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6

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 RICHARD ROE, RICHARD ROE II, DON A.)
11 NELSON, Individuals,)

12 Plaintiffs,)

13 vs.)

14 JOHN DOE, MARK CUBAN, an individual;)
and DALLAS BASKETBALL, LTD., a)
15 partnership, and DOES 1 through 10,)

16 Defendants.)

Case No.: 3:09-CV-682 PJH

**SUPPLEMENTAL DECLARATION OF
JOHN D. O'CONNOR IN OPPOSITION
TO DEFENDANT'S SPECIAL MOTION
TO STRIKE**

17 I, John D. O'Connor, do hereby declare as follows:

18 1. I am an attorney for Don A. Nelson in this case.

19 2. Pursuant to the Court's Order of April 20, 2009, I engaged in supplemental
20 discovery on the issue of malice regarding Nelson's claim that defendants Cuban and Dallas
21 Basketball, Ltd. defamed Nelson on September 21, 2007.

22 3. Accordingly, we directed discovery to determine whether there is an inference that
23 Cuban spoke knowingly falsely or with reckless disregard of the truth when he stated: that Nelson
24 falsely promised to adhere to a five-year contract, including a five-year non-compete clause; that
25 Nelson tried to get \$500,000 immediately paid while falsely representing he would continue to
26 work for Cuban; that he was trying to "rip off" and "deceive" Cuban; that Nelson initiated this
27 fraudulent scheme in a conversation with Cuban.
28

1 4. As part of this discovery, we propounded a Request to Produce Documents under
2 F.R.C.P. Section 34, seeking e-mails that Mr. Cuban submitted to the press during pertinent time
3 periods.

4 5. Attached as Exhibit 101 is an e-mail from Mark Cuban to Janny Hu of the San
5 Francisco Chronicle, and an e-mail string from Mark Cuban to and from Janny Hu of the San
6 Francisco Chronicle on June 28, 2007 at 4:33 p.m.: “We didn’t stop paying him for a limited
7 period until after he took the GS job, which means he had already violated the contract...”

8 6. Attached as Exhibit 7 to my original Declaration in this case is an e-mail from
9 Mark Cuban to his CFO Floyd Jahner, of June 27, 2006, in which Cuban orders Jahner not to pay
10 Nelson his consultant’s salary: “But we didn’t agree that we would pay the 200k. So let’s not pay
11 it.” This e-mail was two months before Nelson took the Golden State job on August 30, 2006.

12 7. Attached as Exhibit 102 is a string of e-mails on July, 2007, to and from Mark
13 Cuban and reporter Bill Ingram regarding the contractual dispute. These e-mails occurred after
14 the filing by the Club of the Counterclaim in the Arbitration. In Exhibit 102, Cuban, speaking
15 about Nelson’s five-year consulting deal of \$200,000.00 per year, told Ingram: “I can give you an
16 analogy that is off the record, but for your understanding of why I think he is so sleazy.” In
17 Exhibit 102, Cuban repeats allegations similar to those of the September 21, 2007 broadcast:

18 “i will give you a simple example of what happened with
19 his consultanting/non compete deal. and this is all off the rec.

20 as part of the deal in 2000 and 2003, both contracts he said
21 would be his last, he got a 5 year consulting deal of 200k per year.
In return he also had a non compete. he couldnt work for another
NBA team.

22 simple and public info. I can’t talk about it , but i can give
23 you an analogy that is off the record, but for your understanding of
why i think he is so sleazy.

24 Lets say you are supposed to get a 10k bonus from your
25 employer every jan 1 for the next 5 years. A total of 50k

26 In july, you go to your employer and suggest that because
27 you need the money, rather than paying it off 10k per year, your
boss writes you a check for 30k now. It saves hiim some money
and you get helped out. But you tell him you will still perform as
28 your job requires.

1 What you know , but your employer doesnt is that you plan
2 on quitting your job 2 weeks after you get the lump sum bonus
3 payment.

4 is that ethical to you ? if that person worked for you, what
5 would you do?"

