



THE ORDINARY COURT OF MILAN
SPECIALISED IN COMMERCIAL MATTERS
SECTION "A" CIVIL

In the precautionary measure entered in G.R. No. **2996/2015** brought by:

LUCINI&LUCINI HOLDINGS SRL

LUCINI&LUCINI COMMUNICATIONS LTD

APPLICANTS

against

MARCO LANZOTTI

MONIKA BERNAS

MARIA TERESA CURTO

RODOLFO SACCANI

NATALIA PORCIUNCULAS

GIORGIO PREMI

DEFENDANTS

The Examining Magistrate;

lifting the reservation adopted at the session on 25/05/2016,

pronounced the following

ORDER

1. The procedural events

The purpose of this precautionary measure in the course of the proceedings is the request by the group Lucini&Lucini - Holding and Communication, the plaintiff in the proceedings, for protective measures against six of its former employees: Marco Lanzotti, Monika Bernas, Maria Teresa Curto, Rodolfo Saccani, Natalia

Porciunculas and Giorgio Premi. They are accused of the illegal theft of secret information and/or confidential information, the illicit theft and re-use of the database for the benefit of the competitor Adglamor, also a defendant in the proceedings and which hired all of the defendants involved in the offence.

This initiative was preceded by the following proceedings:

- urgent appeal for description and injunction *ante causa* brought on 19.4.2014 by the Lucini Group against Adglamor and Marco Lanzotti, during which a technical investigation was permitted, which ended with the defendant being prohibited from using the data and information considered illegitimately stolen in breach of articles 2958, No. 3 of the Civil Code, theft of secrets pursuant to art. 98 of the Intellectual Property Code and a breach of the rights to the database pursuant to art. 102-bis L.A; the measure was confirmed by an appeal;
- appeal in the course of the proceedings at Adglamor's expense, on the grounds of the claim, of a compensatory nature, awarded on the matter: the measure was granted by the examining magistrate for the limited amount of €270,000.00; this measure was also confirmed by an appeal;
- appeal in the course of the proceedings pursuant to art. 700 of the Civil Procedure Code initiated by Adglamor at the expense of Lucini for disparaging behaviour: the measure was partially granted.

In this session, the applicant has outlined, as regards the *periculum*, being judicious, within the framework of the implementation of sequestration against Adglamor, of its insufficient assets and, at the same time having learned of the loss of the defendant's collateral, with the defendant having *medio tempore* discontinued the working relationship with Adglamor. With the creditor's consequent inability to rely on salary payments to satisfy them, upon the outcome of the litigation of their claims.

As regards the *fumus*, the applicant recalled the outcome of the specialist investigations carried out *ante causam* and the assessments made by the precautionary measures magistrate, of the first and second instance. In particular, the key positions in the specific organisational chart have been recalled, before the almost simultaneous resignations, held by the individual defendants: Marco Lanzotti (Database Administrator) Monika Bernas (Seller Manager for the Polish market and responsible for the relevant database), Giorgio Premi (Senior Programmer for the ADsender software) Maria Teresa Curto (Seller Manager for Latin America and Manager of the database in Spanish and

Portuguese), Rodolfo Saccani (Project Manager, responsible for the ADSEnder software), Natalia Porciunculas (Account Manager), Giorgio Premi (Senior Programmer for the ADSEnder software) and finally Natalia Porciunculas (Account Manager).

All the defendants are present: they have raised some common exceptions - and in particular the lack of any joint participation to Adglamor's alleged offences or their unenforceability, with the exclusion of Lanzotti, of the outcome of the CTU *ante causam* - and then added profiles of autonomous defence relating to each position.

On the outcome of the exchange of counter-arguments and of the hearing, on 25.5.2016, the examining magistrate has reserved the final decision.

2. As regards the *fumus*

2.1. General introduction

The applicant considers the defendants complicit in all of the alleged offences in the period in question- abusive acquisition, detection and use of secret information, acts of unfair competition, illicit extraction and reuse of a database, violation of intellectual patent rights- with the exclusion however of the transfer of employees, an action that only Adglamor sees as passively legitimised, which is extraneous to these proceedings.

