

Judge Prepared to Sanction Lawyers in Cybersquatting Feud

By: Marisa Kendall

SAN JOSE — A state judge has proposed heavy sanctions against a Cupertino law firm for what she has called “egregious” and “extreme” ethical violations, including the manufacture and destruction of evidence. Santa Clara County Superior Court Judge Mary Arand is prepared to impose a combined \$500,000 in sanctions against Grellas Shah partners George Grellas and Dhaivat Shah, associate David Siegel and their client, public safety software provider VeriPic Inc.

VeriPic and its lawyers continued to pursue a 2009 defamation lawsuit against VeriPic competitor Foray Technologies, even after they should have known the suit had no merit, Arand wrote in a 59-page order issued Friday. In addition, it appears the attorneys instructed their client to fabricate certain evidence and destroy other evidence to support the fictitious claims, Arand wrote.

“It appears that the misconduct of plaintiffs’ counsel in the course of litigation and pervasive litigation abuse is so egregious and deliberate such that it constitutes fraud on the court,” Arand wrote.

James Greenan of San Ramon firm Greenan, Pepper, Sallander & Lally, filed a motion for sanctions last year on behalf of Foray. Arand responded by proposing terminating sanctions, monetary sanctions of \$250,000 against VeriPic and another \$250,000 against the Grellas Shah attorneys and ordered VeriPic and Grellas Shah to show cause why the sanctions should not be imposed.

At a brief hearing Friday, Arand said she would give everyone full opportunity to be heard. Both sides will return to court May 12 to discuss the next step.

Morgan Franich Fredkin & Marsh partner Mark Fredkin is defending VeriPic against the motion for sanctions. Hull & Ellenberg partner Greg Hull is defending VeriPic President John Kwan. The lawyers declined to comment after the hearing.

The conflict began with accusations that VeriPic, which sells software to law enforcement organizations, was misleading customers with phony domain names. VeriPic bought dozens of domains using its competitors’ names—including www.Foray.ca—and redirected the traffic to VeriPic’s website, according to Greenan’s motion. VeriPic also registered more than half a dozen domains using names of third-party groups—according to Foray’s attorneys—and visitors were directed to a site that was designed to appear neutral

and educational, but was in fact a VeriPic marketing site.

In May 2009, Foray sent a letter to its customers accusing VeriPic of misleading consumers with the phony websites. In response, VeriPic sued Foray for defamation.

VeriPic and Kwan filed that lawsuit knowing it was frivolous because VeriPic had, in fact, bought competitors’ domain names, Arand wrote. At a certain point, she concluded, Grellas Shah attorneys should have known as well.

Last year, VeriPic’s Internet service provider, Big Biz Internet Services, produced emails showing Kwan making arrangements with Big Biz to obtain those domain names and redirect traffic to VeriPic’s websites. Arand found VeriPic attempted to hide those emails during initial discovery.

When VeriPic began to feel a backlash, Kwan first asked Big Biz to hide the fact that his company was behind the websites, and then asked Big Biz to dump the domain names, according to emails quoted in Arand’s order.

In 2010, Kwan emailed Big Biz, complaining some of the domain names still showed VeriPic as the owner and weren’t listed to expire until 2011.

“The lawyer is unhappy with this,” Kwan wrote. “They want to see VeriPic Inc. removed from the owner section of the .uk domain and to have the expiration date put into 2009 or show expired.”

That suggests Grellas Shah was complicit in filing the meritless lawsuit, Arand wrote.

“It appears that the assertions in [Foray’s] letter were true and Kwan went to great lengths to hide such facts, apparently at the direction of, or assistance from, plaintiffs’ counsel,” she wrote.

But red flags appeared in the case even before the Big Biz emails came out.

In March 2012, former Big Biz President David Lai reversed testimony he had given the month before. Big Biz had not done a trademark search of the domain names before registering them to VeriPic, Lai said, though he had previously said otherwise. It appears Shah, who represented both Lai and Kwan, instructed Lai on what to say in his original deposition, Arand wrote. Lai later obtained new counsel.

Grellas Shah and VeriPic did not slow down following Lai’s reversed deposition, Arand wrote. “Rather than concede that its claims were without merit, it appears that VeriPic and its counsel instead have taken an unusually aggressive position to ramp up litigation,” she wrote.

Over the past five years, VeriPic has filed six amended complaints, increasing the demand for



James Greenan,
Greenan, Pepper, Sallander & Lally

damages from \$300,000 to \$225 million.

Despite the increased damages demands, VeriPic’s causes of action fell away one by one—dismissed by the court or withdrawn by VeriPic. The remaining claims accuse Foray of false advertising and unfair competition.

Foray has also filed a cross complaint against VeriPic, accusing the company of trademark infringement and cybersquatting.

VeriPic’s suit, which produced more than 50,000 pages of files, has been a burden on a court already struggling under budget cuts, Arand said at Friday’s hearing.

Greenan believes the sanctions Arand has proposed are justified.

“I’ve been practicing law for 40 years and I’ve never seen anything even come close to the level of conduct that’s described in the order,” Greenan said.

Attorneys are required to self-report sanctions of \$1,000 or more to the state bar, according to the California State Bar’s website.

Retired Justice James Lambden, who served 17 years on the bench of the First District Court of Appeal in San Francisco, said sanctions on the level Arand has proposed are unusual.

“It is rare,” Lambden said, “because of the potentially devastating effect on a professional career.”

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