6 8. Attached as Exhibit 103 is an e-mail string to and from Mark Cuban and Marcus
7 Thompson, a local newspaper reporter, on July, 2007, in which he describes the matter similarly
8 to the subject radio broadcast, calling Nelson "this mother fucker" and showing "how sleezy [sic]
9 nellie is":

10 "no one is afraid of him i don't think. Its just that nellie has
11 no scruples. He is about cash and nothing else.

12 all off the record. I will tell you exactly why i am
13 following through with this legal stuff.

14 he had a 5 year consulting deal through 2011 that paid 200k
15 per year. it had a non compete. I wasnt pissed that he just left the
16 consulting deal and broke the non compete. What pissed me off is
17 that 2 weeks before he took the GS job, he asked me if i would
18 accelerate the consulting payments into a lump sum payment and
19 just pay him off.

20 I told him i would.

21 then i hear rumors about him going to the warriors. so i put
22 off the lump sum payment until i knew what was going on. Then
23 he took the job.

24 bottomline, this mother fucker knew he was going to leave.
25 He tried to pull a quickie on me and take the lump sum, knowing
26 he was going. the equivalent of you asking your boss to give you
27 your christmas bonus for the next 5 years and then quitting the day
28 after he does so. With no intention of paying him back.

 then i started back payments after he took the job. making
his non compete valid.

 thats how sleezy nellie is."

9. Attached as Exhibit 104 is the May 20, 2009 deposition of Mr. Floyd Jahner, the
CFO of defendant Dallas Basketball.

10. With reference to Jahner's lack of knowledge of any e-mails on conversations
between Cuban and Nelson during the pertinent time, see, Exh. 104, p. 8:9-24.

1 11. Regarding the fact that Jahner knew that Nelson wanted a termination, not merely
2 an acceleration of payment, see, Exh. 104, p. 33:13 to p. 34:2.

3 12. That Nelson never told anyone in the summer of 2006 that he wanted to work for
4 five years and follow the non-compete, see, Exh. 104, p. 34:3 to p. 35:6.

5 13. That Nelson never in the summer of 2006 stated he would be bound to the
6 contractual provisions, including the non-compete provision, see Exh.104 p.38:8-13; p. 40:15-24;
7 and p. 41:8-12.

8 14. Regarding Jahner's testimony that he never claimed or considered or thought that
9 Nelson was committing fraud or deceit in these negotiations, see, Exh. 104, p. 43:18 to p. 44:18.

10 15. Attached hereto as Exhibit 105 is the recent deposition of May 20, 2009, of
11 defendant Mark Cuban.

12 16. Regarding Cuban's testimony that he could not recall whether, in June, 2006, he
13 thought the consultant's contract with Nelson was over, see, Exh. 105, p. 50:12-15 and p. 51:3-8.

14 17. Regarding Cuban's inability to recall being involved in any of the negotiations
15 with Nelson regarding the buy-out, see, Exh. 105, p. 62:14 to p. 63:2.

16 18. Regarding Cuban's inability to recall any knowledge beyond the e-mail
17 communications with Jahner regarding the \$500,000 lump-sum settlement negotiations, see, Exh.
18 105, p. 63:13 to 65:21.

19 19. Regarding Cuban's inability to disagree with his prior testimony that it was Jahner
20 who brought up the lump sum settlement idea and not Nelson, see, Exh. 105, p. 66:2 to 67:13.

21 20. Regarding Cuban's inability to determine from Jahner's July 27, 2006 e-mail
22 whether Nelson really wanted a termination walk-away of his contract, see Exh. 105, p. 69:19 to
23 p. 70:4.

24 21. Regarding Cuban's uncertainty on June 26, 2006, as to whether or not the Club
25 owed consultant's salary and whether there was any obligation by Nelson to provide consultant's
26 services, see Exh. 105, p. 73:5-10:

27 Q: You knew that one of the uncertainties in the contract was
28 whether or not, in fact, there are any obligations on you to

1 pay consultant's salary and any obligation on Nelson's part
2 to provide consultant's services, true?