All the defendants consciously made their causal contribution in favour of unfair competitor: while lacking the business qualification required to complete the offences in question, they consciously participated i.e. in the unlawful conduct of the internal (Adglamor): Indeed, this company was established through a third party precisely by former employees of Lucini, which materially would have found out the confidential and secret data and information in question to then unlawfully use them in the new business initiative.

2.2. As regards Monika Bernas, Maria Teresa Curto, Rodolfo Saccani, Natalia Porciunculas and Giorgio Premi

That having been said, the current request for an extension of the protective measures by the applicants cannot be accepted in respect of Monika Bernas, Maria Teresa Curto, Rodolfo Saccani, Natalia Porciunculas and Giorgio Premi, who did not participate in the precautionary stage *ante causam* and to whom the

evidence acquired in that session, in respect of the right of defence protected by the constitution, cannot now be used as evidence.

Furthermore, in the proceedings in question, the necessary investigational oral activities are under way, which must be followed by a technical examination in the cross-examination of all parties on the material acquired in the *ante causam* description to clarify the material and/or moral role, i.e. the contribution under the causal profile, of the individual conduct, as well as the psychological participation and, consequently, the amount of damage attributable to the individual defendants.

Moreover, if it is true that the role of those welcomed by Adglamor is not a necessary condition to infer a joint participation in awareness of the theft alleged here (especially since committing such an offence regardless of this role), it is equally true that the fact that they have been recruited - also under improved conditions - by an unfair competitor is an element in itself that is only neutral with respect to competition in the offences pursuant to art. 98 and 99 of the Industrial Property Code.

2.3. As regards Marco Lanzotti

Marco Lanzotti's position is procedurally distinct with respect to that of the other defendants.

In fact, the technical investigations carried out in the *ante causam* proceedings can be appreciated here by the Court since the defendant has taken part in the relevant proceedings and, therefore, with respect to his position, the principle of the right to be heard has been respected.

For that relevant here, as a result of the measure of the description and of the investigations carried out in the urgent proceedings, some circumstances have been found that have not been challenged by the defence of the actual defendant (but only in their probative value), are now deemed sufficient to support the applicants' argument. And, in particular,

- a folder was found on Marco Lanzotti's external UBS hard disk containing a series of access passwords for Lucini's databases;
- this backup folder was created on 7/2/13, i.e. the day before the defendant's resignation from Lucini and the same day on which, in accordance with the advice of the plaintiff, the illegal extraction of all of its data took place;
- the folder is called *Lucini*;

- *the data are encrypted*" (see page 6 of the technical report);

- the defendant has not provided the password to the CTU so that the contents can be checked.

These elements provide serious, precise and consistent clues according to the dictates referred to in art. 2729 of the Civil Code such as to be able to infer, with presumptive reasoning, a causal contribution of Marco Lanzotti to unlawful conduct set up by Adglamor, which materialised in the illegal reproduction (possibly only in part, a matter to be checked in the course of the investigation in progress) of Lucini's confidential material and subsequent transfer to his new employer. In this respect, it should be recalled that at the time of the offence Adglamor was a newly-created company, 93.76% of whose database comprised information matching that of its competitor Lucini and on whose database was present, according to the evaluations expressed in the urgent session by the Court, 63.63% of the applicants' data.

Moreover, the justifications put forward by the defence of the former employee, for example having forgotten the passkey, does not appear to be very plausible and are therefore unsuitable, now, to refute the evidence indicated above. Similarly, the grievance according to which the backup operation of company passwords would be automatically set by the former employee in his position as Lucini's system administrator seems to be significant: on the contrary, upon his resignation, Marco Lanzotti would have had to delete any of his former employer's relevant computerised data.

3. *As regards the periculum*

3.1. *The applicant's arguments*

Moving on to the *periculum*, as is known, the creditor's fear of losing the guarantee of their credit pursuant to art. 671 of the Civil Procedure Code should be made concrete or in elements of a subjective nature - in relation to conduct that unequivocally demonstrates the intention to reduce assets to evade obligations - or factual elements - relating to the economic consistency of the defendant's assets, in the case, for example, of goods that are easily concealable-

The two requirements must be assessed jointly, since it is necessary to weigh up the consistency of the debtor's assets with the type of activity that the creditor fears may be accomplished and with the applicant's credit.

