European Community in connection with EHOTEL or anything similar.
10. In fact, when the Domain Name was registered on behalf of the Plaintiff on or about March 5, 2003, neither Mr. Lutoborski nor Mr. Jasinski had even heard of the Defendant, nor did they have any reason to have heard of the Defendant, as the Defendant operated in Germany only, catered to Germans only, and was unknown in Poland.
11. Furthermore, since the Plaintiff used the Domain Name in connection with the EHOTEL ZAKOPANE – JASINOWKA, in Poland, the Plaintiff had a legitimate interest in the Domain Name, since it corresponded to the dominant and distinctive part of the business name EHOTEL ZAKOPANE – JASINOWKA.
12. On or about March 15, 2007, Mr. Lutoborski amended the registration details of the March 5, 2003 Domain Name registration, to reflect the fact that that the Partnership was always the beneficial owner of the Domain Name. Accordingly, rather than Mr. Lutoborski being listed as the “registrant” of the Domain Name, the Plaintiff Partnership was listed as the registrant.

13. Accordingly, the “change” in the registrant details associated with the Domain Name as aforesaid, was of no legal significance, as there was no actual transfer of interest in the Domain Name since at all material times the Plaintiff was the beneficial owner.
14. Furthermore and in the alternative, under Polish law governing registered partnerships such as the Plaintiff, registered partnerships have no “legal personality” apart from the partners themselves. A registered partnership is merely an association of individuals, although it a registered partnership has capacity to sue and to be sued, notwithstanding that the partners are personally liable.
15. As such, the “change” in the registration details associated with the Domain Name, if not a correction to reflect the actual beneficial owner as aforesaid, was at most, a reflection of Mr. Lutoborski *continuing* to be the registrant of the Domain Name, but now along with a partner, i.e. Mr. Jasinski.
16. Accordingly, the “change” in registration details of the Domain Name could not at law, amount to a transfer or transmission of interest in the Domain Name from one legal person to another, since the Plaintiff Partnership was not at law, a person; it was only an association of individuals.
17. Accordingly, if the “change” in the registrant details associated with the Domain Name as aforesaid, involved any transfer of interest or change in the actual registrant, which is denied, at very most, then such a transfer or change amounted to only a fifty percent transfer of interest in the Domain Name, since Mr. Lutoborski would have been only transferring half of the interest in the Domain Name to his partner, Mr. Jasinski, while

retaining the other fifty percent, *and continuing to be the registrant of the Domain Name, although with the addition of a new partner.*

18. On or about June 15, 2009, the Defendant filed a complaint against the Plaintiff over the Plaintiff's registration of the Domain Name.
19. Pursuant to ICANN's Uniform Domain Name Dispute Policy (the "UDRP"), a Complainant may commence an administrative proceeding against a domain name registrant and seek transfer of a disputed domain name.
20. Pursuant to the ICANN UDRP, in order to obtain the transfer of a disputed domain name, the Complainant must prove that it has a trademark which is confusingly similar to the disputed domain name, and most importantly, that the domain name registrant registered *and* used the disputed domain name "in bad faith", *and* has "no legitimate interest" in the domain name.
21. Pursuant to the UDRP and the associated case law, in order to properly make a finding of "bad faith registration" against a domain name owner, the Panel must find that the domain name owner registered the disputed domain name in order to take unfair advantage of the Complainant's pre-existing trademark rights; in other words, that the Complainant was the target of a "cybersquatting" attempt by the domain name owner.
22. On or about August 19, 2009, a decision was released by the sole panelist (the "Panelist") appointed to hear the Defendant's complaint.

23. The Panelist found that the Domain Name was likely “registered in good faith” when it was registered on or about March 5, 2003; a finding that ought to have led to the dismissal of such a Complaint.
24. Nevertheless, the Panelist also ruled, that the “change” in registration details associated with the Domain Name (on or about March 15, 2007, wherein the Plaintiff was recorded as registrant rather than Mr. Lutoborski) constituted a transfer from Mr. Lutoborski to a another legal entity – a company”, and as such and amounted to a “fresh registration”.
25. The Panelists finding was based on a misapprehension of the facts, as the Plaintiff was not and is not a “company”; it is a partnership with no distinct legal personality apart from its partners, under Polish law.
26. As such, the Panelist’s misapprehension of the facts led to a serious error in law, as the Panelist found that although Mr. Lutoborski likely registered the Domain Name in good faith in 2003, the “company” [sic] didn’t register it in good faith in 2007.
27. Furthermore, the Panelists misapprehended and misapplied the UDRP, as the UDRP does not properly consider such an immaterial change in registration details under these circumstances as a consideration when determining bad faith.
28. In addition, the Panelist failed to apprehend the fact that at all material times, the registrant of the Domain Name had a “legitimate interest” in the Domain Name, both because of its common genericism, and because of the registrant’s operation of a small

hotel in Poland under a corresponding name, and as a result, erred in law by finding that the registrant did not have a legitimate interest in the Domain Name.

29. Lastly, the Panelist erred in ordering the transfer of the Domain Name when there was absolutely no evidence, let alone a suggestion, that the Domain Name was originally registered to “target” the Defendant in a cybersquatting attempt. In fact, the Plaintiff and its partners had never even heard of the Defendant when the Domain Name was originally registered.

