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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

PLAINTIFFS' OPPOSITION TO SPECIAL MOTION TO STRIKE

Hearing Date: Noveber 1, 2010
Time: 1:30 PM
Courtroom: 6 (Hon. Stephen Wilson)

I. INTRODUCTION

Defendants' Special Motion to Strike under the Anti-SLAPP law seeks to strike the claims for deceit, fraud and unfair competition as requested in this Special Motion to Strike. Moving Brief at 3. However, it completely mischaracterizes Plaintiffs' case. This case does not seek to chill Defendants from exercising their First Amendment rights. Plaintiffs fully agree with Defendants that there is a First Amendment right to petition. In fact, Plaintiffs asserted the First Amendment right to petition in the First Amended Complaint, but *Defendants* did not agree. Part of Defendants' inconsistent tag-teaming of Plaintiffs was actually to file, the same day as they filed this Special Motion to Strike, a Rule 11 motion bizarrely claiming that "Plaintiffs are aware that there is no such thing as a "First Amendment right to petition." See Motion for Sanctions [DN-157] at p. 37, item 242/228. Defendants thrive on creating such "Catch-22s" for their victims and adversaries.

Plaintiffs are not trying to chill or censor anyone's speech. They seek to exercise whatever remedies they may have under the law that will rehabilitate their reputations and their businesses caused by Defendants' misrepresentations and half-truths. If this means Defendants redacting Plaintiffs' names (as they have admitted they do) not "taking down" Reports, or providing honest disclosures that they sell redactions and change meta tags for money, or are held liable for *their conduct* in writing computer code, HTML titles and meta tags, then Plaintiffs will have the relief they seek.

Moreover, Plaintiffs can demonstrate a likelihood of success on the merits. Plaintiffs have come forth with evidence that Defendants have taken down reports as part of a monetary agreement, and Defendants fully admit, repeatedly, in their papers and elsewhere, that they *redact* people's names out of Ripoff Reports, which is tantamount to taking down Ripoff Reports. Yet they frighten people like Plaintiffs into thinking there is no such option. Defendants also strenuously oppose

anyone who seeks ot bring to light the fact that they will change the HTML coding and meta tags for Ripoff Reports, sometimes for money, which has the power to put Google search results about Ripoff Reports in a completely favorable, as opposed to negative light. Defendant also add disclaimers such as "This Report is Not about Google" to complaints about Google to stay in Google's good graces

What this motion does show, however, is that Defendants are not "immune" under this Communications Decency Act for this lawsuit. By bringing this motion, Defendants admit that Plaintiffs are seeking to hold Defendants liable for only their own conduct, and not to impose vicarious liability on Defendants for third-party speech. If this case were only about third-party speech, then Defendants would have no standing to bring this motion. This motion should be denied.

II. LEGAL ARGUMENT

Defendants' anti-SLAPP Motion is based on three narrow grounds: (1) threats made in purported settlement discussions; (2) claims that Defendants mislead the public by claiming that they have never removed Ripoff Reports for money; and (3) the discussion of legal issues on the portion of Defendants' website entitled "Want to Sue Ripoff Report?" For the reasons below, the first and third grounds are moot, and Plaintiffs can demonstrate a probability of success on the merits on the second.

California Code of Civil Procedure § 425.16 requires California courts to evaluate a defendant's motion under the anti-strategic lawsuit against public participation statute (Anti-SLAPP) in two steps. Hilton v. Hallmark Cards, 580 F.3d 874, 882 (9th Cir. 2009). First, Defendants must make a threshold showing that the speech at issue were taken in furtherance of the Defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue, as defined in Cal. Code Civ. Proc. § 425.16(e). Kronemyer v. Internet Movie Data Base, Inc., 150 Cal. App. 4th 941 (Cal. App. 2d

Dist. 2007). Only if defendants make this initial showing does the burden then shift to plaintiffs to demonstrate a probability of prevailing on the claim.

A. Threats Made By Defendants' Counsel Are Not Part of the First Amended Complaint, and this Anti-SLAPP Motion on that Ground is Moot.

Defendants' claim that the First Amended Complaint is strategic litigation against Defendants' threats made on July 20, 2010 defies logic. There are no allegations of those threats in the First Amended Complaint. Plaintiffs expressly refrained from including allegations of those threats in the First Amended Complaint, because this Court had already granted summary judgment dismissing the RICO claims predicated on extortion in the July 19, 2010 Order. The threats were included as a ground on Plaintiffs' Motion for Reconsideration of that Order, based on the theory that the threats were additional and renewed acts of extortion that supported the racketeering pattern, but this Court denied that motion also on September 20, 2010. Therefore, Defendants' threats are not part of the pleadings, and do not justify striking any pleading.

