UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Docket No.: **06 CA 11370 MLW**

Christine. Varad,
Plaintiff,
v.

Reed Elsevier Incorporated,
d.b.a. *Lexis Nexis Corporation,*
Lexis Nexis Accurint,
Defendant.

MOTION TO STRIKE ATTORNEY AFFIDAVITS OF HENRY Z. HORBACSEWSKI AND CHRISTOPHER DONNELLY AS APPENDED TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A SUMMARY JUDGMENT (LEAVE TO FILE PENDING).

Plaintiff, Christine Varad, hereby motions this court to strike attorney affidavits of Henry Z. Horbacsewski, John M. Byrne and Christopher Donnelly as appended to Defendant, Reed Elsevier, Incorporated, d.b.a. Lexis Nexis Corporation, Lexis Nexis Accurint, Opposition to Plaintiff's Motion for a Summary Judgment.

Per LR 7.1(A)(2), counsel for Reed Elsevier, Inc. was contacted and indicated that Reed would oppose this motion.

ARGUMENT

1. **Declarations or Affidavits Comprised of Ultimate Conclusions of Fact or Law or that are Otherwise Speculative Should be Stricken.**

It is well settled that affidavits and declarations must be supported by specific facts based on first hand knowledge. See: F. R. Civ. P. 56(e) (Affidavits must be made on personal knowledge, … set forth such facts as would be admissible in evidence, and … show affirmatively that the affidavit is competent to testify to the matters stated

therein."). Affidavits and declarations become wholly improper, and unhelpful, when they assert "self-serving" or ultimate conclusions of either law or fact. See: e.g., *BellSouth Telecomms., Inc. v. W.R. Grace & Co. – Conn.*, 77 F.3rd 603, 615 (2nd Cir. 1996) (finding that the district court's disregard of affidavits that advocated conclusions of law was proper); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987) ("Affidavits ... setting forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment ... Affidavits must be based on personal knowledge, setting forth facts admissible in evidence."); see also *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985); *Hampton Inns, Inc. v. Ameritel Inns, Inc.* No. 93-459-S, 1995 WL 762148, at *6 (D. Idaho Oct. 19, 1995) ("An affiant's opinion that is not founded on the facts of the case and consists largely of legal conclusions does not conform to the dictates of Rule 56(e) and is not sufficient to raise a genuine issue of fact.").

Thus, when lawyers submit affidavits or declarations that simply opine as to their personal view of a legal issue, courts routinely strike such material from consideration. To hold otherwise would permit a party (and its designated affiants) to usurp the role of the court. *A&M Records, Inc. v. Napster, Inc.*, No. C9905183MHP, 2000 WL 1170106, at *8 (N.D. Ca. Aug. 10, 2000) (striking declaration of law professor that "merely offers a combination of legal opinion and editorial comment on Internet policy."), aff'd, 239 F.3d 1004 (9th Cir. 2001); *Hampton Inns, Inc.*, 1995 WL 762148, at *16 (striking portions of legal expert's declaration and holding that "[i]ndividual lawyers may harbor different views of what they perceive to be the status of the law in this area, but as all counsel in this case can appreciate, it is the function of this Court – not retained legal experts – to

discern the legal standard to be applied in this case."); *Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998) (Court struck portions of lawyer's affidavit which were "fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay."); *State Farm Fire & Casualty Co. v. Woods*, 925 F. Supp. 1174, 1179 (E.D. Tex. 1996) (disregarding defendant attorney's legally conclusory affidavit); *Topps Chewing Gum, Inc. v. Imperial Toy Corp.*, 686 F. Supp. 402, 409 (E.D.N.Y. 1988) ("A word is in order about Ogden's last-minute affidavit. It is for the Court alone to make the final decision as to whether or not the licensing agreement is enforceable. The Ogden affidavit is nothing more than an opinion containing the conclusions of law of an alleged attorney expert. The affidavit does not meet the requirements of F.R.Civ. P. 56(e) in that it is not made on personal knowledge and, in addition, it does not cover a proper area for expert testimony.") aff'd, 895 F.2d 1410 (2d Cir. 1989).

1. **The affidavit of Attorney Henry Z. Horbacsewski Should be Stricken Because His Assertions are Unsupported by Accompanying Admissible Documentation, Because It is Comprised of Legal Conclusion and Speculation and Because his Assertions are Not Based on Personal Knowledge.**

The affidavit of attorney Henry Z. Horbacsewski is comprised of legal conclusions and speculation made without personal knowledge and without any accompanying evidentiary documentation to support the admissibility of his statements and should therefore be stricken in its entirety.

Plaintiff submits Exhibit A, Copies of Corporate filings held by the Florida Secretary of State concerning "Seisint, Inc.". See: Exhibit A, Seisint, Inc. Corporate Filings. The filings do not document that Seisint, Inc. has any interest whatsoever in the above named civil action. Attorney Henry Z. Horbacsewski is a named a Director of

Seisint, Inc. and notably Attorney John M. Byrne is not a named Director within the secretary of state corporate filings. See: Exhibit A, Seisint, Inc. Corporate Filings, page 4.

While Henry Horbacsewski is a named Director on the corporate board of Seisint, Inc. there is no admissible documentary evidence to support that he has any relationship whatever with Reed Elsevier, Inc. d.b.a. Lexis Nexis Corportation or with Lexis Nexis Accurint. However, even if Horbacsewski is employed by Reed, he cannot reasonably claim to have personal knowledge of each and every communication, oral and written, taking place between the public, including specifically the Plaintiff, and his alleged employer, Reed Elsevier Incorporated, d.b.a. *Lexis Nexis Corporation, Lexis Nexis Accurint* and/or Seisint, Inc.

