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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, a California LLC; RAYMOND MOBREZ an individual; and ILIANA LLANERAS, an individual,

Plaintiffs,

vs.

XCENTRIC VENTURES, LLC, an Arizona LLC, d/b/a as BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP OFF REPORT and/or RIPOFFREPORT.COM; BAD BUSINESS BUREAU, LLC, organized and existing under the laws of St. Kitts/Nevis, West Indies; EDWARD MAGEDSON an individual, and DOES 1 through 100, inclusive,

Defendants.

Case No.: 2:10-cv-01360-SVW-PJW

The Honorable Stephen V. Wilson

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

Hearing Date: September 20, 2010
Time: 1:30 PM
Courtroom: 6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants purport to be consumer advocates and proponents of the First Amendment, but this could not be further from the truth. Their methods are the height of hypocrisy. Defendants profit by crippling individuals and businesses and reacting vehemently whenever a dissenter dares to speak up against them. They pretend to be champions of the First Amendment, but they have served a proposed Rule 11 motion that -- incredibly – insists, at Paragraph 242 that **"Plaintiffs are aware that there is no First Amendment right to petition."** Defendants also served a takedown demand to one of Plaintiffs' witnesses that claimed – also incredibly – that he was "improper" to imply that the Communications Decency Act ("CDA") can be challenged in the Courts, writing "**The CDA is a statute; therefore any true challenge to its language and effect must be undertaken by Congress, and not by any court.**" See Declaration of Daniel F. Blackert in Support of Motion for Reconsideration (DN-125) ("Blackert Dec.") at paragraph 19, Ex. 3. Such a claim is patently frivolous in light of Reno v. ACLU, 521 U.S. 844 (1997), in which the Supreme Court of the United States struck down portions of the CDA itself as unconstitutional.

Defendants are not interested in seeking truth through transparency. They are interested in capitalizing on anomalies in the law to trap victims into paying fees or making illegal agreements with uninformed victims that contain unconscionable provisions such as purporting to sign away the right to sue critics that have defamed them on Defendants' website. If someone criticizes them in the press, such as blogger Sarah Bird or the Village Voice Media, they sue them. If someone testifies against them, they personally threaten to create a "Hall of Shame" for that witness on their website. See Blackert Dec. paragraphs 20-21, Exhibit 4. In short, they seek to isolate their victims from systems of support like witnesses and counsel. They conduct a secret reign of terror in litigation,

knowingly attempt to get "dirt" on their critics and "hold their feet to the fire" until they comply with Defendants' demands.

Here, they try to use the pretext that their demands were part of a settlement communication to cover up the fact that what they really offer do to fix the reputation hit jobs that their site enables is to change names, redact information and alter HTML so they can continue to claim on their website that "Reports Never Come Down" and that they often win attorneys' fees. Understandably, they do not want this information out there because it undermines the effect they are trying to create of being a consumer watchdog.

None of the matter Defendants seek to strike prevents them from serving as a consumer watchdog. If the matter they seek to strike is scandalous, it is because it happened, not because it is in the public record.

II. RELEVANT PROCEDURAL BACKGROUND

Defendants' website, www.ripoffreport.com ("ROR" or the "Website") contains numerous false and inaccurate statements. These statements were addressed and backed up with detailed factual support in Plaintiffs' proposed Second Amended Complaint, Complaint, and First Amended Complaint. The additional causes of action that Defendants complain should not have been added to the First Amended Complaint naturally flow from the more detailed allegations required in repleading Plaintiffs' RICO claim predicated on wire fraud. Although AEI and the individual plaintiffs are still technically in business, they are severely hampered in operating and/or generating profit because few individuals or businesses are willing to work with them when they realize the existence of the "reports" at issue and rely on what they believe to be an objective site with the motive of helping consumers.

On July 13, 2010, United States Magistrate Judge, Patrick J. Walsh ("Judge Walsh") issued a Minute Order of a telephonic hearing regarding a settlement conference originally scheduled for July 14, 2010. DN-92. The Court took the

settlement conference off calendar as Mr. Magedson was unwilling to travel to Los Angeles. Judge Wilson further Ordered the following: "The parties are ordered to meet and confer when they next meet in person at the deposition of Defendant's principal in Arizona. The Parties should attempt to resolve the case at that time. If they are unable to do so, the Court will conduct a settlement conference and attempt to settle the case. (*emphasis added)*. DN-92. It is clear from Judge Walsh's Order that he did not Order a "confidential" settlement conference on July 20, 2010 as Defendants falsely argue in their Motion at page 3.

