NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

August 16, 2016

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Re: *Jon Beutler v. John Doe* (*In re* <rat.com>), CL-2015-13256

Dear Counsel:

This dispute concerning the Internet domain name <rat.com> is before the Court on the Motion for Default Judgment of Plaintiff Jon Beutler ("Beutler"). Beutler seeks a default judgment against Defendant John Doe ("John Doe") and an order directing Verisign, Inc. ("Verisign"), a non-party Internet domain name registry, to transfer <rat.com> to Beutler. Three issues are before the Court:

A. Does a plaintiff have the authority to obtain a judgment against "John Doe" in an Internet domain name dispute, when the identity of "John Doe" has not been ascertained through pre-trial discovery?

B. Does an order of publication comport with constitutional due process and a strict construction of the statute authorizing service by publication, when the identity of "John Doe" has not been ascertained through pre-trial discovery?

OPINION LETTER

C. Does an Internet domain name registry constitute a necessary party, when a plaintiff seeks a mandatory injunction ordering the registry to unilaterally transfer a disputed Internet domain name to the plaintiff?

For the reasons that follow, the Court denies the Motion for Default Judgment without prejudice.

I. BACKGROUND

A. Technical Background

An Internet domain name is the "address" at which a computer user accesses a website on the Internet directly, instead of conducting what may prove a time-consuming search. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 221 (4th Cir. 2002); *Network Solutions, Inc. v. Umbro In'l, Inc.*, 259 Va. 759, 765 (2000). A typical domain name is www.fairfaxcounty.gov, which serves as the domain name for the Fairfax County Government website. *See Harrods*, 302 F.3d at 221. Like all domain names, www.fairfaxcounty.gov is made up of "sections of alphanumeric characters separated by periods, called 'dots.'" *Id.* "These sections are referred to, working from right to left, as the top-level domain, the second-level domain, and so on." *Id.* In this example, the top-level domain is the suffix ".gov." *See id.* "The second-level domain is the section just to the left of the top-level domain." *Id.* Here, the second-level domain is "fairfaxcounty." *See id.*

Most businesses on the Internet use the .com top-level domain,[1] and as a result, Internet users can intuitively find a company's website by typing its corporate or trade name into a web browser or search engine. *See Network Solutions, Inc. v. Umbro Int'l, Inc.*, 259 Va. 759, 766 (2000). To be sure, the Fairfax County Government,[2] or any public or private entity for that matter, would want to register and "use its recognized name in the second level of its Internet domain name." *Network Solutions*, 259 Va. at 766. Reserving a second-level domain name is usually accomplished through the services of a domain name registrar that works with a top-level domain registry.

When an entity registers its corporate or trade name for use on the Internet, domain name registrars and domain name registries serve important, but distinct functions. *See CNNL.P., L.L.P. v. Cnnews.com*, 177 F. Supp. 2d 506, 512 n.7 (E.D. Va. 2001), *aff'd in part, vacated in part on other grounds*, 56 Fed. Appx. 599 (4th Cir. 2003). On the one hand, "A domain name registrar is an organization or commercial entity that manages the reservation of Internet domain names." *Schreiber v. Dunabin*, 938 F. Supp. 2d 587, 592 (E.D. Va. 2013). On the other, "A domain name registry is a database of all the domain names registered in a top-level domain." *Id.* Significantly, while the role of a domain name registry is generally limited to processing registrar orders and ensuring that there are no duplicate domain name registrations, a registry's

[1] The top-level domain .com is derived from the word commercial. *Network Solutions*, 259 Va. at 765 n.5.

