FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

2007 JUN 21 P 12: 25

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

GRADUATE MANAGEMENT ADMISSION COUNCIL **1600 Tysons Boulevard** **Suite 1400** **McLean, Virginia 22102,** **Plaintiff,** **v.** **LEI SHI, d/b/a "SCORETOP.COM"** **140 Beaumont Trail** **Aurora, Ohio 44202, and** **JOHN DOES 1-5,** **Defendants.**	**Civil Action No.** 1:07CV605 LMB/BRP

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

Plaintiff Graduate Management Admission Council ("GMAC") hereby alleges as follows:

NATURE OF ACTION

1. This is a civil action for damages and injunctive relief against defendant Lei Shi, d/b/a "scoretop.com" ("Shi") and John Does 1-5 ("Doe Defendants") (collectively, "Defendants"). Four causes of action are asserted: direct copyright infringement, contributory infringement, vicarious liability for copyright infringement by others, and tortious interference with contractual rights.

2. GMAC develops and owns the Graduate Management Admission Test ("GMAT"), which is a standardized exam that is relied upon by business schools around

the world to assess the qualifications of school applicants. Defendants operate an internet-based commercial test preparation program which purports to assist prospective examinees in preparing to take the GMAT. As part of that program, they have improperly solicited, obtained, copied and distributed copyrighted GMAT materials as to which GMAC is the copyright owner.

JURISDICTION AND VENUE

3. Plaintiff GMAC is a non-profit Virginia corporation having its principal place of business at 1600 Tysons Boulevard, Suite 1400, McLean, Virginia 22102.

4. Defendant Shi is an individual who, on information and belief, resides in Ohio, where his address is 140 Beaumont Trail, Aurora, Ohio 44202.

5. "Scoretop.com" is a website domain name that currently appears on a registry of domain names with "Domains by Proxy, Inc." listed as the registrant and the administrative and technical contact, and "Wild West Domains, Inc." listed as the "current registrar." On information and behalf, Shi is the person who originally registered, and who continues to own, the scoretop.com domain name. He is also the person who administers, or helps to administer, the scoretop.com website, under the name "Stone."

6. The true names and capacities of John Does 1-5 are unknown to GMAC at this time. Upon information and belief, each of the John Doe defendants has helped administer the scoretop.com website and/or has posted GMAC's copyrighted material on the scoretop.com website. GMAC believes that information obtained in discovery will lead to the identification of each Doe Defendant. GMAC will amend its complaint to allege the true names and capacities of the Doe Defendants as they are ascertained.

7. The matter in controversy includes claims brought under federal law, exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different States. The Court has original subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1338(a).

8. The Court has supplemental jurisdiction over GMAC's state law claim under 28 U.S.C. § 1367(a).

9. Venue is proper under 28 U.S.C. §§ 1391 and 1400(a).

10. This Court has personal jurisdiction over Shi based upon at least the following activities: (a) commercial transactions that have occurred between Shi and residents of the Commonwealth of Virginia, and on-going interactions and communications between Shi and residents of the Commonwealth of Virginia through use of the Scoretop website; (b) Shi's acts in interfering with contracts entered into by GMAC, a Virginia company, and individuals who take the GMAT exam; and (c) the harm that has been caused to GMAC in this district as a result of Shi's unlawful actions.

11. Upon information and belief, this Court has personal jurisdiction over the Doe Defendants based on at least one or more of the following activities: (a) commercial transactions that have occurred between the Doe Defendants and residents of the Commonwealth of Virginia, and on-going interactions and communications between the Doe Defendants and residents of the Commonwealth of Virginia through use of the Scoretop website; (b) the Doe Defendants' acts in interfering with contracts entered into by GMAC, a Virginia company, and individuals who take the GMAT exam; and (c) harm that has been caused to GMAC in this district as a result of the Doe Defendants' unlawful actions.

A. Factual Allegations Regarding GMAC And The GMAT

12. GMAC was formed in 1954 as a supporting organization for business schools. GMAC now has 154 university business school members located in the United States, and 29 university business school members from the international community.

13. Among other activities, GMAC develops and owns all rights in and to the Graduate Management Admission Test, or GMAT. The GMAT is designed to help business schools assess the qualifications of applicants for advanced study in business and management. It measures basic verbal, quantitative, and writing skills that are developed over a long period of time. Of the several thousand graduate management programs offered worldwide, more than 4,000 programs use the GMAT. A significant number of those programs are located at schools in Virginia, including the University of Virginia, the College of William & Mary, George Mason University, the University of Richmond, Hampton University, Virginia Polytechnic and State University, and Virginia Commonwealth University.

