AEI v. Xcentric -- Response to "Newly Discovered Evidence"

David Gingras **Wed, Jul 14, 2010 at 12:26 PM**
Reply-To:
To: Lisa Borodkin · blackertesq
Cc: Maria Crimi Speth

Lisa,

Despite the odd posture of this case, I wanted to provide you with some additional disclosure about the "newly discovered evidence" issue you mentioned to Judge Wilson at Monday's hearing. In order to be clear – when I say "odd posture", what I mean is this: you asked for and received an order from Magistrate Walsh staying discovery as to all issues other than your extortion claim. Of course, summary judgment has been granted in favor of Defendants on the extortion claim, so that claim is no longer part of the case (and, as an aside, unlike an order granting a motion to dismiss with leave to amend, my view is that when summary judgment has been granted on a claim, that ruling is *res judicata* and since the claim was adjudicated on the merits, it cannot be repleaded). What this means is that because there is no extortion claim left in the case, discovery is stayed as to any remaining claims, whatever they may be.

Nevertheless, Maria and I both expect that you will file an amended complaint which attempts to raise a RICO/wire fraud claim based, at least in part, on the "newly discovered evidence" you mentioned. As such, I want to fully explain my view of this issue so that you can understand why this evidence does not support a wire fraud claim. As Maria already indicated, if Plaintiffs try to raise a claim based on this issue, it will force me to become a witness in the case since I am the only person with first-hand knowledge of these facts. While I am reluctant to do this, I am certainly prepared to do so if necessary.

In terms of the evidence, the facts are as follows. In late November 2009, I received a letter from a lawyer named Frank Eppes. A copy of that letter is attached. As you can see, the letter is very simple.

On December 1, 2009, I sent an email to Mr. Eppes responding to his letter. A string of emails between me and Mr. Eppes are also attached. There are additional later emails relating to the case, but these are the primary ones which explain the background.

As you can see, I informed Mr. Eppes that Ripoff Report was not willing to remove the report at issue, but we were willing to redact his client's unusual surname from the report so that anyone performing a Google search of the name of the 16-year old daughter of the deceased subject of the report would not find the complaint. Mr. Eppes responded to say this was acceptable to his client, and we therefore agreed to make the redaction. (NOTE – my December 2, 2009 email back to Mr. Eppes contains a typo. The text currently says, in part, "However, you can inform your clients that our decision was based in large part on the fact that their lawyer sent a simple, straightforward request which did contain the usual pages and pages of blusterous threats we often see." This sentence should have included the word "not" between the words "did contain").

For technical reasons, this change apparently did not work at first, and we therefore had to make a second attempt

to address the matter (redacting material from the site is much more complicated than simply deleting a file from a computer). The second attempt was successful and for a period of several months we believed the issue was resolved. Unfortunately, the author apparently discovered that the post had been redacted, and he decided to simply repost the original version or make some other update which replaced the name; I don't recall exactly which one it was but I could make that determination by reviewing other emails.

This resulted in one of the affected family members, , contacting me repeatedly requesting that I devote more time to fixing the issue (again), and asking or implying that I should help monitor the situation in the future. Unfortunately, due in large part to the demands placed on my time by your clients' lawsuit, after spending hours and hours dealing with the matter, I had to inform Ms. that I could not devote any further resources to her request. This is how the matter was left. Of course, if my litigation workload becomes lighter in the future, I may be willing to resume my assistance to Ms. , but it's always possible that no matter how many times we try to help her, those efforts could be futile if the author just continues reposting the same information.

In sum, I do not think this event qualifies as newly discovered evidence nor does it support a wire fraud claim for at least four reasons.

First, I recall personally mentioning the matter to you (though not by name) several months ago; before you "discovered" it by speaking to Jan Martin Smith.

Second, the circumstances of the matter are entirely consistent with Ed's deposition testimony in which he freely admitted modifying a report about Google co-founder Sergey Brin (this discussion occurred around pages 40-42 of Ed's June 8, 2010 deposition). Of course, in the deposition you asked Ed whether he had ever "taken down" the report about Mr. Brin, and I objected on the basis that it misstated his testimony – it's a well-known fact that the report was not taken down, the name was simply changed from Brin to Bonoi or something similar. You knew about this event with ample time to include a discussion of it in your MSJ opposition, but you did not do so.