Even though there is no claim in the pleadings based on the threats of July 20, 2010, even if they were, they would not justify a Special Motion to Strike for several reasons. First, threats are not protected conduct and are not barred from discovery or disclosure under Federal Rule of Evidence 408. There is no *federal* settlement privilege from discovery, and Plaintiffs have no obligation to keep the threats confidential where they may lead to discoverable matter:

> "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); United States v. ASCAP, 1996 U.S. Dist. LEXIS 4159 (S.D.N.Y. Apr. 2, 1996) ("We start by noting that Rule 408 is not, by definition, the source of a privilege); Bd. of Trs. v. Tyco Int'l. Ltd., 253 F.R.D. 521, 523 (C.D. Cal. 2008).

In particular, Rule 408 does not bar threats to retaliate. *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); Jennmar Corp. of Utah, Inc., 301 N.L.R.B. 623, 631 n.6 (1991); Michigan Precision Indus., Inc., 223 N.L.R.B. 892, 893 (1976; Uforma/Shelby Bus. Forms v. NLRB, 111 F.3d 1284, 1294 (6th Cir. 1997); Phoenix Solutions, 254 F.R.D. 568, 584 (N.D. Cal. 2008).

In Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A., the Court stated:

> "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).

Second, Plaintiffs contend that the July 20, 2010 discussions were not a Court-ordered settlement conference and in fact covered a range of topics, including a detailed pre-filing meet-and-confer discussion on the frank merits of the case and motions that were contemplated.

Third, Defendants had no reasonable expectation of privacy in the kind of threats that were made on July 20, 2010. Defendants previously waived the right to claim any expectation of privacy in the type of proposal presented on July 20, 2010. Again, the matter was previously introduced to reconsider the claim of extortion – this time in the guise of a "settlement offer" – but the gist of it was the same as the proposal in the letter Defendants previously filed with the Court as Exhibit C to the June 24, 2010 Reply Declaration of David Gingras on Defendants' first motion for summary judgment. Defendants' May 11, 2010 settlement demand very clearly spelled out the similar offer made to Plaintiffs, along with another round number of payment -- $25,000. [DN-77, Ex. C]. At that time, Defendants offered the May 11, 2010 letter to show some wrongdoing by Plaintiffs' attorneys. Thus, Defendants cannot in good conscience claim any expectation of privacy on virtually the identical demand, but with bigger numbers.

Fourth, any purported agreement to remain hush about Defendant's threats is void as contrary to public policy and entirely unenforceable under California Civil Code Section 1668. Although Plaintiffs, again, are not seeking to hold Defendants' liable for the threats in the First Amended Complaint, Defendants offered along with those threats a release from suing Plaintiffs' counsel in a separate, future action in retaliation based on future, unripe claims. See DN-127 at 17-18. These releases of such future tort claims themselves would also be 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 to keep the discussions confidential 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. Therefore, the threats made by Defendants' counsel is not the subject of this action, and this Special Motion to Strike should not be granted on that ground.

B. Plaintiffs Can Demonstrate a Likelihood of Success on the Merits on the Claims That Defendants Falsely State they Have Never Removed Reports.

The second ground on which Defendants' motion is based is allegations that Defendants lead subjects of Ripoff Reports (sometimes, "Reports") to believe that Defendants *never* take down Reports for money. Plaintiffs can and will demonstrate a likelihood of success on the merits of that claim.

First, that claim is demonstrably factually false, as described in the Declaration of Kent Hutcherson filed as Exhibit **12** to the First Amended Complaint. [DN-96-12] Second, Defendants admit that they redact names from reports See Declaration of Daniel Blackert, Exs. 6 & 7 [DN-125-6, DN-125-7] and change the HTML coding and meta tags of Reports for money. See Second Questionnaire, August 16, 2010 Declaration of Lisa Borodkin ¶3, Ex. 1 [DN-121-1]. Thus, Defendants do things that eliminate the harm from Reports, they just do them in ways that Defendants contend still allows them to claim, literally, that they do not "take down reports."

Second, this contention only proves, as a matter of logic, why the Communication Decency Act does not provide "immunity" to Defendants on this theory. Defendants claim, in this very motion, that Plaintiffs are seeking to hold them liable for their speech. But it is not for the purpose of chilling Defendants' speech. It is for the purpose of recovering from damage caused by Defendants' lies and half-truths. Plaintiffs would be willing to resolve this case if Defendants redacted their names from the Reports or changed the HTML coding and meta tags so that harmful statements about them were not prominently displayed on Google search results. But Defendants will not do so unless they are paid money.