14. The GMAT is comprised of three sections, the Analytical Writing Assessment (or "AWA"), the Quantitative Section, and the Verbal Section. The Analytical Writing Assessment section, comprised of two 30-minute essays, measures the ability to think critically and communicate complex ideas through writing. The Quantitative Section contains 37 multiple-choice questions that have five answer choices per question and two question types, Data Sufficiency and Problem Solving. This section measures basic mathematical skills and understanding of elementary concepts as well as the ability to reason quantitatively, solve quantitative problems, and interpret graphic data. The Verbal Section contains 41 multiple choice questions with five answer choices

per question, in the areas of Reading Comprehension, Critical Reasoning and Sentence Correction. The Verbal Section measures the ability to understand and evaluate what is read and to recognize basic conventions of standard written English.

15. The GMAT is administered at test centers around the world in a computer-based (rather than paper-based) format. During the 2005-2006 testing year, for example, the GMAT was administered over 200,000 times.

16. The GMAT is a computer-adaptive exam. This means that the multiple-choice questions are dynamically selected from a pool of available questions as the examinee takes the test, based upon the examinee's ability level and whether the previous questions are answered correctly or incorrectly. The questions range in difficulty from low to moderate to high difficulty.

17. The development of GMAT test questions and question pools is a lengthy, painstaking and expensive process involving multiple individuals and several levels of review and analysis.

18. At present, it costs GMAC approximately $2,400 to develop a single verbal or quantitative multiple-choice test question of the quality necessary to be administered on the GMAT.

19. It has been, and will continue to be, the regular practice of GMAC to register GMAT tests and test questions with the Register of Copyrights pursuant to and in compliance with the secure-test regulations issued by the Copyright Office. The "TX" registration numbers assigned by the Copyright Office to GMAT forms and/or sets of computer-based items registered by GMAC include the following: TX 6-324-921, TX 5-564-049, TX 5-534-428, TX 4-619-436, 4-478-971, 4-457-103, TX 4-383-060, 4-284-

162, 4-187-373, TX 4-173-739, TX 4-117-484, TX 4-073-489, and TX 4-028-130. At all relevant times, GMAC has been the sole owner and holder of all right, title and interest in and to the copyrights in the GMAT tests and test questions at issue.

20. The GMAT tests and test questions are original, copyrightable materials, and GMAC has complied in all respects with the requirements of the Copyright Act, 17 U.S.C. § 101 *et seq*. It therefore enjoys certain exclusive rights with respect to the test and the test questions, including the exclusive right to copy, distribute, display, and publish the tests and test questions; to authorize others to do so; and to prepare derivative works.

21. The GMAT is a "secure" test, which means that the questions on the exam are confidential and have not been previously disclosed by GMAC to the general public.

22. Confidential GMAT test questions are not intended to be made available to the public except during actual test administrations, when GMAC elects to retire the questions, or under such other circumstances as GMAC has authorized.

23. The current "GMAT Information Bulletin" includes the following text:

> You may not communicate with anyone about the content of the GMAT® test while the test session is in progress, during any breaks, or after administration of the test.
>
> ***
>
> Removing or attempting to remove test content from the test center is strictly prohibited. Under no circumstances may any part of the test content viewed during a test administration be removed, reproduced, and/or disclosed in any form by any means (for example, verbally, in writing, or electronically) to any person or entity at any time. This includes, but is not limited to, discussing or disclosing such test content via e-mail; in any Internet "chat room," message board, or other forum; or otherwise. This disclosure prohibition applies before, during, and after any administration of the GMAT ® exam.

***

> [T]he GMAT® test questions administered at test centers are valuable copyrighted, trade secret property of GMAC®. These test questions have not been previously published or disclosed to the public at large. Before you take the GMAT® exam, you agree to maintain the confidentiality of all test questions administered to you during the test. A disclosure of test questions in any form by any means in violation of this confidentiality agreement undermines the integrity and security of the GMAT® exam.

The Bulletin is posted on GMAC's website and is available to examinees well in advance of their test date. All examinees must agree to abide by the policies set forth in the Bulletin in order to register for the exam.

24. The "GMAT® Examination Testing Rules Agreement" is given to examinees at the test center. By providing a digital signature to this document, examinees confirm that they "will not try to record, copy, or disclose any exam question or answer, in whole or in part, in any form or by any means (orally, in writing, on any Internet 'chat room', or otherwise)."

25. Examinees are also given a "GMAT® Nondisclosure Agreement" at the test centers. It currently provides, in relevant part, as follows:

> I understand that the GMAT™ test is a confidential and secure test, protected by the laws in the United States and elsewhere. I agree that I will not discuss the content of the test with anyone and I will not record, copy, or disclose any exam question or answer, in whole or in part, in any form or by any means (orally; in writing; in any Internet "chat room," message board, or forum; or otherwise).

