

General Registry No. 2015/2996



MILAN COURT OF FIRST INSTANCE

SPECIALISING IN CIVILIAN ENTERPRISE "A"

in the precautionary procedure registered under general registry no.
2996/2015 brought by:

LUCINI&LUCINI HOLDINGS SRL

LUCINI&LUCINI COMMUNICATIONS LTD

CLAIMANT

against

ADGLAMOR SRL

DEFENDANT

The Investigating Magistrate;

- on deciding on the outstanding issue for which the decision was reserved at the hearing of 1.12.2015, has issued the following

ORDER

1. *Prima facie.*

1.1. The application for an order for seizure during the proceedings, made by the Lucini defence to protect their claim for compensation, of which it seeks payment in the legal proceedings of the case, is well founded.

As regards the *prima facie* case, the reserved application finds support in the positive judgment on the unlawful conduct of the defendant expressed by this Office in the pre-trial proceedings brought on 20/02/2014 by the present claimant against Adglamor, *inter alia*.

On that occasion, an injunction was placed against the current defendant, the respondent in the trial proceedings, on the use of data and information, especially email addresses and horoscope texts, owned by the present claimant, constituting its business assets, under the Privacy Act pursuant to Article 98 of the



Industrial Property Code and copyright relating to the database pursuant to Article 102-bis of the Applicable Law, as well as the regulations on unfair competition.

In this provision (confirmed on appeal and the related expressed reasons) we should now refer to the *prima facie* case of the amount receivable – again underlined as compensatory – brought by the proceedings and of which Lucini hereby invokes, in furtherance of the corporate objectives, its order for seizure.

On this point it should be noted that the views urgently expressed by the Court have been supported by a thorough technical investigation from which it has been revealed that out of 41,873,128 email users present in the Lucini database (excluding duplicates relating to individuals who have signed up for further services) at least 26,645,952 were discovered, at the time of the investigation, among Adglamor's users. Therefore, the percentage of 63.63% of Lucini's data is found to be present in Adglamor's databases. The latter databases therefore consist of 93.76% information coinciding which that belonging to the competitor.

Furthermore, also on that occasion, it was found that "in the database and in the evidence gathered from the defendant, there are also elements of text used in the horoscopes of the claimant.

Specifically, Lucini's database tables contain 157,366 horoscopes, while those of Adglamor contain 21,614, of which 81% (17,577) are imitative of those of the applicant in that they contain at least 30 consecutive, identical characters, in various languages.

Such coincidence, despite the generality and repetition of the phrases freely combined by the computer system to form horoscopes, suggest that the text data, which can be protected in light of Article 1 of the Applicable Law, have been learned, thereby saving both formulation costs and costs of translating them into different languages."

The validity of the claims of the claimant, at least for the offences positively identified during the pre-trial stage, is not otherwise opposed by opposite outcomes, in which the taking of evidence has not yet been initiated.



The likelihood that such offence caused, in terms of the procedural grounds, serious economic damage to the claimant due to the weakening of its position on the market, against a symmetrical unfair advantage of the competitor which has saved costs and investments for building the database, to be restored on the outcome of the legal proceedings of the case, appears therefore to be high.

1.2. Objections of the defendant

Illiquidity of credit.

The current illiquidity of credit from remand, in compensation, is not an obstacle to the granting of an order for seizure, given that this remedy can be amicably granted for illiquid credit that is not due, as is clear from the text of Articles 1186 and 1356 of the Italian Civil Code.

There remain presumptive indices, enabling crystallization of the amount of the claimant's likely claim on the basis of the offence proven until now as a matter of priority.

This case involves, in fact, the removal of a significant proportion of the information assets constituting the claimant's database (the illegality of the transfer, in accordance with the court of first instance, would be better investigated in the continuation of the trial) and the state is not assessed to infer the quantum.

The number of undue repetitions was quantified by the court-appointed expert witness during the pre-trial stage to the extent of 26,645,952 details (corresponding to the number of email users in Adglamor's database that coincide with those of Lucini, whose database instead consists of 41,873,128 email users).

By quantifying, in a prudential manner, the value of each contentious email address at €0.10, the amount of €266,459.52 is reached.

Given the complexity of the dispute and all mutual disputes, the claim for compensation is prudently quantified at €270,000.00.