Thereafter, Mr. Magedson's Deposition was scheduled for July 20, 2010. On July 20, 2010 Plaintiffs Counsel and their clients flew to Arizona to take the deposition. Defendants would not allow Plaintiffs to take Mr. Magedson's deposition. The parties, unable to resolve this issue, telephoned Judge Walsh. Judge Walsh Ordered that the deposition would not go forward that day. See Minute Order of July 20, 2010, DN-95. The Minute Order, in its entirety states the following: "Case called and counsel make their appearances. The Court met with the parties to discuss the deposition of Edward Magedson. The Court concludes that the deposition is foreclosed by Judge Wilson's Order of the previous day." DN-95. The Order **does not** mention anything about settlement. In fact, the Court declined Plaintiffs' request to reschedule a settlement conference.

Defense Counsel, in their Motion Papers, incorrectly argues that Plaintiffs "[Breached] the confidentiality of a court-ordered settlement proposal […](page 3 at ¶3)." Tellingly, Defense Counsel **fails to attach any Court Order or Settlement Agreement to her moving papers.** There is none. The true facts are that Plaintiffs requested that Magistrate Walsh reschedule the actual mandatory settlement conference for the state law claims, and the Court declined to do so. In fact, the best proof that there was no settlement conference is that the threats and demands happened at all. It is highly unlikely that Defendants would have said the things they did in the Court's presence.

III. ARGUMENT

A. Federal Rule Of Evidence 408 Does Not Create A Privilege

Rule of Evidence 408 is inapplicable where the claim is based on some wrong that was committed in the course of settlement discussions:

> "Rule 408 is . . . inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, *unfair labor practice*, and the like. . . . Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations."

23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5314 (1st ed. 1980), cited in Uforma/Shelby Bus. Forms v. NLRB, 111 F.3d 1284, 1293 (6th Cir. 1997) (emphasis added).

> In particular, Rule 408 does not bar threats to retaliate:
> "*Accordingly, we hold that Rule 408 does not exclude evidence of* ***alleged threats to retaliate*** *for protected activity when the statements occurred during negotiations focused on the protected activity and the evidence serves to prove liability either for making, or later acting upon,* ***the threats***.

See Vulcan Hart Corp. (St. Louis Div.) v. NLRB, 718 F.2d 269, 277 (8th Cir. 1983)(Rule 408 did not bar evidence of demand during negotiations to settle grievance that employee resign his union office when General Counsel did not seek to prove validity of grievance). The fact that Rule 408 does not bar admission of the evidence, however, of course does not indicate that the statements at issue are in fact threats; Jennmar Corp. of Utah, Inc., 301 N.L.R.B. 623, 631 n.6 (1991)(although Rule 408 bars evidence proving the merits of the subject of settlement discussions, employer could introduce evidence that it offered to reinstate employee as a defense to unfair labor practice charge based on its subsequent discharge of employee); Michigan Precision Indus., Inc., 223 N.L.R.B. 892, 893 (1976)(threats to refuse to rehire employee unless he dropped unfair labor

practice charges were not excluded by Rule 408). Uforma/Shelby Bus. Forms v. NLRB, 111 F.3d 1284, 1294 (6th Cir. 1997) (emphasis added). Evidence of the compromise of a claim different than the claim currently in dispute therefore is admissible unless "the compromise evidence requires an inference as to the offeror's belief concerning the validity or invalidity of the compromised claim." See Uforma/Shelby Bus. Forms v. NLRB, 111 F.3d 1284, 1294 (6th Cir. 1997).

The argument Defendants appear to be making -- that facts should be excluded under F.R.E. 408 by virtue of having been first disclosed in relation to settlement discussions-- was specifically rejected by the Northern District of California in Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A.:

> "Notably, the 2006 amendment to Rule 408 was made with the intent to retain the extensive case law finding the rule inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. See Fed. R. Evid. 408, advisory committee's note, citing, e.g., Coakley & Williams v. Structural Concrete Equip., 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); Athey v. Farmers Ins. Exchange, 234 F.3d 357 (8th Cir. 2000) (admitting evidence of settlement offer by insurer to prove insurer's bad faith); Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations)."