[2] In contrast to the .com top-level domain used by most businesses, the U.S. government and state and local governments typically use the .gov top-level domain. *See Data Mountain Solutions, Inc. v. Giordano* (*In re Giordano*), 472 B.R. 313, 320 (Bankr. E.D. Va. 2012).

maintenance and control of the central registry database enables it to transfer any domain name in its top-level domain without the cooperation of a registrar. *GlobalSantaFe Corp. v. Globalsantafe.com*, 250 F. Supp. 2d 610, 619–20, 622 (E.D. Va. 2003) (discussing the registrar-registry relationship). As is the case here, it is common for a plaintiff to request a court order that directs a registry to unilaterally transfer an infringing or stolen domain name without assistance from a registrar. *See id.* at 622.

B. Factual Background

Beutler, a resident of Utah, registered the domain name <rat.com> in 1995 and used it in connection with various businesses he operated over the next two decades, including Renegade Advanced Technologies. The widely-known domain name registrar GoDaddy.com LLC ("GoDaddy") reserved and maintained the registration information of <rat.com> until the summer of 2015. Verisign, located in Reston, Virginia, acts as the domain name registry for all domain names in the .com top-level domain, including <rat.com>.

In July 2015, GoDaddy sent Beutler an e-mail notice about the upcoming renewal date for the registration information of <rat.com>. However, Beutler soon discovered that he could not access his account and contacted GoDaddy about the problem. Despite multiple attempts to resolve the login issue with GoDaddy, Beutler did not regain access to his GoDaddy account until August 13, 2015. Meanwhile, John Doe accessed Beutler's GoDaddy account without authorization and transferred <rat.com> from GoDaddy to a domain name registrar based in the United Kingdom: TLD Registrar Solutions, Ltd. ("TLD"). Beutler could no longer use or control the <rat.com> domain name as a result. Although John Doe was required to provide registrant information as part of the transfer of <rat.com> from GoDaddy to TLD, he used a privacy service run by Whois Privacy Corp. ("Whois") to shield his identity.

C. Procedural Background

On October 6, 2015, Beutler filed this action against John Doe, seeking a declaratory judgment and damages for conversion and tortious interference with contractual relations.[3] Beutler also requested an order directing Verisign to transfer <rat.com> to him, although Verisign was not joined as a party defendant.

Before filing his complaint, Beutler hired a Michigan law firm specializing in Internet law to assist local counsel. On October 8, 2015, Michigan counsel tried unsuccessfully to contact John Doe through his Whois e-mail address. To no avail, Michigan counsel also sent a letter to Whois demanding that the company remove its privacy service from John Doe's registrant information. From October to December 2015, Michigan counsel served numerous Virginia attorney-issued subpoenas duces tecum on non-parties residing in Arizona, Illinois, Colorado, Nevada, the U.S. Virgin Islands, Germany, the Bahamas, and the United Kingdom.[4]

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[3] The Complaint omits an ad damnum clause stating the amount of damages sought by Beutler. Va. S. Ct. R. 3:2(c)(ii).

[4] The Court notes that the Motion to Associate Counsel Pro Hac Vice in this case was not filed until October 22, 2015, after Michigan counsel began serving Virginia attorney-issued subpoenas duces tecum. In addition, the record

Those subpoenas sought information about John Doe and, in some instances, yielded responsive documents. However, none revealed John Doe's location or identity.[5] More significantly, none appear to have been issued in accordance with the proper statutory authority or applicable rules of court.[6]

Unable to locate or identify John Doe, Beutler filed a Motion and proposed Order of Publication with the intention of serving John Doe pursuant to Virginia Code § 8.01-316. The Court entered Beutler's proposed Order of Publication on January 8, 2016, which required, "[T]he Defendant referred to in Plaintiff's Complaint as 'John Doe' [to] appear in this Court and protect his or her interest within 21 day[s] of the completion of service of process by publication." The Order drafted by Beutler's counsel also directed a copy of the Order of Publication to be "mailed to the [n]ecessary party to this action: Verisign, Inc., 12061 Bluemont Way, Reston, VA 20190." In accordance with Virginia Code § 8.01-317, the Clerk of Court caused the Order of Publication to be published in the *Washington Times* and also directed John Doe to appear on or before March 24, 2016. John Doe failed to appear, either in person or through pleadings, to defend his interest in <rat.com>.