Defendants frivolously argue that because the removal of the Report in

question was related to settlement of a litigation in *Xcentric Ventures, LLC v. QED Media Group, LLC*, the statement that "reports never come down" is protected by the anti-SLAPP. Defendants argue, "the *QED Media* case involved Defendants' right of petition, and to the extent Plaintiffs are alleging any misconduct arising from that activity, their claims are within the scope of the anti-SLAPP law, citing Kolar v. Donahue, McIntosh & Hammerton, 145 Cal.App.4th 1532, 1537, 52 Cal.Rptr.3d 712 (2006).

Forst, the Court in Kolar denied the anti-SLAPP motion. Nothing in Kolar holds that acts in performance of a settlement agreement is related to protected petitioning activity. Moreover, the claim in Kolar was an attorney malpractice suit, which the Court expressly held was not related to the underlying case for purposes of the anti-SLAPP law.

The claim here is Defendants falsely state on their website that they never remove Reports, when in fact Reports were removed as part of the settlement in *QED Media*. See August 16, 2010 Declaration of Lisa Borodkin at ¶3 & Ex. 1, ¶5 & Ex. 3, FAC ¶175 & Ex. 8 [DN-96-8]. The statements are on Defendants' website, and were not made in connection with the actual litigation. It defies logic to say that Plaintiffs' allegation regarding the removal of reports that happened after the litigation was concluded is in any way to chill the right of petition that Defendants already exercised. Therefore, this motion should be denied on that ground as well.

Defendants also misconstrues the nature of Plaintiffs' claim. Plaintiffs unfair business practices claim (made pursuant to Cal. Bus. & Prof. Code § 17200) is based, among other things, on Defendants' optimizing and custom-writing computer code so that it changes negative search results to positive results in Google search results. See Declaration of Joe Reed [DN-96-25] at ¶¶16-23, Exs. C & D. Many courts have held that speech involving illegal activity cannot receive First Amendment protection. See Flatley v. Mauro, 39 Cal.4th 299, 317 (Cal.

2006)("Section 425.16 cannot by invoked by a defendant whose asserted protected activity is illegal.").

Defendants' Special Motion to Strike also claims Defendants are "immune" from liability pursuant to 47 U.S.C. § 230(c), otherwise known as the Communications Decency Act ("CDA"). Moving Brief at 8. Section 230 of the Communications Decency Act specifies that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."47 U.S.C. § 230(c).

There is no such "immunity" under the CDA. See City of Chicago, Illinois v. StubHub, 2010 U.S. App. LEXIS 20017 (7th Cir. Sept. 29, 2010) at *7. That case states:

> "As earlier decisions in this circuit establish, subsection (c)(1) [of the CDA] does not create any 'immunity' of any kind. See Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003); Chicago Lawyers' Committee for Civil Rights Under Law, Inc v. Craigslist, Inc., 519 F.3d 666, 669-71 (7th Cir. 2008)."

Id. at *7-*8.

Any such exclusion from liability applies only if the "interactive service provider" is not also an "information content provider." An information content provider is described as one who is "responsible, in whole or in part, for the creation or development of" the offensive content. As the Ninth Circuit in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC notes, "a website operator can be both a service provider and a content provider" if it "creates itself, or is 'responsible, in whole or in part' for creating or developing" the content at issue. 521 F.3d 1157 (9th Cir. 2007) (citing 47 U.S.C. § 230(f)(3)). "[T]he party responsible for putting information online may be subject to liability, even if the information originated with the user." Id. at 1165.

Defendants are both "interactive service providers" and "information content providers." In MCW, Inc. v. Badbusinessbuereau.com,L.L.C., 2004 U.S. Dist. LEXIS 6678 (N.D. Tex. Apr. 19, 2004), the Court held that website operators

satisfied the definition of information content provider concerning disputed consumer complaints posted on the website. Id at 31-36. "The defendants cannot disclaim responsibility for disparaging material that they actively solicit." Id. at 34.

The court in MCW, Inc. found that the web site operators were "information content providers" because they were responsible, in whole or in part, for the creation or development of third party defamatory messages created by the web site users. Id. At 33-36. The court reasoned that:

> [t]he defendants cannot disclaim responsibility for disparaging material that they actively solicit. Furthermore, actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher's editorial role. The defendants are clearly doing more than making minor alterations to a consumer's message. They are participating in the process of developing information. Therefore, the defendants have not only incurred responsibility for the information developed and created by consumers, but have also gone beyond the publisher's role and developed some of the defamatory information posted on the websites. Id. at 34-35

In reaching its conclusion, the court explained that an interactive computer service provider is transformed into an information content provider when it creates or develops content provided by third parties:

> [t]he CDA requires courts to consider whether a party is responsible, in whole or in part, for the creation or development of information. . . . Being responsible for the creation or development of the information is sufficient. This distinction is significant because a party may be responsible for information created or developed by a third party without actually creating or developing the information itself.

