

General Registry No. 653/2016



COURT OF MILAN

SECTION SPECIALISING IN BUSINESS MATTERS – A –

The Court, in a panel comprising the following magistrates:

Ms Paola Gandolfi	Chairperson
Mr Alessandro Dal Moro	Judge
Ms Silvia Giani	Reporting Judge

Pronounced the following

ORDER

in the proceeding for appeal under general registry no. **653/2016**, filed by:

ADGLAMOR S.R.L. (Tax Code 08157150965), in the person of its legal representative, represented and defended by DAVIDE MERLO and FRANCESCA NASTRI, duly appointed to the counsel which appears in the margin of the opposition report of the interim proceedings, with address for service at VIA CHIOSSETTO, 2 MILAN, at the office of the defence lawyer, FRANCESCA NASTRI;

CLAIMANT

against

LUCINI & LUCINI HOLDINGS S.R.L. (Tax Code 02540880123), in the person of its legal representative, represented and defended by the lawyers PAOLA BARAZZETTA, PIETRO ORZALESI and STEFANO CANCARINI, as well as by special power of attorney as part of the counsel appealing for a seizure order, with address for service at VIA MONTEROSA 91, MILAN at the office of the defence lawyers;

and



LUCINI & LUCINI COMUNICAZIONI S.p.A., in the person of its legal representative, represented and defended by the lawyers PAOLA BARAZZETTA, PIETRO ORZALESI and STEFANO CANCARINI, as well as by special power of attorney as part of the counsel appealing for a seizure order, with address for service at VIA MONTEROSA 91, MILAN at the office of the defence lawyers.

DEFENDANT

1. In a writ of summons served on 15 January 2015, the Lucini&Lucini companies, after having filed an interim ruling, which concluded with the confirmation of the description granted *without prior hearing of the other party* and the receiving of the request for serving an injunction for damages on Adglamor for the use of data and information belonging to Lucini&Lucini, has filed the trial proceedings, requesting assessment of the illegality of the conduct undertaken by Adglamor, for having committed acts of unfair competition by stealing and using secret business information, diverting employees, breaching database constitutional rights under Article 102-bis of the Copyright Law and plagiarising the creative content of horoscopes developed by the claimant and also requesting the defendant to be ordered to pay compensation for damages caused to them as a result of the aforementioned unlawful conduct.
2. During the course of the aforementioned trial proceedings, the Lucini&Lucini companies requested, on claiming compensation, a seizure order, which was authorised by order issued on 22 December 2015, amounting to €270,000.00.
3. By deed filed on 13 January 2016, Adglamor S.r.l. brought a complaint against that measure, calling for the lifting of the seizure order and, specifically, arguing that:
 - the precautionary order would have to be declared inadmissible, since it is brought against only one of the debtors, despite the existence of several liability.
 - there is no requirement for a *prima facie* case for the partial coincidence of email addresses, amounting to 63.63% and due to their free availability on the market.
 - the *periculum* cannot be evidenced by the accounting data for the year 2014, given that the claimant has already produced, during the pre-trial phase, the documentation attesting to the financial situation as at 2015, which is not taken into any consideration.
4. Lucini & Lucini Holdings and Lucini & Lucini Communications responded by requesting confirmation of the order under appeal.
5. At the discussion hearing of 18 February 2016, during which an attempt was made, albeit unsuccessfully, to reach a conciliation, the parties discussed and the Board made its decision.



6. The complaint made by Adglamor S.r.l. is unfounded and, consequently, the decision of the court made in the first phase is confirmed.

6.1. *Regarding the existence of a prima facie case.* There were no indications from the present case such as to invalidate the findings reached on the basis of the *prima facie* case. In this case, the order of the court of the first phase is referred to, of the granting of the seizure order, by precautionary order of 12/12/2014 with which the defendants were inhibited from the continued use of data and information originating from Lucini&Lucini. Technical advice, given by description during the pre-trial proceedings was, indeed, made to ensure that a very high percentage of the defendant's data was found in the claimant's database. Precisely 26,645,952 email users were found on Adglamor's database, compared with 41,873,128 present in Lucini's database, the former corresponding to a percentage of 63.63% of the total number of those of the defendant and, also constituting almost the entire information existing on the claimant's database. Furthermore, the technical expert revealed "that in the database and evidence obtained from the defendant, elements of text used in the claimant's horoscopes were also found".

Such elements, combined with the passive transfer of some former employees of Lucini to Adglamor, suggest a *prima facie* case of the apprehension and transfer of data from the database of Lucini to that of Adglamor and, therefore, taking into account the relevant data extracted and reused and their financial value, this all constitutes the case of breach of the law on databases pursuant to Article 102-*bis* of the Copyright Law and unfair competition pursuant to Article 2598 no. 3 of the Italian Civil Code. The producer of a database, in fact, is entitled to prohibit the extraction, that is, the transfer of all or a substantial part of the contents of a database to another medium by any means or any form.