3 A: Yes, sir.

4 22. Regarding Jahner's statement in Exhibit 7 to the O'Connor Decl. whether the
5 "lump sum settlement" Jahner was negotiating was a settlement of the uncertainties as to whether
6 Cuban owed Nelson consultant's salary and whether Nelson owed consultant's services, see, Exh.
7 105, p. 73:11-22, p. 78:13 to p. 79:3.

8 23. That Cuban has no knowledge that Nelson was trying to defraud him in the
9 contractual buyout negotiations, see, Exh. 105, p. 78:13 to 79:3:

10 Q: You state here there is no animosity, there is nothing
11 nefarious, there are no negatives, no games being played.
12 Do you have any indication that Mr. Nelson is responding
13 to your failure to pay him his consulting salary, do you
14 have any knowledge that anything else Mr. Nelson was
15 doing was nefarious?

16 A: I don't know.

17 Q: Ok. So you are sitting here now. You don't know that Mr.
18 Nelson was trying to defraud you in these negotiations,
19 true, you don't know that.

20 A: I don't know.

21 Q: Ok. Then do you have any knowledge, I am here now at
22 your deposition asking you as to whether or not you have
23 any knowledge of any fraud or deceit by Mr. Nelson in
24 these negotiations; do you have any?

25 A: I don't know.

26 24. As to Cuban's lack of knowledge of any fraud of Nelson in negotiations that
27 occurred in July of 2006, see, Exh. 105, p. 79:6-10:

28 Q: Tell me anything you know of fraud and deceit of Mr. Nelson and the
negotiations that occurred in the summer of 2006.

A. As it reflects July of 2006, I don't know.

29 25. Regarding Cuban's lack of knowledge that Nelson, in June through August of
30 2006, ever represented that he would adhere to a non-compete covenant for the next five years,
31 see, Exh. 105, p. 86:23 to p. 87:9:

32 Q: During the summer of 2006, June through August 2006, did
33 he ever represent to your organization, any employee of
34 your organization, that he would adhere to a noncompete
35 covenant for the next five years?

36 A: Did he ever represent to our organization that he would –

37

1 Q: That he would adhere to a noncompete covenant for the
2 next five years.

3 A: I don't recall.

4 Q: Did he ever represent that he would adhere to the
5 noncompete clause for any length of time?

6 A: Any length of time, I don't recall.

7 26. Regarding July 27, 2006, when Cuban told Jahner to go ahead and agree to the
8 \$500,000 lump-sum settlement, Cuban's testimony that he thought this was not a settlement but
9 an acceleration, see, Exh. 105, p. 100:19 to 101:11.

10 27. Regarding Cuban's knowledge that Nelson and his counsel had been telling the
11 Mavericks since August 1, 2006 that they wanted a termination of the contract, and that Cuban
12 claimed knowledge as "all of this came to a head as part of the lawsuit." See, Exh. 105, p. 106:10-
13 16.

14 28. Regarding Cuban's knowledge of rumors that Nelson might be coaching another
15 team in mid-July of 2006, see, Exh. 105, p. 114:19 to p. 115:16.

16 29. Regarding Cuban's characterization of what he meant by "he tried to rip me off."
17 See, Exh. 105, p. 122:16 to 123:7.

18 30. Regarding Cuban's admission that he meant to convey on the radio broadcast that
19 Nelson tried to deceive him, see, Exh. 105, p. 123:18-24, p. 125:2 to p. 126:17.

20 31. Cuban considers the term "Mark" as he used it in the interview interchangeable
21 with "Mavericks" and that Cuban cannot recall specifically whether or not Nelson, the individual,
22 spoke to Cuban, the individual, see, Exh. 105, p. 126:18 to p. 127:14.

23 32. Regarding Cuban's denial that he was conveying to Murph and Mac and their
24 listeners that he had a personal conversation with Nelson, see, Exh. 105, p. 128:13-16.

25 33. Regarding Cuban's previous testimony that he was not involved in negotiations
26 with Nelson over this buy-out, see, Exh. 105, p. 130:11-24.