All examinees view the Nondisclosure Agreement on their computer screen the day of testing. They must expressly agree to comply with its terms before being allowed to test.

26. In order to help prospective examinees familiarize themselves with the types of questions contained on the GMAT and otherwise prepare for the exam, GMAT

publishes previously administered, "retired" GMAT questions. For example, GMAC makes the GMATPrep® software available to all prospective examinees at no cost. The GMATPrep® software contains hundreds of publicly released, non-secure GMAT questions in an electronic format that is similar to what examinees will encounter when they take the actual GMAT exam. In addition, each year GMAC publishes "The Official Guide for GMAT® Review," which includes hundreds of sample test questions. The current Official Guide (11th Edition) can be purchased by examinees at a cost of $36.95. Additional practice questions are found in "The Official Guide for GMAT® Verbal Review" and "The Official Guide for GMAT® Quantitative Review," each of which is available for purchase at a cost of $16.95. GMAC also makes available paper tests that contain actual, retired GMAT questions, at a cost of $25 for three tests.

27. GMAC makes its Official Guide (11th Edition) and related Verbal and Quantitative supplements available to test preparation programs at a discounted bulk rate. This enables test preparation programs to acquire sample GMAT practice questions in a lawful manner that does not infringe GMAC's copyrights.

B. <u>Defendants' Unlawful Conduct</u>

28. This case involves the unauthorized reconstruction and disclosure of copyrighted GMAT test questions and answers by Shi, the Doe Defendants, and/or other individuals for whose conduct Shi and/or the Doe Defendants are responsible. Rather than purchase publicly released GMAT preparation materials from GMAC to use in their GMAT preparation program, Defendants have obtained, used, and distributed GMAT questions that have been improperly and unethically disclosed by individuals who had already taken the GMAT.

29. Through an interactive website accessed at the internet address "www.scoretop.com," Defendants offer forums where visitors to the site can share information about the GMAT. The website also provides practice GMAT questions and answers. Defendants previously operated a similar site at the internet address "www.64168.com." On both sites, Defendants have posted and downloaded, and encouraged and helped others to post and download, copyrighted GMAT materials.

30. Scoretop allows guest visitors limited free access to the website. The website, however, heavily promotes its restricted-access "VIP membership." For $30.00, users obtain 30 days' VIP access.

31. A benefit of VIP membership, as marketed on the Scoretop website, has been obtaining access to question "sets" and "JJs." "Sets" are collections of previously administered GMAT test questions that Defendants and/or others have unlawfully assembled into "sets" which have been made available on the Scoretop website. "JJ" is an acronym used on the scoretop website for "jungle juice" or "jijings." It refers to actual GMAT questions that have been reconstructed and reproduced on the Scoretop website; these are GMAT questions which GMAC has not released publicly. "MJJs" purport to be reconstructed math (quantitative) questions, and "VJJs" purport to be reconstructed verbal questions.

32. Scoretop has promoted VIP membership with numerous forum postings that extol the benefit of having access to "JJs." Many of these postings come from chatters who purportedly earned high GMAT scores because of their Scoretop membership, and who provide "debriefings" of their GMAT experience.

33. For example, in a posting dated May 30, 2006, titled "The Wicked Sick Guide to GMAT Domination," "h3adsh0t" stated that he had "slain the beast literally in its very lair," having taken the GMAT "in the testing center [in Virginia] that's closest to the GMAC headquarters." He then offered the following advice to prospective examinees:

> Take [Scoretop's] VIP....
>
> [G]o through as many MJJs as you possibly can. They are invaluable. They are priceless. Let me say it again -- they're inestimable.... The current month's JJ's represent the questions that are most probable to appear on the exam, but they're not the only ones that may appear.... I ... saw 10-12 JJs [when I took the GMAT], word by word, and many of the other questions felt very familiar.

In addition to making this posting, and prior to taking the GMAT exam, "h3adsh0t" regularly participated in "Forums" hosted on the Scoretop website, in which he and other Scoretop members exchanged information about the GMAT and discussed sample questions and answers.

34. Similarly, in a post-exam debriefing, "sammi" stated that he "got 3 successive [math] questions, of which all three were from scoretop Nov or Dec!.... [T]he confidence you derive out of solving a seen problem is incomparable."

35. Forum chatters have posted on the Scoretop website reconstructed GMAT questions and answers that they recalled seeing on the exam.

