COURT OF MILAN – Department Specialising in business matters – A
The Court, in the shape of Ms Paola Gandolfi

pronounced the following

ORDER

In the pre-trial proceedings registered under no. 10505 in the year 2014 in the General Registry

lodged by:

LUCINI&LUCINI HOLDINGS SRL (Tax Code: 02540880123), under the sponsorship of the lawyers PAOLA BARAZZETTA and PIETRO ORZALESI (RZLPTR76C09B354Y), VIA CIMAROSA, 13 20144 MILAN; STEFANO CANCARINI (CNCSFN78H10B157E), Viale Monte Rosa, 91 20149 MILAN;

CLAIMANT:

LUCINI&LUCINI COMMUNICATIONS LTD (Tax Code: 08456040966), under the sponsorship of the lawyers PAOLA BARAZZETTA and PIETRO ORZALESI (RZLPTR76C09B354Y) VIA CIMAROSA, 13 20144 MILAN; STEFANO CANCARINI (CNCSFN78H10B157E) Viale Monte Rosa, 91 20149 MILAN;

CLAIMANT:

Versus

ADGLAMOR SRL (Tax Code: 08157150965), under the sponsorship of the lawyer FRANCESCA NASTRI (NSTFNC78H51F912C) VIA CHIOSSETTO, 2 20122 MILAN; DAVIDE MASSIMILIANO MERLO (MRLDDM67M03D150N) VIA ZAMBIANCHI, 8 24121 BERGAMO;

RESPONDENT;

MARCO LANZOTTI (Tax Code: LNZMRC77E15F133U), under the sponsorship of the lawyer SERGIO DI NOLA and

RESPONDENT;

The Designated Judge, by dropping the previous reserve,

NOTES:

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By application on 20/02/14, Lucini and Lucini Holdings S.r.l. and Lucini&Lucini Communication Ltd – companies which are involved in distributing, via internet, a horoscope service in various languages, with tens of millions of users – asked to provide a description of the entire user database currently used by ADGLAMOR

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S.r.l. as well as the operating software used by the same to send direct email marketing notifications and emails sent by the domains related to AdGlamor, to record the sending of the aforementioned notifications, considering the violation of the rights on the database and counterfeiting of information systems owned by the claimant party. On the result of the description, the claimant party also requested to arrange the seizure of the database and software, with the prohibition of using the data, the setting of an appropriate penalty and publication of the provision. The claimant put forward that, as of the end of 2012, some of its disloyal employees had formed AdGlamor, a company which, since May 2013, had sent thousands of direct email marketing notifications DEM boasting possession of tens of millions of users, which corresponded to those contained in Lucini's database at the date of the exiting of the employee Marco Lanzotti and therefore had to be considered unlawfully removed, jointly with the code and methodology for developing the software and other confidential information, which enabled the respondent to offer a service based on that of the claimant, without incurring any costs.

The Designated Judge having granted the order of description, without the prior hearing of the other party, ADGLAMOR entered an appearance by contesting all of the claims of the counterparty, although admitting having used some email addresses that coincide with those of Lucini, allegedly purchased on the open market.

Having considered the applications for seizure and injunction, a complex cross-examination was carried out by a court-appointed expert consultant, in relation to the alleged tributary nature of the software of the respondent party from that of the claimant, on the coincidence of the database and text elements, in various languages, in the formulation of horoscopes.

Having filed the report on 08/10/14, the parties arranged for the discussion of the same. Therefore, at the request of the Designated Judge, the respondent party declared itself willing to the deletion of the data identified by consultant as corresponding to that in the Lucini database and the operations were carried out under the supervision of the court-appointed expert consultant.

At the hearing of 02/12/14, the claimant, following the deletion, renounced the application for seizure and the parties debated the remaining precautionary claims made by Lucini and the Designated Judge reserved her decision.

On a preliminary count, it is considered how the conduct attributed by Lucini&Lucini is ascribed to both the competitor AdGlamor and to former employee Marco Lanzotti.

The latter is considered as a third competitor in the offence.