27 34. Regarding Cuban's lack of knowledge that Nelson ever represented to anyone at
28 the Mavs that the consulting deal would stay in force with this non-compete clause in the summer
of 2006, see, Exh. 105, p. 135:18-22; p. 137:20-24; 138:1-16.

1 35. Regarding Cuban's inability to point to any basis for his statements on Murph and
2 Mac about Nelson's supposed representation about the non-compete, other than by reference to
3 "general circumstances," see Exh. 105, p. 138:18 to p. 140:10.

4 36. Regarding Cuban's state of mind as being "more than a little bit pissed" in making
5 these statements, see Exh. 105, p. 142:14-22.

6 37. Regarding Cuban's inability to identify what check or amount he was supposedly
7 intending to write as described in the radio interview, see Exh. 105, p. 146:9-16.

8 38. Regarding Cuban's denial of accusing Nelson of making a promise to honor the
9 non-compete clause and then violating it, see, Exh. 105, p. 150:10-19.

10 39. Regarding Cuban's denial that the advance bonus payments he was speaking about
11 to Murph and Mac involved the \$500,000 sum, see, Exh. 105, p. 152:5-16.

12 40. That when Cuban is asked about his statement about being deceived and Nelson
13 trying to rip him off, claims nothing more than general knowledge or general understanding as a
14 basis for these statements, see, Exh. 105, p. 153:15 to p. 154:6S; p. 154:24 to p. 155:6.

15 41. Regarding Cuban's inability to give specifics about why he was "mad" and
16 "pissed" about Nelson's deceiving him and ripping him off, see, Exh. 105, p. 155:16 to p. 157:6.

17 42. Attached as Exhibit 106 are excerpts from Cuban's deposition of January 18,
18 2008.

19 43. For Cuban's prior testimony that he knew Jahner had initiated the lump-sum
20 settlement discussions with Nelson, see, Exh. 105, p.62:14 to p. 63:2.

21 44. That Cuban admitted he had no part in the buyout negotiations with Nelson, see,
22 Exh. 106, p. 176.

23 45. That Cuban admitted that he knew the negotiations with Nelson broke down over
24 disagreement about continuing contractual obligations, see, Exh. 106, p. 217.

25 46. Attached as Exhibit 107 is correspondence of October (undated 2006
26 correspondence), from Robert Hart, General Counsel for Cuban and Dallas Basketball, LTd, to
27 Nelson's counsel. The correspondence states on the first page that in the recent contractual
28

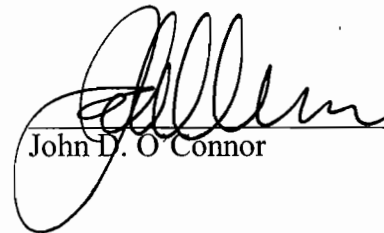
1 negotiations, Nelson sought to get “as much money as possible through an agreed termination of
2 his employment agreement....”

3 47. Attached as Exhibit 108 is the Response and Counterclaim filed by Dallas
4 Basketball in Arbitration on May 13, 2007. At pp. 15-16 of the Counterclaim, details of the
5 contractual negotiations are alleged, showing that the Club knew Nelson wanted to terminate his
6 contract, and not to remain obligated for five years:

7 “In response, Claimant told the Mavericks that he would be
8 interested in a lump-sum buyout of his consulting contract.
9 Specifically, Claimant asked that, rather than receive payroll
10 checks for the next five years, he be paid a flat \$500,000
11 immediately...In early-August of 2006...Mr. O’Connor proposed
12 reducing the Maverick’s payment to \$400,000 in exchange for the
13 Mavericks’ agreement to immediately terminate the contract and
14 its restrictions...On August 4, 2006, Mr. O’Connor sent a letter to
15 the Mavericks suggesting that the team was in
16 breach...Considering that the parties were negotiating a lump sum
17 buy-out of the salary, the Mavericks were understandably confused
18 by the allegations of breach.”

19 48. Regarding examples detailing some historical manifestations of ill-will by Cuban
20 toward Nelson, see, Exh. 106, p. 83:12 to 87:3 and p. 126:10 to 127:6.

21 Dated: June 3, 2009

22 
23 _____
24 John D. O'Connor