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reveals that the Virginia attorney-issued subpoenas duces tecum were not signed by local counsel or any active member of the Virginia State Bar. As a consequence, the subpoenas are nullities. Va. S. Ct. R. 1A:4(2) ("Any pleading or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by local counsel."); Va. S. Ct. R. 4:9A(a)(2) ("[A] subpoena duces tecum may be issued by an attorney-at-law as an officer of the court if he or she is an active member of the Virginia State Bar at the time of issuance. . . . An attorney-issued subpoena duces tecum must be signed as if a pleading . . . ."); *Shipe v. Hunter*, 280 Va. 480, 483 (2010) ("[A] pleading, signed only by a person acting in a representative capacity who is not licensed to practice law in Virginia, is a nullity.").

The Court is particularly troubled by the service of these subpoenas duces tecum on out-of-state, non-parties in light of Virginia Legal Ethics Opinion 1495, which identifies this tactic as attorney misconduct involving dishonesty, fraud, deceit or misrepresentation. *See* Va. Legal Ethics Op. 1495 (1992) ("[T]he committee is of the opinion that it would be improper and violative of DR l-l02(A)(4) for a Virginia attorney to request a Virginia court to issue a subpoena duces tecum to obtain documents from an out-of-state individual, knowing that such subpoena is not enforceable, unless the subject of the subpoena has agreed to accept service."); *See also* Va. S. Ct. R. 1A:4(9) ("An applicant or out-of-state lawyer admitted *pro hac vice* may be disciplined in the same manner as a member of the Virginia State Bar.").

[5] Beutler did not seek to use the subpoena provisions of Virginia Code § 8.01-407.1, Identity of persons communicating anonymously over the Internet, and therefore the Court takes no position on its applicability to this case.

[6] *See, e.g.*, 28 U.S.C. § 1781 (Hague Evidence Convention); Ariz. R. Civ. P. 45.1; 735 Ill. Comp. Stat. 35/1; Colo. Rev. Stat. § 13-90.5-101; Nev. Rev. Stat. § 53.100; Va. Code Ann. § 8.01-412.8; V.I. Code Ann. tit. 5, § 4922 (each adopting the Uniform Interstate Depositions and Discovery Act); Va. Code Ann. § 16.1-89 ("A copy [of an attorney-issued subpoena duces tecum], together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance by the attorney."); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 446 (2015) ("Although the General Assembly has expressly authorized Virginia courts to exercise personal jurisdiction over nonresident parties, it has not expressly authorized Virginia courts to compel nonresident non-parties to produce documents located outside of Virginia.").

i. Beutler's Motion for Default Judgment

On March 31, 2016, Beutler filed the Motion for Default Judgment before the Court, seeking an order "directing Veri[s]ign to transfer the Domain Name into Plaintiff's ownership and control." On April 29, 2016, the Court held a default judgment hearing where local counsel for Beutler presented oral argument. The Court then took this matter under advisement.

II. STANDARD OF REVIEW

A defendant served by publication is in default if he or she fails to appear on or before the date specified in the order of publication. Va. Code Ann. § 8.01-318. "A default acts as an admission of a defendant's liability." *Carden v. U.S. Food Serv.*, 2007 Va. Cir. LEXIS 122, at *4 (Roanoke July 25, 2007) (citing *Funkhouser v. Million*, 209 Va. 89, 93 (1968)). Nonetheless, a defendant who has fallen into default "admits only what is well pleaded." *Wessel v. Bargamin*, 137 Va. 701, 709 (1923). A default judgment cannot be entered if the complaint does not state a cause of action. *Id.* Moreover, a default judgment is only valid if the trial court has territorial jurisdiction, subject-matter jurisdiction, and if adequate notice has been given to the defaulting party. *Landcraft Co. v. Kincaid*, 220 Va. 865, 870 (1980).