In this regard, the teaching of the Supreme Court should be remembered, according to which, in principle, “unfair competition must be considered as a case typically attributable to market players in competition, not configurable where there is no subjective condition of the so-called competitive relationship”, however, this “does not exclude the legitimate predicable nature of unlawful competition, even when the act adversely affecting the right of the competitor is made by a person who, although not possessing the necessary subjective requirements itself (not being those competitor of the claimant) but acting on behalf of (or in conjunction with) a competitor of the claimant, being itself entitled to engage in acts that may lead to some financial benefits.

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In this case, therefore, the third party is legitimately held liable, jointly and severally with the businessman who assisted in the conduct, while lacking altogether such link between the third party in the conduct which was detrimental to the principle of professional integrity and the businessman competitor of the claimant, the same third party is called to respond under Article 2043 of the Italian Civil Code" (as Cass. 17459/07; in compliance with 9117/12; 6117/06; 13071/03).
In this regard, the claimant complains of having suffered, by the respondent, a transfer of key staff, which are not easily replaceable and in possession of information that altogether constitutes the entire corporate assets of Lucini.
In this respect, it should be briefly remembered that the so-called diversion of employees, through which the businessman intends to secure the work services of one or more employees of a competing business, is a normal expression of freedom of financial initiative pursuant to Article 41 of the Constitution and free movement of labour according to Article 4 of the Constitution (see, among many, Cass. 5718/96; 6712/96; 5671/98). Therefore, for the purposes of the activities of acquiring righteous collaborators and employees, the event of unfair competition requires its execution with the aim of damaging the other company, to an extent that exceeds the normal damage that may result from the loss of employed workers who choose to work at another company. The illegality of the conduct under Article 2598 no. 3 of the Italian Civil Code should therefore be inferred from the essential objective that the competing entrepreneur proposes, through this diversion of employees, to cripple the investment efforts of his competitor. It does not suffice, in fact, that the act in question is directed to conquer the competitor's market space, even by means of acquiring the best collaborators, but needs to be directed to deprive the competitor of the profit of "its" investment (Cass. 5671/98). To identify such competitive unfairness, the means used must first be considered, by assessing the methods used for recruiting the transferred employees and the potentially "destabilising" effects on the other business organisation, to one launching with copycat transfer (allowing it to hold on to objective, circumstantial elements, a prerequisite of the so-called "*animus nocendi*" [intention to harm]).
The effects on Lucini's entrepreneurial organisation due to the transfer of seven employees and one external consultant remain obscure: it would, in fact, have been a specific burden for the claimant to provide sufficient evidence above all of AdGlamor's active conduct, at least to strengthen the will of the employees to resign, therefore it is not possible to consider whether the respondent party, which flatly denies it, had put in place activities to causally influence the decision of Lucini employees to terminate their employment relationship. But, above all, as a source of the specific claims of the witnesses, it was for the claimant to provide, even in this precautionary measure, reasonable evidence of the concrete destabilising effects of such transfer on its organisation, by offering evidence to the court in order to understand its overall organisation, the role performed by the resigning employees within the same, the complete rarity of the number of resignations in relation to the usual company turnover, the difficulties encountered in replacing the resigned employees (with staff already employed or to be hired) in relation to the duties actually performed by them and the availability of similar internal expertise or in any case on the labour market.