Phoenix Solutions, 254 F.R.D. 568, 584 (N.D. Cal. 2008).

Here, F.R.E. 408 does not apply to exclude the evidence filed with Plaintiffs' motion for reconsideration because it relates to actionable, new threats committed during the July 20, 2010 meeting. The evidence Defendants seek to strike largely consists of evidence of threats to retaliate against Plaintiffs' counsel personally for protected activity, and otherwise of independently wrongful acts. Defendants have no claim for malicious prosecution unless this action terminates favorably. Thus, Defendants' offer to grant Plaintiffs' counsel a personal release

from that is tantamount to a threat, and falls squarely within the evidence of retaliation admissible under the case law and in Wright & Miller.

Threats that a Rip-off report will happen to Plaintiffs' counsel and that she will be on the cover of a book, are also examples of retaliation for protected conduct in bringing this action. They are extortionate in themselves, and therefore Rule 408 does not apply. Likewise, the threat the "Ripoff Reports happen to everyone" coupled with the offer to redact names and the arbitrariness of the sums demanded, are independently wrongful acts that are actionable. They are not being used solely to prove the validity of previous claims.

Descriptions that Defendants "hold their feet to the fire" referring to critics of CAP members, likewise are not inadmissible because they occurred in settlement discussions. Similarly, Defendants' continuing to pressure Plaintiffs for information about a third party that Plaintiffs do not have is not inadmissible simply because they occurred in settlement discussions.

The cases cited by Defendants are distinguishable. Sterling Savings Bank v. Citadel Development Company, Inc., 656 F.Supp. 2d 1248, 1256 (D. Or. 2009) in fact cites to Uforma for the rule that statement such as these are admissible "to prove other wrongful activity that occurred during the settlement negotiations themselves." Cyr v. Reliance Standard Life Insur. Co., 525 F. Supp. 2d 1165, 1171-71 (C.D. Cal. 2007) did not involve a rule 12(f) Motion to Strike pleadings, but involved evidentiary rulings on a motion for summary judgment. In any event the evidence in Cyr was being offered to show the liability and amount of a preexisting claim in dispute, not as here to show new facts warranting reconsideration. Kelly v. L.L. Cool J, 145 F.R.D. 32, 40 (S.D.N.Y. 1992), states only that settlement discussions are immaterial to show fault – here they are not being proferred for that purpose. Again, Defendants ignore the exclusion in Uforma and Phoenix for evidence of new wrongs, threats and retaliation.

B. Federal Rule of Evidence 408 Does Not Limit Discovery

In addition, the statements Defendants seek to strike are at a minimum relevant to Plaintiffs' motion for reconsideration of their Rule 56(f) motion for leave to take discovery. The facts that Plaintiffs learned on July 20, 2010 are not inadmissible for the purpose of demonstrating that relevant discovery exists:

> "We start by noting that Rule 408 is not, by definition, the source of a privilege. The rule limits the admissibility of settlement terms or proposals and of other representations made in the course of settlement discussions, but it does not purport to preclude discovery of such agreements or statements. Indeed, it could scarcely do so in view of the fact that it authorizes the use of such information at trial for a number of purposes."

United States v. ASCAP, 1996 U.S. Dist. LEXIS 4159 (S.D.N.Y. Apr. 2, 1996), See also Bd. of Trs. v. Tyco Int'l. Ltd., 253 F.R.D. 521, 523 (C.D. Cal. 2008) (no federal settlement privilege governing confidentiality of settlement agreements and related documents).

The statements Defendants seek to strike can be offered for the purpose of showing they are likely to lead to admissible evidence of similar tactics, in terms of Defendants offering to change Reports and HTML to present more favorable search engine results for parties that have either joined CAP or have arranged settlements with Defendants. Plaintiffs showed Defendants a number of example documents of that nature on July, 20, 2010. That is the type of discovery Plaintiffs would expect to take if the motion for reconsideration is granted. At a minimum, Defendants' offer of redaction may be presented to show that there is discoverable evidence relevant to the claim if Plaintiffs are granted leave to take discovery.