III. DISCUSSION

A. The Complaint does not state a cause of action upon which a default judgment can be entered because neither the Code of Virginia nor the Rules of the Supreme Court of Virginia authorize the "John Doe" pleading style in Internet domain name disputes.

The Court concludes that it cannot enter a default judgment against an unidentified John Doe defendant in an Internet domain name dispute. As a matter of Virginia practice:

> [I]t is not uncommon for a plaintiff to use the "John Doe" pleading style to initiate a lawsuit against a defendant whose identity is unknown at the time the lawsuit is filed *for the purpose of subsequently using discovery to learn the identity of the defendant so that proper service of process on the defendant can be obtained.*

Am. Online, Inc. v. Nam Tai Elecs., Inc., 264 Va. 583, 592 (2002) (emphasis added).

However, the John Doe pleading style is an interim device only to be used until a plaintiff complies with Virginia Code § 8.01-290 by providing the clerk of court with "the full name and last known address of each defendant . . . ." Va. Code Ann. § 8.01-290; Va. Code Ann. § 8.01-407.1 (allowing discovery "[i]n civil proceedings where it is alleged that an anonymous individual has engaged in Internet communications that are tortious . . . .").

Apart from the method of postponed identification described in *Nam Tai*, "The only explicit statutory authority for 'John Doe' pleading in Virginia is in the context of uninsured motorist cases." *Conley v. Bishop*, 32 Va. Cir. 236, 237 (Fairfax 1993); Va. Code Ann. § 38.2-2206(E) (permitting John Doe lawsuits against unknown vehicle owners or operators who cause

injury). "The Virginia legislature has not spoken to nor provided a statutory basis for further or other 'John Doe' actions." *Kovatch Mobile Equip. Corp. v. Frederick Cnty. Maint. Dep't*, 62 Va. Cir. 52, 55–56 (Roanoke 2003). Although one Virginia circuit court concluded that "there is no legislation or case law prohibiting 'John Doe' claims," *Lacoste Alligator, S.A. v. Doe*, 81 Va. Cir. 412, 414 (Arlington 2010), the plain language of Supreme Court of Virginia Rule 3:2, which governs the commencement of civil actions, "contemplates a named party" and "makes no specific provision for 'John Doe' pleading." *Conley*, 32 Va. Cir. at 237; Va. S. Ct. R. 3:2(b) ("The complaint shall be captioned with the name of the court and the full style of the action, which shall include the names of all the parties."). Indeed, the caption requirements of Rule 3:2 embrace what the Supreme Court of Virginia has called "the normative principle of disclosure." *Am. Online v. Anonymous Publicly Traded Co.*, 261 Va. 350, 364 (2001) (discussing the predecessor rule of Rule 3:2).

While Virginia trial courts certainly have the discretion to allow actual, identified parties to proceed pseudonymously when the "need for anonymity outweighs the public's interest in knowing the party's identity and outweighs the prejudice to the opposing party," that discretion has never been extended to cases involving defendants who remain unidentified after pre-trial discovery has been conducted. *Id.*; *see also* Va. Code Ann. § 8.01-15.1 (permitting plaintiffs to proceed anonymously under special circumstances). Consequently, with the exception of cases arising under the Virginia uninsured motorist statute, the trial courts of the Commonwealth have no authority to entertain default judgment motions brought against John Doe defendants.