In this case, the serious indications that would allow the expression of a positive opinion of the onset of precariousness and aggravation of the framework of the defendant's collateral would lie in the recent termination of the permanent employment contract with Adglamor, from which the defendants derived their sole source of income in the past three years. Furthermore, some defendants would not be holders of any immovable property while others would own assets already burdened by mortgages; and, all, would have credit positions against Adglamor for outstanding salary payments.

3.2. *As regards Marco Lanzotti's position*

Moving on to the *periculum*, although the applicants do not complain about the defendant's conduct, under the subjective profile, aimed at reducing the creditor's collateral, under the objective profile of the loss of employment a circumstance objectively suitable to reduce the prospect of satisfying the creditor on the outcome of the proceedings on the merits of the case appears.

And even though the lack of sources of income is considered with particular caution, having repeatedly stressed the case-law that a precarious economic condition, statically considered, is not sufficient if there is the risk that the debtor will aggravate the condition (see T. Milano, 20.3.1997, T. Trento 25.9.1993), here the situation envisaged by the applicants with respect to the start of proceedings on the merits of the case has certainly worsened and does not seem adequately compensated by the request, made by Marco Lanzotti, for access to occupation compensation.

3.3. *As regards Monika Bernas, Maria Teresa Curto, Rodolfo Saccani, Natalia Porciunculas and Giorgio Premi*

Even though the negative judgement expressed in point sub 2.2. on the *fumus* absorbs every question and investigation need on the *periculum*, for the sake of completeness it should be pointed out that the defence of some defendants categorically denied the objective aggravation of their asset position: Monica Bernas is still currently an employee of Adglamor while Giorgio Premi and Rodolfo Saccani have already been hired by another company; finally Natalia Porciunculas declares having found a new job; these circumstances were not contested and herein must be considered undisputed.

Therefore, at least in relation to the four defendants cited above, in addition to the lack of the *fumus* the worsening of their financial situation caused by the deemed loss of employment does not even exist, to be protected by the remedy invoked.

4. *The judicial order*

For all the above reasons the appeal must now be upheld in a limited way to the position of Marco Lanzotti, while it must be rejected in respect of the other defendants.

As regards the amount of protective measure to grant, it should be noted that the constraint of passive solidarity prescribed by art. 2055 of the Civil Code relates to the situation of a single harmful event chargeable to several persons. In this session, on the contrary, the plaintiff complains of different types of injury caused by distinct illicit conduct, one of which the defendant is not accused of (misuse of employees); As regards the other conducts, the joint participation of Marco Lanzotti has been established here at the level of the *fumus* only with regard to the theft of company, secret and/or confidential information, while with regard to other profiles it has not yet been sufficiently investigated: one thinks of unfair competition due to the illegal use on the market of such information, illegal precisely because the qualification of entrepreneur is required and it can also be declared in respect of the disloyal former employee, after having established a causal contribution also in this autonomous conduct. Moreover, with Marco Lanzotti not formally holding any corporate role at the company Adglamor, the preliminary activity to investigate and the deemed creation, by a third party, of the competitor company is in the course of completion in the proceedings on the merits of the case.

Now, therefore, the compensation credit that the applicants are acting to protect, and for which the *fumus* of the illegal damaging joint participation of Marco Lanzotti was established seems to be more limited than that already declared by this Office, in the first and second interlocutory stage against Adglamor.

At its discretion and prudentially, i.e. using a very similar yardstick to that often used to liquidate damage even in the decision stage, and considering that the protective measure for €270,000.00 was granted at the expense of the competitor company, the sequestration is granted here for the limited sum of €40,000.00.

The decision on the costs of the proceedings, relating to all procedural positions previously examined, should be referred back to the merits, concerning precautionary measures in the course of the proceedings.

FOR THESE
REASONS

1. it authorises the precautionary sequestration up to the amount of €40,000.00 in favour of the applicants and at the expense of Marco Lanzotti;
2. it rejects the application for precautionary sequestration formulated by the applicants in respect of the other defendants for the reasons referred to in the narrative;



3. costs of the case.

Communicated in

Milan, 20.6.2016

the Examining Magistrate

Dr Alima Zana