Additionally, FTC v. Accusearch, Inc., 2007 U.S. Dist. Lexis 74905 (D.Wyo. Sept 28, 2007), the court applied similar logic. It held that a website that solicited the purchase of telephone records participated in the creation or development of the information, despite the fact that the phone records themselves were created by third-parties. Therefore, they were denied immunity under the CDA for alleged unfair trade practices. Id.

C. Plaintiffs Have Offered to Withdraw the Allegations Regarding Defendants' Statements on the "Want to Sue Ripoff Report?" Page, and this Anti-SLAPP Motion on that Ground is Moot.

The third ground on which Defendants' Special Motion to Strike is based is Defendants' statements on the portion of their website that says, "Want to Sue Ripoff Report?" Again, this demonstrates that Plaintiffs generally seek to hold Defendants liable for only their own conduct. However, this ground is also moot because Plaintiffs offered to strike those allegations from the pleadings by offering and requesting Defendants to stipulate to a Second Amended complaint that eliminated all the allegations supporting this third basis for the anti-SLAPP motion. Defendants refused, and in fact, opposed the motion to so amend the pleadings. Plaintiffs are still willing to withdraw those allegations, because this case is really about what Defendants do, not what third parties say. In short, Plaintiffs are not using litigation to punish Defendants for their First Amendment rights, and are not seeking to hold Defendants liable for third-party speech, but are seeking to hold the proper parties accountable for their own conduct.

Defendants ascribe nefarious motives to Plaintiffs in making them parties to this action, but that is Defendants' own doing. When other victims, such as David and Lisa Blockowicz, have sued the person who write the Reports about them for defamation and have not named Defendants as parties, as in the Blockowicz v. Williams matter, Defendants will not obey any Court order to take down the material. They claim that unless they are parties with notice and right to be heard, they are not bound by any such order. In essence, Defendants have argued to the Courts that plaintiffs should and must name them as parties if they wanted Defendants to be bound by any Court order requiring them to take down content.

Defendants claimed at oral argument to the Seventh Circuit Court of Appeals on September 23, 2010 that "we have complied with Court orders against our client." See Declaration of Lisa J. Borodkin ("Borodkin Dec.") at Exhibit 1.

When Plaintiffs asked what kind of a court order Defendants would comply with, Defendants filed this motion. Borodkin Dec. Ex. 2. Merely asking Defendants what their position is in order to further a non-judicial resolution is not calculated to silence them. This motion should be denied on the third ground as well.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Special Motion to Strike in its entirety.

DATED: October 13, 2010

Asia Economic Institute

/s/ Lisa J. Borodkin
DANIEL F. BLACKERT
LISA J. BORODKIN
Attorneys for Plaintiffs

DECLARATION OF LISA J. BORODKIN

I, Lisa J. Borodkin, declare:

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California and this Honorable Court. I am co-counsel of record for Plaintiffs Asia Economic Institute LLC, Raymond Mobrez and Iliana Llaneras ("Plaintiffs") in this action. I have first-hand, personal knowledge of the facts set forth below and, if called as a witness, I could and would testify competently thereto.

2. Attached hereto as **Exhibit "1"** is a true and correct copy of an email message dated September 23, 2010 confirming the pre-filing meet and confer discussion on Plaintiffs' contemplated motion under Rule 56(f) to take discovery.

3. Among other subjects, I sought clarity from Defendants on what type of order they would comply with to take Reports down and whether their position was that they should be named as parties in cases seeking redress for defamation for Ripoff Reports. On September 23, 2010, I had retrieved and listened to the oral argument in the appeal in Blockowicz v. Williams, 10-1167 (7th Cir. Sept. 23, 2010) through PACER on the website of the Seventh Circuit at the following link: http://www.ca7.uscourts.gov/fdocs/docs.fwx

4. I sought clarity from Defendants' attorneys on the following statement made in the oral argument on September 23, 2010 in the appeal to the Seventh Circuit in Blockowicz v. Williams, 10-1167 (7th Cir. Sept. 23, 2010):

"The Court: And you flout all of these Court orders, I take it? For the 30 orders you're talking about, you have refused to comply with.

Ms. Speth: Your Honor, we have complied with Court orders against our client. We have not complied with Court orders in cases in which we are not

a party. We're not a defendant, had no opportunity to be heard, and were [sic] not applicable to us because we're not aiding and abetting the actual author of the report."

5. Defendants did not clarify what they were referring to when they argued to the Court that they "have complied with Court orders against our client." Rather, Defendants stated their intention to file this anti-SLAPP motion as a consequence of Plaintiffs' efforts to achieve clarity. A true and correct copy of the September 24, 2010 email is attached hereto as Exhibit **"2."**

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 13th day of October, 2010, in Los Angeles, California.

/s/ Lisa J. Borodkin
Lisa J. Borodkin