This conclusion finds support among other jurisdictions and the federal courts, which similarly disapprove of John Doe lawsuits. *See, e.g.*, *Van Biene v. Era Helicopters*, 779 P.2d 315, 322–23 (Alaska 1989) ("The majority of courts considering this issue have held that jurisdiction to sue unknown or fictitious persons must be obtained pursuant to some express rule or statute."). In that regard, the United States Court of Appeals for the Fourth Circuit has observed, "The designation of a John Doe defendant is generally not favored in the federal courts; it is appropriate only when the identity of the alleged defendant is not known at the time the complaint is filed and the plaintiff is likely to be able to identify the defendant after further discovery." *Njoku v. Unknown Special Unit Staff*, 2000 U.S. App. LEXIS 15695, at *2 (4th Cir. July 7, 2000); *Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982) (["I]f it does not appear that the true identity of an unnamed party can be discovered through discovery or through intervention by the court, the court could dismiss the action without prejudice."). For instance, in *Njoku v. Unknown Special Unit Staff*, the Fourth Circuit vacated the district court's award of damages against five unnamed correctional officers because there was "no basis to permit a judgment against an unidentified John Doe defendant to be sustained." *Id. at* *2–3; *Price v. Marsh*, 2013 U.S. Dist. LEXIS 137153, at *19 (S.D. W. Va. Sept. 25, 2013) ("Where a party is not known or identified, a cause of action simply does not yet exist. No relief can be granted against an unidentified party.").

The Court finds no reason for a different result under Virginia law. More than fifty years ago the Supreme Court of Virginia determined, "A complaint which shows on its face that an essential allegation is not susceptible of proof does not state a cause of action." *Patterson v. Anderson*, 194 Va. 557, 569 (1953). Consistent with *Patterson*, where a complaint brought without statutory authority fails to identify a John Doe defendant after subsequent discovery, an

allegation essential to the entry of a judgment against a particular person is not susceptible of proof. *See id.*; *Price*, 2013 U.S. Dist. LEXIS 137153, at *19; *Am. Online, Inc. v. Nam Tai Elecs., Inc.*, 264 Va. 583, 592 (2002). Indeed, Beutler acknowledges as much in the Complaint, stating, "Plaintiff will amend this Complaint to allege Defendant's true name and capacity when ascertained." However, Beutler has not amended the Complaint and John Doe remains unknown despite Beutler's efforts to discover his identity. The Court cannot enter a default judgment against John Doe in the absence of an express rule or statute that authorizes the John Doe pleading style in Internet domain name disputes.

B. An unidentified John Doe defendant cannot be served by publication under Virginia Code § 8.01-316 because "John Doe" does not describe an actual party defendant against whom a lawsuit is brought.

The Court must also determine whether John Doe was properly served by publication and defaulted upon failing to answer or appear by the date specified. A fundamental principle of due process guides this inquiry: A party must "be given notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree or order may be entered affecting his right to liberty or property." *Doe v. Brown*, 203 Va. 508, 512 (1962) (quotation omitted). In addition, because service by publication is "constructive only, the order of publication and the statute authorizing it both must be strictly construed." *Dennis v. Jones*, 240 Va. 12, 18 (1990).

The touchstone of constitutionally adequate notice is whether the method of service used was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In *Mullane v. Hanover Bank & Trust Company*, the Supreme Court of the United States acknowledged that service by publication typically comports with constitutional due process when the name or address of an interested party is unknown or not reasonably ascertainable. *Id.* at 316; *see also Schroeder v. New York*, 371 U.S. 208, 212–13 (1962).

In accordance with the constitutional due process requirements set forth in *Mullane* and its progeny, the Code of Virginia provides for service by publication when:

> [D]iligence has been used without effect to ascertain the location of the *party* to be served; or . . .
>
> [T]he last known residence of the *party* to be served was in the county or city in which service is sought and that a return has been filed by the sheriff that the process has been in his hands for twenty-one days and that he has been unable to make service . . . .

Va. Code Ann. § 8.01-316(A)(1)(b)–(c) (emphasis added).

Strictly construing this statute, as the Court must, the plain and unambiguous language of Virginia Code § 8.01-316(A)(1)(b)–(c) prescribes service by publication on a "party."[7] *See id.* The Court concludes that the term "party" cannot be interpreted to permit service by publication on an unidentified John Doe defendant. Although Title 8.01 of the Code of Virginia does not define "party" for the purposes of service by publication, a "party" is "one by or against whom a lawsuit is brought." *Jeneary v. Commonwealth*, 262 Va. 418, 428 (2001) (quoting Black's Law Dictionary) (internal quotation omitted). Stated more exactly, the term "'party' is a technical word having a precise meaning in legal parlance, which is to *describe the actual parties to the suit*." *Id.* (emphasis added).