36. Defendants and their agents ask for and encourage such debriefings.

37. Individuals who have posted GMAT questions on the Scoretop website, and/or who have solicited such postings, are employed by or are agents of the Defendants, or their postings are otherwise subject to Defendants' control.

38. In addition to publishing and distributing confidential, copyrighted GMAT questions and answers, Defendants have unlawfully published and distributed non-confidential copyrighted GMAT materials. These materials include the GMAT Official Guide and question "sets" that include GMAT questions that GMAC has published in various derivative works.

39. The Defendants do not have and have never had permission to reproduce, publish, display, distribute copies of, or prepare derivative works based on any released or unreleased GMAT test questions or other copyrighted GMAT materials.

40. Defendants' misappropriation, use and distribution of GMAC's copyrighted materials has at all relevant times been, and continues to be, willful and knowing.

41. Defendant Lei Shi has taken the GMAT exam at least three times. He took the GMAT on September 14, 2002, October 11, 2002, and October 20, 2003.

42. On each occasion that he took the GMAT, Shi was informed in writing that GMAT examinees may not disclose the test questions or answers that they see when taking the test.

43. Notwithstanding his awareness of this non-disclosure obligation, Shi has actively encouraged examinees to post and discuss GMAT test questions and answers on the Scoretop website (and, previously, on the 64168.com website). He has also distributed and/or provided links to GMAT exam questions and answers, in whole or in part, to third parties by way of the Scoretop website (and by way of the 64168.com website).

44. Prior to filing this lawsuit, GMAC contacted Shi regarding his unlawful conduct. Infringing material nonetheless remains posted on the Scoretop website, and Shi continues to encourage "VIP members to bring in [(i.e., post)] any GMAT questions in doubt" for "discussions" with the Scoretop "tutors".

COUNT I: COPYRIGHT INFRINGEMENT

45. GMAC repeats the allegations above as if fully set forth herein.

46. Each version of the GMAT exam is an original work of authorship that is copyrighted under the laws of the United States on creation. GMAC owns the copyright in each of these GMAT exams and in the questions and answers contained therein.

47. Under the Copyright Act, 17 U.S.C. § 101 et seq., GMAC enjoys exclusive rights with respect to the GMAT tests and the questions and answers contained therein, including the exclusive rights to reproduce, distribute, publicly perform, display and create derivative works based on the tests and test questions and answers.

48. GMAC has been issued certificates of registration by the Register of Copyrights for the GMAT examination.

49. Defendants have not been authorized by GMAC to reproduce, publish, distribute copies of, or prepare derivative works based on any published or unpublished GMAT test or test questions or any other copyrighted GMAT works.

50. Defendants have copied, reproduced, distributed, published and/or displayed copyrighted GMAT test preparation materials (*e.g.*, the Official Guide) and copyrighted GMAT test questions, or derivations thereof, without permission or authorization from GMAC.

51. Defendants have willfully infringed and are continuing to infringe GMAC's copyrights by copying, reproducing, distributing, publishing, preparing

derivative works from, and displaying copyrighted GMAT test preparation materials and/or test questions, or derivations thereof.

52. Defendants' infringement of GMAC's copyrights has harmed GMAC, for which GMAC is entitled to damages and other relief.

COUNT II: CONTRIBUTORY INFRINGEMENT

53. GMAC repeats the allegations above as if fully set forth herein.

54. With knowledge of the infringing activity, Defendants have induced, caused, or materially contributed to the acts of third parties in infringing upon copyrights held by GMAC. Among other activities, they have done so by:

(a) Encouraging and/or soliciting others to post GMAT questions and other GMAT materials on the Scoretop website and the 64168.com website that are protected by the copyrights held by GMAC; and

(b) Distributing on the Scoretop website and the 64168.com website copies of GMAT questions and other GMAT materials that are protected by the copyrights held by GMAC.

55. Defendants' acts have harmed GMAC, for which GMAC is entitled to damages and other relief.

COUNT III: VICARIOUS LIABILITY FOR INFRINGING CONDUCT OF OTHERS

56. GMAC repeats the allegations above as if fully set forth herein.

57. Defendants possess the right and the ability to supervise what gets posted and accessed on the Scoretop website.

58. Defendants and their employees and agents have encouraged and induced others to use the Scoretop website (and the prior website at 64168.com) to post, discuss,

access, and distribute copyrighted GMAT questions and answers and other GMAT materials.

59. Defendants have an obvious and direct financial interest in having copyrighted GMAT questions and answers posted, discussed, accessed, and distributed on the Scoretop website: they are paid monthly membership fees by individuals who want access to the GMAT materials.