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However, these profiles do not exhaust the assessment of the non-competitive nature of the acquisition of others' employees, where it appears that they have transferred through the transfer of resources, through which data and information has also been transferred, which are the exclusive property of the claimant, legitimately acquired and kept confidential and which formed part of the relevant assets and ability to compete in the market.
Such inferred start-up copycat trading, through illicit apprehension of information and technical and business knowledge, making it possible to enter the market without bearing the required costs and difficulties of an ordinary start-up, represents an assumption of unlawful competition.
Of particular concern is the transfer of information regarding users, certainly competence of Lucini, of which the claimant alleges to be protectable also in terms of Article 98 of the CPI, being confidential knowledge, not generally known or readily accessible and still subject to measures that are reasonable adequate to keep it secret, or at least confidential, known only to employees and collaborators under an obligation of confidentiality (Doc. 15). Specifically, it is undisputed that the information was stored at the datacentre which is equipped with adequate safeguards to ensure confidentiality, guaranteed through a firewall access to the corporate network and through various levels of accreditation of business users, who had access through a personal username and access password which is continuously renewed (Doc. 16). It also concerns information of undeniable great financial value, for which significant investments were required for its implementation.
In the phase of assessing the merits of the case, a further assessment shall be made on the existence of the operation of Article 98 of the CPI, but it seems that the circumstantial evidence in this regard already offered enables the claimant to invoke the protection of ownership, and not only competitive pursuant to Article 2598 no. 3 of the Italian Civil Code, of the information in question.
This refers, especially, to information concerning approximately 75 million users, divided into linguistic basins, together with personal details, information regarding education, profession, city of residence and other information required for sending customised email marketing notifications (DEM).
Such amount of data, in addition to comprising the company's assets protectable under Article 98 of the CPI, must also be considered along the same lines as a database according to Article 102-bis of the Applicable Law, understood as a "collection of works, data or other materials arranged systematically and methodically and individually accessible by electronic or other means". The aim of the regulation is to safeguard, beyond copyright, the creators of databases against misappropriation of the results of financial and professional investment made in obtaining and collecting the contents. The case of the constitutive law is therefore represented by the investment made for the obtaining, verification and presentation of the database contents, which must then be substantial in quantitative or qualitative terms. In fact, investments related to the verification of a database are understood as those relating to means intended to ensure the reliability

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of the information contained in that database, to monitor the accuracy of the materials collected – upon the formation of this database and during the period of operation of the same – and for the purposes of its use by authorised users.
It appears to the court that the investments required for presenting the data and making it externally available, through complex organisation and functionality, which are not merely a reflection of the generation of the data, may also certainly be assumptively deemed relevant pursuant to Article 2727 of the Italian Civil Code, with no need for an in-depth investigation, also in consideration of the fact that the protection threshold should not be set at such a high level so as to cripple the protective purpose of the regulation.
The acknowledged ownership of the *sui generis* right gives the creator the right to prohibit the extraction, i.e. the permanent or temporary transfer of all or a substantial part of the data to another medium/device, by any means or form.
The limit of the powers granted to the creator of the database are marked by the entity carrying out the extraction and/or reuse (public dissemination) of "all or a substantial part of the contents of the database", which would allow the appropriation, without charges, of the results of its investment to build the database.
The definition of "substantial part" requires a consideration of both quantitative and qualitative criteria. In the first case, it refers to the volume of data extracted and/or reused in the database and must be assessed in relation to the total volume of the contents thereof. In fact, if a user extracts and/or reuses a quantitatively significant part of the contents of a database, the construction of which required the use of substantial resources, the investment in the extracted and/or reused part is, proportionally, equally significant. In the second case, assessed from a qualitative perspective, the contents of a protected database refers to the significance of the investment in the obtaining, verification or presentation of the content of the subject of the process of extraction and/or reuse, regardless of the fact that such subject is a qualitatively substantial part of the general contents of the protected database.
Now, from the outcome of the consultation, it is proven that 41,873,128 email users existing in the Lucini database (excluding duplicates relative to subjects who adhered to further services), at least 26,645,952 were present at the time of the appointed consultancy among AdGlamor users. Therefore, 63.63% of Lucini's data was proven to be present in AdGlamor's database.
It should also be considered that the total number of users of the respondent party amounted to 28,416,893; therefore 93.76% of AdGlamor's database was composed of data coinciding with that of Lucini.
The Consultant also managed to obtain factors which allow, within the limits of the precautionary measure of knowledge, for the conclusion of an apprehension of data from Lucini's database and subsequent transfer to that of AdGlamor.