In contrast, "John Doe" is a fiction whose name does not describe an actual party to a lawsuit because, by nature, "John Doe" is unknown. *See id.*; *Conley v. Bishop*, 32 Va. Cir. 236, 238 (Fairfax 1993) (holding that "John Doe" was not a misnomer of the newly named defendant because the plaintiff was not harboring a mistake about the identity of the proper party; the identity simply was not known). It follows that "John Doe" is not a "party to be served" within the meaning of Virginia Code § 8.01-316(A)(1)(b)–(c). Even assuming that service by publication on an interested party whose name or address is not reasonably ascertainable comports with constitutional due process, Virginia Code § 8.01-316(A)(1)(b)–(c) is limited to actual parties and excludes fictitious John Does from its scope. *See Jeneary*, 262 Va. at 428. Accordingly, in this case, Beutler has yet to effect service of process on the person responsible for transferring <rat.com> from GoDaddy to TLD. Without proper service of process alerting an actual party defendant to the commencement of this action, the Court does not have jurisdiction to enter the default judgment requested. *See e.g.*, *Pate v. Southern Bank & Trust Co.*, 214 Va. 596, 597 (1974) ("[A] court cannot render a personal judgment against an individual unless that court has jurisdiction over the person. Jurisdiction is usually obtained by service of process . . . .").

C. Verisign is a necessary party because the Court cannot award complete relief among those already parties to this action.

Finally, the Court must determine whether it has the authority to order non-party Verisign to transfer <rat.com> to Beutler without Verisign first being joined as a necessary party. Despite the fact that the Order of Publication drafted by Beutler's counsel directed a copy of the Order to be "mailed to *the [n]ecessary party to this action: Verisign, Inc.*" Beutler asserts that Verisign need not be joined as a party defendant because, "on March 25, 201[6], and before Plaintiff filed his Motion for Default Judgment, Plaintiff requested Veri[s]ign approve the language in the proposed order." In support of this contention, Beutler points to an e-mail chain in which counsel for Verisign wrote, "This will be fine." in an apparent reference to Beutler's proposed order of default judgment. The Court disagrees with Beutler's analysis.

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[7] Virginia Code § 8.01-316(A)(2) also provides for service by publication "when a pleading (i) states that there are or may be persons, whose names are unknown, interested in the subject to be divided or disposed of; (ii) briefly describes the nature of such interest; and (iii) makes such persons defendants by the general description of 'parties unknown' . . . ." Beutler cannot avail himself of this provision: He did not make "parties unknown" defendants in any pleading and otherwise failed to strictly comply with the requirements of Virginia Code § 8.01-316(A)(2). Therefore, the Court declines to address the applicability of Virginia Code § 8.01-316(A)(2).

The Supreme Court of Virginia defines the term "necessary party" broadly:

> Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

Synchronized Constr. Servs. v. Prav Lodging, LLC, 288 Va. 356, 364 (2014).

In addition, "the necessary party doctrine is calculated to ensure that all parties central to a dispute can have their interests resolved, so that absent parties' interests are not adversely affected and participating parties may be awarded complete relief." *Id.* at 366. The necessary party doctrine therefore requires a court to determine whether it can award a plaintiff complete relief among those already parties to an action. *See e.g.*, Va. S. Ct. R. 3:12(a) (addressing persons to be joined if feasible).

Here, Verisign and John Doe are not party defendants before the Court. Moreover, Virginia lacks a statutory framework comparable to the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), that would require Verisign "to expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name . . . . " 15 U.S.C. § 1125(d)(2)(D)(i)(I).[8] Consequently, Beutler's request for an order directing Verisign to transfer <rat.com> is in the nature of a mandatory injunction directed toward a non-party that, in this case, also happens to be in possession of the disputed subject matter.