60. Defendants know, and have known at all relevant times, that other individuals are posting content on the Scoretop website that is copyrighted by GMAC, and/or that they are making such content available through links to other websites. Defendants also know that the disclosure and distribution of such GMAT materials has not been authorized by GMAC. Defendants are vicariously liable for these third-party infringements of GMAC's copyrights.

61. Defendants' acts have harmed GMAC, for which GMAC is entitled to damages and other relief.

COUNT IV: TORTIOUS INTERFERENCE WITH CONTRACTUAL RIGHTS

62. All GMAT examinees agree to comply with GMAC's testing policies as a condition of taking the GMAT exam. In exchange for being allowed to take the GMAT and having GMAC score their exams and report their scores to prospective business schools, examinees agree to comply with GMAC's testing policies.

63. GMAC's testing policies prohibit examinees from discussing or disclosing secure GMAT test questions or answers with or to third parties. This non-disclosure requirement is spelled out in the "GMAT® Information Bulletin," the "GMAT® Examination Testing Rules Agreement," and the "GMAT® Nondisclosure Agreement."

64. Defendants have been aware at all relevant times that GMAT examinees are subject to a non-disclosure obligation to GMAC. Indeed, non-disclosure requirements were imposed upon Shi when he took the GMAT.

65. Despite this knowledge, Defendants have encouraged third parties to breach their non-disclosure obligations by posting and/or discussing GMAT questions and answers on and by way of the scoretop.com website, and perhaps through other means.

66. GMAC has been financially harmed by the Defendants' tortious interference with GMAC's contractual rights, and is entitled to compensatory and punitive damages as a result of those breaches, as well as other relief.

PRAYER FOR RELIEF

WHEREFORE, GMAC respectfully requests that the Court:

(1) Enter a permanent injunction, as specifically provided by 17 U.S.C. § 502 and any other applicable law, that prohibits the Defendants, their agents, servants, employees, attorneys, assigns and all persons in concert or participation with them, from infringing in any manner GMAC's existing or future copyrights by copying, duplicating, distributing, posting, displaying, advertising, selling, adapting, publishing, reproducing, preparing derivative works based on, renting, leasing, offering or otherwise transferring or communicating in any manner, orally or in written, printed, audio, electronic, photographic, machine-readable, or other form, including but not limited to any publication on the internet, or communication to any agent, representative, employee, member, person or affiliate, or in written or downloadable electronic materials, any test questions that are identical or substantially similar to actual, copyrighted GMAT test

questions or other copyrighted GMAT material, or aiding, abetting, or licensing any other person to do the same;

(2) Enter an order, as specifically provided for in 17 U.S.C. § 503, impounding in unencrypted, plain text format:

(a) all copies of all test questions, answers, workbooks, software, simulated exams and other materials that are used by the Defendants and that contain test questions or other materials that infringe GMAC's copyrights, and

(b) all plates, molds, matrices, masters, tapes, disks, hardware, software and other articles for reproducing such infringing copies;

(3) Enter an order, as specifically provided by 17 U.S.C. § 503, for destruction of all infringing copies of materials that include all or any part of any copyrighted GMAT test questions or answers or any GMAC materials derived from such test questions or answers;

(4) Award GMAC:

(a) All profits earned by the Defendants, directly or indirectly, by reason of their infringement of GMAC's copyrights, plus GMAC's actual damages resulting from the infringement of GMAC's copyrights by the Defendants, as authorized by 17 U.S.C. § 504(b); or

(b) As an alternative to GMAC's actual damages and the Defendants' profits, and at the election hereinafter by GMAC, statutory damages based upon the Defendants' willful infringement in the maximum amount permitted by the Copyright Act, as authorized by 17 U.S.C. § 504(c);

(5) Award GMAC its costs incurred in this action, including reasonable attorneys' fees, as provided by 17 U.S.C. § 505 and by any other applicable law; and

(6) Enter an order requiring that Defendants file with this Court and serve upon GMAC, within thirty (30) days after the entry and service of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendants have complied with the injunction;

(7) Award GMAC compensatory and punitive damages, based upon Defendants' tortious interference with GMAC's contracts with other parties; and

(8) Award GMAC such other, further, different, or additional relief as this Court deems equitable and proper.

DATED: This, the 21st day of June, 2007

Respectfully submitted,

Joseph E. Hartman (VSB 44145)
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004-2623
(202) 662-0200
Fax: (202) 662-4643
jhartman@fulbright.com

Counsel for Plaintiff Graduate Management Admission Council

Of Counsel:
Robert A. Burgoyne
Caroline M. Mew
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004-2623
(202) 662-0200
Fax: (202) 662-4643
rburgoyne@fulbright.com
cmew@fulbright.com