Third, as you know, this issue (about Sergey Brin) has been discussed *ad nausem* on the SEOmoz "Anatomy of a Ripoff Report Lawsuit" page which I know you have reviewed, so it's simply not possible for you to allege that you only recently discovered that Ripoff Report has occasionally redacted information from the site. Indeed, you asked Ed about it in his deposition because you were aware that the report about Brin was changed.

Fourth, as you know we previously corresponded with and informed him we were willing to redact certain information from a report about him, which we eventually did. Because I know you have spoken with Mr. and have listed him as a witness in this case, you were certainly aware that Ripoff Report does, in fact, redact information from reports as we did for Mr. I and for Ms. That fact (which was never disputed) was not newly discovered because you already knew about it several weeks ago, if not long before.

In short, the facts of the "newly discovered" matter do not establish that Ripoff Report is disseminating false information when we say "we never remove reports". On the contrary, the report about Mr. wasn't removed and I never told Ms. Smith that it was removed; I merely told her that we agreed to try to help the family, which was entirely true.

In terms of legal significance of these facts, even if we assume *arguendo* that it's false for Ripoff Report to say that reports are never removed, as Judge Wilson already implied in his questioning to you, this couldn't support a wire

fraud claim because there's no evidence showing that your clients relied on this representation or that they were harmed in any way by it. Without both of those showings, these facts could not support a wire fraud/RICO claim for the exact reasons explained in a case cited on page 3 of my MSJ reply brief -- *Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006).

As explained in *Sosa*, the plaintiff alleged that the defendant (DirectTV) committed two RICO violations based on mail fraud and wire fraud arising from a demand letter that DirectTV sent to people it believed were stealing satellite TV signals. The class action plaintiffs alleged that these demand letters constitute extortion, unfair business practices, and mail/wire fraud. In particular, the plaintiffs' claims alleged that the letter from DirectTV contained a false statement that a lawsuit would be filed "within 14 days" if the target did not pay up. Even assuming that statement was false, the court concluded that it could NOT support a mail fraud claim:

> Here, Sosa argues that DIRECTV's threat to sue "within 14 days" was false and constituted mail fraud. Sosa acknowledges that many thousands of lawsuits were ultimately filed against recipients who failed to settle DIRECTV's claims, but he contends that most of these suits were not filed within 14 days, and that DIRECTV never intended to sue all of those to whom it sent the letter. We are dubious that this statement would be actionable under any circumstances. We need not reach this question here, however. "It is well settled that, to maintain a civil RICO claim predicated on mail [or wire] fraud, a plaintiff must show that the defendants' alleged misconduct proximately caused the injury." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir.2004) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)). Sosa utterly fails to show how DIRECTV's false threat to sue within 14 days proximately caused him any injury.

Sosa, 437 F.3d at 941. As in *Sosa*, even if you could prove that it is false for Ripoff Report to say that reports are never removed, this statement cannot support a RICO claim absent evidence that it proximately caused injury to your clients.

NOTE – please review the disposition in *Sosa*. The defendant brought an anti-SLAPP motion which was granted and this ruling was affirmed by the 9th Circuit. As such, assuming your clients amend their factual allegations to try to base their claims on Ripoff Report's speech about its litigation history (an undisputed matter of public interest) as opposed to just reports about AEI (which the court felt was not a matter of public interest), you need to be aware that we will defend with another anti-SLAPP motion. Because you have already repeatedly stated that the Ripoff Report's litigation history and activity is a matter of substantial public interest, the burden would shift to you to show a likelihood of success. Of course, for the reasons explained above, that showing would not be possible based on *Sosa*.

As always, you can and should pursue whatever course of action you believe is factually and legally appropriate. However, if you bring a wire fraud claim based on my clients' speech about their litigation history and speech describing their operation the site, you should be prepared to respond to another anti-SLAPP motion which I believe the court will grant, resulting in a mandatory award of attorney's fees to defendants.

P.S. You asked Maria to give you this information in a sworn declaration. As explained above, I don't think discovery on this issue is available to you given the present stay, but because I want to ensure that you have the facts available to make an informed decision about this matter, I will be happy to give you my affirmation as to the truthfulness of the above facts (bearing in mind my legal conclusions are matters of opinion, not fact).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED ON: July 14, 2010.

/S/David S. Gingras

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2 attachments

Emails to Frank Eppes re .pdf
208K

Ltr from Frank Eppes - Nov. 24, 2009.pdf
444K