A mandatory injunction is an equitable remedy that is used "to undo an existing wrongful condition; but its use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue."[9] *WTAR Radio-TV Corp. v. City Council of Virginia Beach*, 216 Va. 892, 894 (1976). However, to render a non-party to an injunction amenable to its terms, "A

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[8] The full text of this subsection provides:

> (D) (i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall--
> (I) expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and
> (II) not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.
> (ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

[9] A mandatory injunction is an extraordinary remedy that requires Beutler to prove (1) that he would suffer irreparable harm if the injunction were not granted and (2) that he has no adequate remedy at law. *Wright v. Castles*, 232 Va. 218, 224 (1986). Beutler failed to address either of these prerequisites in his pleadings.

non-party must have actual notice or knowledge of the injunction, and the evidence must show that the non-party violated the terms of the injunction while acting as *an agent of or in concert with one or more of the named defendants*." *Powell v. Ward*, 15 Va. App. 553, 556 (1993) (emphasis added) (citing *Rollins v. Commonwealth*, 211 Va. 438 (1970)). Thus, if Verisign resists an order requiring it to transfer <rat.com> to Beutler, Verisign would only be subject to the contempt power of the Court if Beutler proved Verisign acted as an agent of, or in concert with, John Doe. *See id.*

Under similar circumstances, other jurisdictions have determined that mere inactivity on the part of a non-party registry or web hosting service does not constitute aiding and abetting the violation of an injunction. *See e.g.*, *Blockowicz v. Williams*, 630 F.3d 563, 568 (7th Cir. 2010) ("[T]he fact that Xcentric is technologically capable of removing the postings does not render its failure to do so aiding and abetting. Xcentric's and Magedson's mere inactivity is simply inadequate to render them aiders and abettors in violating the injunction."); *North Face Apparel Corp. v. Fujian Sharing Import & Export Ltd. Co.*, 2011 U.S. Dist. LEXIS 158807, at *6 (S.D.N.Y. June 24, 2011) ("Because Public Interest Registry was not joined as a party in the underlying lawsuit, and was not an officer, agent, servant, employee, or attorney of any defendant, I lacked the authority to order Public Interest Registry affirmatively to act, i.e., to disable or otherwise render inactive defendants' infringing domain names and transfer them to plaintiffs' ownership and control.") (quotations, brackets, and citation omitted).

The Court is persuaded that the same would be true in this case. Without the ability to issue a binding injunction against John Doe or Verisign, the Court cannot award Beutler complete relief among those already parties to this action. Consequently, Verisign is a necessary party that has not been joined as a party defendant. The Court declines to enter an order that would amount to little more than a paper tiger.

IV. CONCLUSION

The Motion for Default Judgment is DENIED without prejudice to being renewed upon amendment of the Complaint and service upon the Defendants in a manner consistent with this Opinion Letter and the enclosed Order.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

Enclosure

OPINION LETTER

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JON BEUTLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL-2016-13256
	)	
JOHN DOE,	)	
	)	
Defendant.	)	
	)	
(*In re* <rat.com>)	)	

ORDER

THIS CASE came before the Court on April 29, 2016, upon Plaintiff's Motion for Default Judgment; and

IT APPEARING to the Court, after considering the Motion, pleadings, and exhibits, the relevant authorities, and hearing argument from counsel, that the Motion is not well-taken; it is therefore

ORDERED, for the reasons stated in the Court's Opinion Letter, that Plaintiff's Motion is DENIED without prejudice to being renewed upon amendment of the Complaint and service upon the Defendants; and

IT IS FURTHER ORDERED that Plaintiff is granted leave to amend the Complaint in accordance with Rule 1:8 of the Rules of the Supreme Court of Virginia. Any further motions in this action should be placed on the docket of Judge Daniel E. Ortiz.

ENTERED this 16th day of August, 2016.

[redacted]

Daniel E. Ortiz
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.