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It appears, in fact, that on Marco Lanzotti's PC, in a backup folder dated 07/02/13, there are folders named Lucini and encrypted data, while in the Sottocornola folder there are emails in English regarding data supplied by AdGlamor for marketing campaigns in China corresponding to the amount of relative addresses existing in Lucini's database.
Particularly enlightening is the content of an exchange of emails with Elizabeth from Egentic, who notes that the data received from AdGlamor in October 2013 was labelled by Lucini&Lucini, receiving an awkward response from the employee of the respondent party.
Therefore, this is a circumstantial framework pursuant to Article 2729 of the Italian Civil Code that univocally testifies to the sense of an operation against Lucini&Lucini of concern for data - protected under Article 98 of the CPI and 102-bis of the Applicable Law – and its transfer to the competitor to whom former employees of the claimant have also transferred.
It should be added that in the database and in the evidence obtained from the respondent party, there is also evidence of text used in the horoscopes of the claimant.
Specifically, Lucini's tables contain 157,366 horoscopes, while those of AdGlamor contain 21,614, the latter of which 81% (17,577) are imitations of those of the claimant, in the sense that they contain at least 30 identical consecutive characters, in various languages.
Such coincidence, despite the vagueness and repetition of phrases freely combined by the informations systems to create the horoscopes, suggest that even the text data, which is protectable in relation to Article 1 of the Applicable Law, have been taken, therefore saving costs of both their creation and translation into the various languages.
On the other hand, the consultant concluded that the software used by AdGlamor is not tributary to that of Lucini&Lucini, although the programmers of the respondent party, having transferred from the claimant, may have easily implemented the new framework, knowing the limits, features and advantages of the solutions implemented by Lucini. However, nothing prevents the individuals who transferred to AdGlamor from using their mere professional expertise learned from previous experiences.
As mentioned, the data proven to have been taken from Lucini&Lucini has been deleted from the respondent party's server, which, even by such act, this was not intended to acknowledge the validity of the claimant's claims. Therefore, Lucini&Lucini waived the application for seizure and only insisted on an injunction and penalty (as well as publication).
It appears to this court that the act of deleting the data is not sufficient to rule out the risk of potential future use, considering that the data was probably originally present on a personal PC of one of the Lucini employees who transferred to AdGlamor and could have been copied elsewhere.
To be sure, obtaining the likelihood of success on the merit of the reported illegal conduct, even the requirement for urgency, there was and is, if any further use of the user contacts is considered, with a duplication of the emails sent to users, a risk of irremediably damaging the accreditation of the claimant's business, with

equally and potentially irreparable effects on its position in the market.
Furthermore, where the deletion definitely occurred (as seems plausible) the injunction would be a completely neutral sanction, making it not possible such future use of the banned data.
The injunction, as requested by the claimant itself, should cover the use of data and information, especially email addresses and horoscope texts, origin of Lucini&Lucini, except for the proof, at expense of AdGlamor, of its legitimate purchase on the open market (proof of this is still lacking, despite the original allegations).
The injunction may be assisted by a sanction of EUR 0.15 for each data, as defined above, that, as of now, is proven to have been used (with reference to the data and not to the individual use).
It should, on the other hand, be considered that the publication of the measure, which should be compensatory, not precautionary, in nature, should expect a decision on the merits.
Given that the extent of the description must necessarily follow the proceedings on the merits, within thirty calendar days of the notification of this decision pursuant to Article 132 of the CPI, the final settlement of the defence costs and court-appointed expert consultant fees should be paid to that office.

For these reasons

the court, having considered that the conduct of AdGlamor S.r.l. and Marco Lanzotti qualifies as an act of unfair competition under Article 2598 no. 3 of the Italian Civil Code, theft of secrets according the Article 98 of the CPI and violation of database rights under Article 102-bis of the Applicable Law, inhibits the use of data and information by the respondent party, especially email addresses and horoscope texts, sourced from Lucini&Lucini, except for the proof, at expense of AdGlamor, of their legitimate purchase from the open market, with the establishment of a sanction of EUR 0.15 for each data as defined above that is used as of now.
The court assigns a term of thirty-one days from the notification of this order for the start of the proceedings on the merits.
Be it published
Milan, 12/12/14

The Designated Judge
Ms Paola Gandolfi

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