C. Defendants Waived Expectations of Confidentiality

Although no federal settlement privilege exists, in addition, Defendants have previously waived the right to claim any expectation of privacy in the type of settlement offer presented on July 20, 2010. Defendants previously filed with the

Court as Exhibit C to the June 24, 2010 Reply Declaration of David Gingras, Defendants' May 11, 2010 settlement demand which very clearly spells out the similar offer made to Plaintiffs, along with another round number of payment -- $25,000. See DN-77, Ex. C. That letter also spells out at page 4 the request for Plaintiffs to provide information regarding third parties (i.e., John Brewington or Sarah Bird) that have allegedly aided this litigation.

Due to Defendants' own actions in filing that May 11, 2010 settlement demand with the Court, they cannot later claim that Plaintiffs' actions have harmed them and should be stricken as scandalous. There is little difference between the demands covered there and what has been filed in terms of the demands made on July 20, 2010 except for the amounts, and some of the facts that do not go to the validity of the underlying claim.

Defendants have also given Plaintiffs a declaration from Mr. Gingras where he explains that Defendants are willing to redact but not to remove reports. See Blackert Dec. at Ex. 6 and 7. Therefore, the portions of Plaintiffs' motion regarding Defendants' offer to redact is also nothing new, and Defendants cannot claim they are prejudiced in not having the matter stricken.

D. The Court Did Not Order a Confidential Settlement Conference.

Defense Counsel, in their Motion papers, argue that Plaintiffs breached the "confidentiality of a court-ordered settlement conference" (page 3 at ¶3); however they offer no support for this assertion. Defense Counsel does not attach as an exhibit or even point to any Court Hearing, Order, or Transcript that this Court ordered a settlement conference on July 20, 2010.

Attorney Speth, in her Declaration, alleges that "On July 20, 2010, pursuant to the Order of Magistrate Walsh, I attended a settlement conference at my office. (Speth Dec. page 1 ¶3)" Attorney Kunz, Attorney Gingras, and Mr. Magedson allege the exact same thing. Defendants do not attach an Order or even address when this non-existent Order was issued. Instead, Defendants offer no proof,

attach no Order, avoid this issue, and make a statement without any proof. They offer no evidence to support this frivolous allegation; only **self-serving Declarations**. The Declarations do not even describe in what way the alleged matter was taken out of context or was misleading. This is not enough.

In Musladin v. Lamarque, 555 F.3d 830, 850 (9th Cir. 2009), the Court refused to consider Declarations that were clearly self-serving and hearsay. In Tripati v. McKay, 211 Fed. Appx. 552, 553 (9th Cir. 2006), the Court concluded that self-serving affidavits were not enough to defeat a motion.

E. The Alleged Agreement Defendants Seek to Enforce Is Void As Against Public Policy and Is Unenforceable

Defendants argue that "[…] Plaintiffs have violated the verbal agreement made between the parties at the commencement of the settlement conference to keep the negotiations and discussions confidential. (page 4 ¶4)." Such an agreement would be entirely unenforceable under Caifornia Civil Code Section 1668 as contrary to public policy. As discussed in the Memorandum of Points and Authorities in support of Plaintiffs' Motion for Reconsideration, Defendants threatened in bad faith affirmatively to *sue* Plaintiffs' counsel in a separate, future action in retaliation based on future, unripe claims. DN-127 at 17-18. They then offered releases of such future claims that are void under California Civil Code §1668 as contrary to public policy. See McQuirk v. Donnelley, 189 F.3d 793, 797-98 (9th Cir. 1999) (Cal. Civ. Code § 1668 explicitly renders invalid contracts that release liability for "willful injury to the person or property of another" and "contractual releases of future liability for intentional wrongs").

Moreover, the alleged agreement violates California's Statute of Frauds, California Civil Code Section 1624(a)(1), and Arizona's Statute of Frauds, Revised Statutes Annotated 44-101.5, because it cannot be performed within one year. Without proof in writing signed by a party against which it is to be enforced, such an agreement does not satisfy the Statute of Frauds.