The inadmissibility of the application against a single liable debtor

As regards the inadmissibility of the order for seizure against only a single liable debtor, this case - albeit followed by certain judgements of merit - must be rejected; and it is deemed that the



bond of joint liability is aimed at enhancing the protection of the creditor who may choose which debtor to appeal to, even for full compensation, identifying its guarantee with multiple subjects, to be exercised also against the assets of only one of them. Therefore, the damage to the capacity of assets, even of one of the liable co-debtors, is evidently relevant for the purposes of activating the orders for seizure provided for, governing the expectations of the creditor in the payment of the credit.

Accepting the opposite case "would force" the creditor to prove, during the pre-trial stage, the incapacity of all other co-debtors, a condition not required during the implementation stage, so that the solidarity bond would ultimately weaken, rather than strengthen, the position of the creditor.

2. Periculum

The claimant expressed two distinct motives to support the risk of leakage of the asset securities to the defendant. Specifically:

- the defendant's attempt of so-called "overseas-setting-up", through the establishment on 01.09.2015 of an English limited company - Yodea Media Limited, doc. 64 - controlled by the defendant and active in the digital marketing agency, providing email marketing services also via an internet domain connected to Adglamor servers (doc. 70) and an online horoscope service generally similar to that provide by the Italian parent company (doc. 74);
- the precarious financial situation of the defendant can be deduced from the latest financial statements, filed for 2014 and from the statements made to the INPS [national institute of social security] by its sole director, due to the failure to pay its employees for several months.

The defendant replied by emphasising, as for the first standpoint, the dissolution of the company under English law which occurred prior to the filing of the complaint and, under the second standpoint, the solidity of its financial situation, even in light of the last financial statements and accounting elements filed for the current year. Finally, the statements to the Institute of Social Security would have no probative value, since they are



intended only to persuade the Institute to advance its disbursements.

Nevertheless, the facts elements currently subjected to the scrutiny of the Court materialise, from subjective and objective standpoint, Adglamor's risk of dispersion of capital, pending the proceedings.

In fact:

- last year's balance sheet, relating to the year 2014, shows a situation of low liquidity to enable Adglamor to pay, in the short-term at least, its obligations (given that, for example, the receivables due within one year amounted to €265,480 while the corresponding debt amounted to €473,886, please see doc. 76 of the defendant);
- the disclosure statement made by the sole director of Adglamor to a public body, that is, the INPS (in relation to the position of its employee, Monika Bernas: "due to the continuation of a serious financial crisis, the company is not able to pay the monthly instalments of the payslips relating to her maternity leave", please see doc. 12 of the file regarding the defendant Bernas) revealing, admittedly and alternatively: if true, an actual difficulty to pay debts, even of amounts much lower than those in question by the defendant; if untrue (as alleged here by the defence of the defendant) a concerning desire to avoid paying its obligations, declaring non-existent circumstances to the Institute of Social Security. Both cases reveal serious indications to support the defendant's risk of dispersion of asset securities;
- the recent establishment of a foreign company held in the majority of its share capital by the defendant, even if dissolved in the meantime, is an indication of the desire of the defendant to transfer part of its activities and therefore its resources outside of the Italian territory. Even in the absence of a clear intention to avoid the claims of Lucini, such conduct includes a further indication of the likely greater difficulty to be able to successfully claim Adglamor's capital as a result of the proceedings. Furthermore, even if the dissolution of that subject (not yet "in times of difficulty" but in conjunction with the



notice of the claim, completed on 13-18.11.2015)), this would not cancel out the concerns of the claimant in terms of the projection of important Adglamor resources abroad.

- There also exists the second of the requirements for Lucini's access to the precautionary preventive protection of its credit.

3. Precautionary order

The order for seizure is therefore granted to the claimant to the amount of €270,000.00 for the reasons expressed under section 1, while the costs of litigation shall be reserved to the case, since these are ongoing proceedings in dispute.

For these reasons

1) Authorises Lucini LUCINI&LUCINI HOLDINGS SRL and LUCINI&LUCINI COMMUNICATIONS LTD, in the person of their respective legal representatives pro tempore, to implement the order for seizure against ADGLAMOR SRL, in the person of its legal representative pro tempore, to the amount of €270,000;

2) Expenses of the case

Be it published

Milan 22.12.2015

The Investigating Magistrate

Dr Alima Zana