If Reed Elsevier, Inc. functions as corporate "parent," or "controlling shareholder" to a wholly owned subsidiary Seisint, Inc. no documentation has been provided to this Court to support that fact or legal conclusion. Seisint, Inc. has proffered no outside documentation to this Court to evidence that Seisint, Inc. genuinely has any role concerning Reed Elsevier, Inc., d.b.a. Lexis Nexis Corporation, Lexis Nexis Accurint. Defendant Reed's attorney affidavits submitted without supporting documentation are not sufficient to provide admissible evidence on that conveniently contrived factual issue.

2. **The affidavit of Attorney John M. Byrne Should be Stricken Because His Assertions are Unsupported by Accompanying Admissible Documentation, Because It is Comprised of Legal Conclusion and Speculation and Because his Assertions are Not Based on Personal Knowledge.**

The affidavit of attorney John M. Byrne is also comprised of legal conclusions and speculation made without personal knowledge and without any accompanying

evidentiary documentation to support the admissibility of his statements and should therefore be stricken in its entirety.

The John M. Byrne waiver of process and affidavits make claim that Byrne is Director and Senior Corporate Counsel to Seisint, Inc. The State of Florida corporate filings do not support his assertion. His name does not appear in the list of named corporate Directors. While John M. Byrne may function as Senior Corporate Counsel and Director of Lexis Nexis Corporation, there is no evidence to support that he had similar fiduciary duties with Seisint, Inc. See: Exhibit A, See: Exhibit A, Seisint, Inc. Corporate Filings, page 4.

The reasonableness of the usual standard applied by courts of requiring supporting evidentiary documentation for admission of attorney affidavits is clear where it would appear from admissible evidentiary documentation that John M. Byrne has repeatedly submitted knowingly false statements to this Court concerning his role in connection with Seisint, Inc. See: Exhibit A, Seisint, Inc. Corporate Filings, page 4. Byrne has stated in his "Waiver of Service" statement, and both affidavit documents referenced repeatedly by Reed motions before this Court that he is a Director at Seisint, Inc. The State of Florida corporate filings as to Seisint, Inc. negate the truthfulness of those statements.

3. The affidavit of Attorney Christopher Donnelly Should be Stricken Because His Assertions are Unsupported by Accompanying Admissible Documentation, Because It is Comprised of Legal Conclusion and Speculation and Because his Assertions are Not Based on Personal Knowledge.

The affidavit of attorney Christopher Donnelly is comprised of legal conclusions and speculation made without personal knowledge and without any accompanying

evidentiary documentation to support the admissibility of his statements and should therefore be stricken in its entirety.

The Donnelly affidavit improperly assets conclusions of law regarding the element of discovery concerning Reeds failure to timely respond to Plaintiff's Motion for a Summary Judgment filed on October 30, 2006 and improperly speculates without prerequisite personal knowledge as to Plaintiff's relationships with F&W Publishing, Adams Media and the Massachusetts and Maine Boards of Bar Examiners. His affidavit should be stricken for those reasons.

Plaintiff filed a Motion for a Summary Judgment on October 30, 2006 and Reed had the full opportunity provided by LR 7.1 (B)(2) for either filing a response to the summary judgment motion or alternatively the filing of a timely F.R.Civ.P. 56 (e) Motion for Discovery. Reed failed to timely file any response to Plaintiff's motion during the designated LR 7.1 (B)(2) response period, and yet, Reed now expects this Court to granted leave to file either or both of those documents months after the required filing date has passed.

Reed's requests stand in direct contradiction to well settled precedent concerning that discovery issue. See: *Alholm v. American Steamship Co.*, 144 F.3d 1172, 1177 (8th Cir. 1998) (noting that Rule 56 does not require that discovery be closed before motion can be heard); *G&G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587 (9th Cir. 1998) amended and superceded on other grounds, 156 F.3rd 893 (9th Cir. 1998) vacated on other grounds, 526 U.S. 1061, 119 S.Ct. 1450, 143 L.Ed.2nd 538 (1999) (rejecting argument that plaintiff's motion for summary judgment "premature" when it was filed more than 20 days after lawsuit was commenced and no motion under Rule 56(e) was pending);

Brill v. Lante Corp. 119 F 3rd 1266, 1275 (7th Cir. 1997) (commenting that plaintiff's argument that summary judgment should not have been granted while discovery remained open is an argument that "hardly concerns us because a party can file a motion for summary judgment at any time, indeed, before discovery has begun")". See: *Steven Baicher-McKee, William Jenson, John Corr, Guide to Federal Rules of Civil Procedure*, 6th Ed, West 2002, page 753, note 6.

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiff's *MOTION TO STRIKE ATTORNEY AFFIDAVITS OF HENRY Z. HORBACSEWSKI AND CHRISTOPHER DONNELLY AS APPENDED TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A SUMMARY JUDGMENT (LEAVE TO FILE PENDING).*

December 18, 2006

Respectfully submitted,

Christine Varad
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Milton, Massachusetts 02186
781 534 8770

I certify that on this 18th day of December 2006, I caused a copy *of MOTION TO STRIKE ATTORNEY AFFIDAVITS OF HENRY Z. HORBACSEWSKI AND CHRISTOPHER DONNELLY AS APPENDED TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A SUMMARY JUDGMENT (LEAVE TO FILE PENDING)* to be served