30. Accordingly, pursuant to ICANN’s “UDRP”, the Defendant had no grounds to obtain the transfer of the Domain Name away from the Plaintiff and to itself.

31. Nevertheless, on or about August 5, 2009, the Panelist wrongly ordered that the Domain Name be transferred away from the Plaintiff and be given to the Defendant.

32. Pursuant to the ICANN UDRP, the commencement of such an administrative proceeding, “shall not prevent either [the domain name owner] 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*” [emphasis added].

33. Accordingly, pursuant to the UDRP the Plaintiff herein is seeking “independent resolution” of the dispute by this Honourable Court, and this Honourable court’s decision will be binding and have priority over the UDRP administrative decision.

34. Furthermore, having commenced the within court proceeding, the Plaintiff is entitled in law, to a hearing de novo, as the UDRP decision was not a “binding arbitration” under law.
35. In the alternative, the decision transferring the domain name away from the Plaintiff was patently unreasonable and entirely insupportable on the facts or law, and therefore the Plaintiff seeks judicial review of the Administrative Panelist Decision.
36. Furthermore, the Plaintiff pleads and the fact is, that there is no justification in law for forcibly transferring the Domain Name, which is a kind of property and/or contractual right, away from the Plaintiff, when the Domain Name is capable of being used by the Plaintiff in a manner which does not infringe the limited trademark rights of the Defendant. There are other uses for the Domain Name other than in association with hotels and accordingly, the Plaintiff ought to be free to use its Domain Name in any lawful manner it so chooses.
37. Lastly, the Plaintiff relies upon the principle of laches and delay. The Defendant has taken not steps whatsoever to assert its purported rights to the domain name for over six (6) years and as such must be deemed to have waived any rights which it otherwise may have had, such rights in any event being denied. In the alternative, the Plaintiff pleads that any cause of action that the Defendant may have had against the Plaintiff for transfer of the domain name has expired by operation of applicable limitation periods under Polish law or otherwise. In the further alternative, the Plaintiff states that the Defendant has acquiesced and/or consented to the Plaintiff’s use and registration of the Domain Name

since the Defendant invited the Plaintiff to use the Domain Name as an affiliate of the Defendant's business.

38. In commencing the UDRP administrative process, the Defendant expressly submitted and contractually agreed to the jurisdiction of the Ontario courts for any challenge to a decision transferring the domain name from the Plaintiff to the Defendant.

39. Furthermore, the domain name registrar for the Domain Name, Tucows, which is located in Toronto, Ontario, will only lock the domain name and suspend the transfer process, if such a court proceeding is brought within the Province of Ontario.

40. Accordingly, Ontario is the proper and only forum for this dispute.

41. The Defendant's actions in commencing the UDRP administrative process when it had no valid and bona fide claim to the Domain Name as against the Plaintiff, constituted interference with the Defendant's contractual relations and business interests, and the Plaintiff has suffered damages as a result, including but not limited to inability to deal with the Domain Name, loss of revenues, loss of opportunity, tarnishment of title to the Domain Name, and out of pocket expenses, for which the Defendant is liable.

42. In particular, as a result of the Defendant's UDRP Complaint, the Domain Name has been administratively frozen, and therefore the Plaintiff herein is unable to deal with the Domain Name, monetize the Domain Name, sell the Domain Name, rent the Domain Name, or otherwise benefit from the Domain Name, pending the outcome of the within

proceeding. This has caused and will continue to cause damages to be sustained by the Plaintiff which the Defendant is in law responsible for.

43. Furthermore, the Defendant commenced the UDRP proceeding knowing full well that it had no valid claim to the Domain Name as against the Plaintiff, or alternatively, ought to have known as much, and as such its action to deprive the Plaintiff of its lawful property were brought in bad faith for self-interested commercial gain, and constituted an attempt at Reverse Domain Name Hijacking, which is tortious conduct deserving of this Honourable Court's censure, and thereby entitling the Plaintiff to damages.

44. The Plaintiff states that it is entitled to serve this Statement of Claim on the Defendant pursuant to Rule 17.02 of the *Rules of Civil Procedure*, because;

- a) Pursuant to Rule 17.02(a), the claim is in respect of personal property located in Ontario, i.e. the Domain Name registered with Tucows;
- b) Pursuant to Rule 17.02(c)(i), the claim is in respect of the interpretation, rectification, enforcement or setting aside of a deed, contract, or other instrument (the Domain Name Registration Agreement in particular, which is governed by the laws of Ontario) in respect of personal property (i.e. the Domain Name) in Ontario;
- c) Pursuant to Rule 17.02(f)(ii) the claim is in respect of contracts, i.e. the Domain Name Registration Agreement and the ICANN UDRP, which provide that they are to be governed by or interpreted in accordance with the laws of Ontario; and
- d) Pursuant to Rule 17.02(f)(iii) the parties to the ICANN UDRP have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract.

45. The Plaintiff requests that the trial of this action be at Toronto, Canada.

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Date: September 30, 2009