In terms of a circumstantial framework, which univocally testifies to the apprehension and reuse, through former employees, most of the data present in Lucini's database, the respondent/claimant has not provided proof of the lawful purchase of such data.

The new documents produced by the claimant herein do not invalidate the findings that have already emerged in the precautionary measure.

The contracts produced by Adglamor on appeal do not have a certain date; all are subsequent to the date on which the information was transferred to Adglamor's database, they do not specify the identity of the email addresses to which they refer (being, however, certain that the two contracts exhibited during the expert procedures concerned only a limited number of email addresses against the millions of pieces of information found on the claimant's database that coincide with those of the defendant) nor is it revealed whether the aforementioned information



coincide with those subject to the dispute or whether it refers to other email addresses subsequently purchased. Furthermore, the information is not supported by any specific accounting item documenting the payment made.

The new documents, produced on appeal and from third parties, are, therefore, inadequate for proving the lawful origin of the information found on the claimant's database.

6.2. Regarding the inadmissibility of the seizure order against a single joint debtor. The claimant asked to ensure the inadmissibility of the action taken since it is proposed against a single joint debtor.

The Court believes that the interim protection against a single joint co-debtor is admissible without there being the need for the creditor to take legal action against the other obligated parties, as otherwise it would deprive the creditor of the right to choose the debtor against whom to bring an executive action and the several basis would weaken the position of the creditor, rather than strengthen it.

As evidenced by the judge of the first phase, "the joint and several liability basis is aimed at strengthening the protection of the creditor who may choose whom to turn to for the compensation of the entire amount, specifying its guarantee at a plurality of subjects, to be exercised even against the property of only one of them. The detriment to the financial capacity, of even one of the joint co-debtors, is relevant to the activation of the protective measures provided in defence of the expectations of the creditor for the compensation of credit".

6.3 Regarding *Periculum in mora*. *Periculum in mora* exists in the case of "well-founded fear on the part of the creditor in losing the guarantee of their credit". The seizure order has the duty of ensuring the integrity of the collateral, ensuring the profitability of the future performance of disposals that could be detrimental to future compensation.

It exists in the case of symptomatic elements of a real danger of depletion of the debtor's assets, such as to cause the creditor to lose their credit guarantee.

Such are those which had already emerged during the first pre-trial phase, represented by the disclosure statement dated 19/01/2015 of the debtor company to a public body, regarding "*the serious financial crisis*" of the company, such as to hinder it "from paying the monthly instalments originating from the payslips relating to maternity leave" (Doc. 15); the situation shown by the financial statements for 2014: in this case, the companies poor liquidity; the composition of the assets posted in the balance sheet resulting from the aforementioned financial statements, consisting solely of intangible assets and receivables and, conversely, a lack of tangible assets; the easy concealment of goods comprising the assets.



Added to these objective factors are those arising from the appeal and specifically the next unsuccessful outcome of the pledging of securities and third parties seizure order (please see Docs. 17, 18 and 19 of the defendant).

The disproportion between the credit and existing assets, together with the serious and tangible danger of a further decrease of the collateral due to the easy concealment of existing goods, form the basis of the serious risk to the creditor of losing its credit guarantees.

The claimant complained that the judge of the first phase had not taken into account the balance sheet as at 2015, in which belies, in its opinion, the situation of illiquidity and would provide the framework “of a company undergoing expansion”, with investments made without recourse to bank credit.

The Court believes that the draft of the financial statements produced by the claimant company relating to 2015, for its partiality and temporariness, due to the lack of explanatory notes and management report, as well as the requirements pursuant to law, is not an adequate instrument for representing the financial position of the company, providing all of the information required for a true and fair representation.

Furthermore, the composition of the liabilities resulting from this accounting update, consisting of amounts due to employees, public institutions (INP for €65,641.35), tax authorities for withholding tax on employees, bank financing, together with the lack of establishment of an appropriate risk provision, the persistent lack of liquidity and increase in debt to suppliers compared with the previous year, appear to contradict the statements of the claimant and belie the rosy picture it has painted. The lack of real estate, the proven unprofitability of securities and of that held by third parties, due to the failure to discover personal goods and current bank accounts during the pre-trial proceedings, despite the alleged existence of goods and the accompanying expansion of the company, confirm the serious risk of decrease in collateral during the period, such as to validate the right in the ordinary trial proceedings, during which the precautionary protection was exercised.

7. Since the pre-trial proceedings were filed during the proceedings, the costs shall not be paid in this case, but on the outcome of the trial proceedings.

Therefore

The Court of Milan, Section Specialising in Business Matters – Section A -, resolving on the appeal lodged by **ADGLAMOR S.R.L.** against **LUCINI & LUCINI HOLDING S.R.L.** and **LUCINI & LUCINI COMMUNICATIONS L.T.D.**, hereby resolves:



to reject the appeal proposed by Adglamor S.r.l. and therefore confirms the order of 22 December 2015.

Be it published.

Milan, thus resolved in the Council Chamber on 19 February 2016

The Reporting Judge
Ms Silvia Giani

The Chairperson
Ms Paola Gandolfi