F. Sanctions

Here, Defendants are also seeking sanctions. A motion for sanctions is a very serious issue and the standard for the imposition of sanctions is much higher than a motion for summary judgment. Sanctions cannot be imposed when "the evidence supporting the claim is reasonable, but simply "weak" or "self-serving," sanctions cannot be imposed." (Thompson v. Relation Serve Media, Inc., 610 F.3d 628, 665 (11th Cir. June 30, 2010).

The sanctions Defendants seek are inappropriate. They may file evidentiary objections in response to the evidence on this motion, but the facts are presented for a proper purpose in the motion for reconsideration of the order granting partial summary judgment and denying leave to take discovery under Rule 56(f). Defendants have made tactical decisions that have prolonged the case, and driven up fees and costs that were in their power to prevent.

Defendants, in their motion papers, cite Chambers v. Nasco, 501 U.S. 32, (1991), to support their argument for sanctions. However, Chambers is drastically different from the case at Bar. Defendants take a simple quote from the case in an effort to persuade this Court. However Defendants fail to explain the facts of the case or the Supreme Court's logic for a substantial award of sanctions or, for that matter, why Chambers is similar to this Case. It is not.

In Chambers, the case began as a simple action for specific performance of a contract. However, this soon turned into a fraud on the Court and a blatant abuse of the Judicial system. The Defendant operated a television station and agreed to sell it along with its license to the Plaintiff. Shortly thereafter, Defendant changed his mind. Plaintiff sued for, among other things, specific performance. In Chambers, Defendant engaged in egregious conduct that resulted in the District Court awarding nearly $1 million dollars in sanctions in the form of attorney's fees and expenses. The case eventually made it to the Supreme Court, which held that the award of sanctions was appropriate for the following reasons: Defendant (a)

committed fraud in order to bypass the Court; (b) filed false and frivolous pleadings: and (c) "attempted by other tactics of delay, oppression, harassment and massive expense to reduce [opposing counsel] to compliance."

There has been no such delay, oppression or fraud here. The inflated attorneys' fees and allegedly harmful record are largely the product of Defendants' own doing. This Court found that Defendants **violated California Penal Code Section 632** in making unauthorized recordings with a resident of California. DN-94 at 22:2-3 and held them inadmissible as unauthenticated and unreliable. DN-94 at 25-27. However, Defendants **still persist in making arguments based on the contents of those inadmissible recordings**. See Motion to Strike at page 5.

Defendants could have kept this case within a manageable budget with many more settlement options with early disclosure or complying with Plaintiffs' reasonable request for discovery. However, Defendants chose not to do that. They decided to try to entrap Plaintiffs and divide them from their counsel by threats, while denying them reasonable discovery and attempting to bury them in discovery on all claims and a premature summary judgment motion on all claims when the case had been clearly bifurcated. As a result, Plaintiffs brought a successful motion to compel, and ultimately a motion to exclude unreliable, improperly authenticated evidence obtained through violation of the wiretapping law.

Defendants refuse even to put Plaintiffs on notice of what the sanctions are for, or in what way the facts have been misrepresented. They want to threaten Plaintiffs and counsel behind closed doors but will not state their version of the facts. It was only as a result of this lawsuit that Defendants began notifying callers that they are taping calls. One would think that a site that prizes free speech and exposes scams on behalf of consumers would want to be very transparent about the actual nature of the goods and services it sells itself. If word gets out that Defendants are selling redactions -- if not outright retractions – then the market can decide if it is a service worth paying for. If the service has value, demand should

go up and the price of buying a redaction should come down, such that more people affected by Ripoff Reports could afford them, including Plaintiffs.

IV. CONCLUSION

There is no reasoned basis why Defendants should be so vehemently opposed to the information that Defendants seek to strike from the record. Defendants' website is very forthright about their aggressive tactics. Defendants brag of their victories and claim to explain the law to visitors to their site. It should come as no surprise to anyone that Defendants seek monies they style as fees. It is apparently the fact that Defendants are willing to sell **redactions** from Reports and from HTML (which effectively removes Reports from Google searches) that Defendants do not want in the public record.

Defendants would prefer to shroud their business and litigation tactics in mystery and continue to intimidate the public by settling cases in private. This was not Congress' intent in passing the CDA. There is no compelling reason to strike the matter Defendants complain of. For all these reasons, Defendants' Motion to Strike should be denied.

Dated: August 31, 2010

Respectfully Submitted,

/s/ Daniel F. Blackert

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