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10
11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
13

14 PHASE II CHIN, LLC and LOVE &
MONEY, LLC, formerly O.P.M.L.V.,
15 LLC,

Case No. 2:08-cv-00162-JCM-GWF

16 Plaintiffs,

17 v.

18 FORUM SHOPS, LLC, FORUM
DEVELOPERS LIMITED
19 PARTNERSHIP, SIMON PROPERTY
GROUP LIMITED PARTNERSHIP,
20 SIMON PROPERTY GROUP, INC.,
CAESARS PALACE CORP, CAESARS
21 PALACE REALTY CORP., DOES 1
through 20, AND ROE CORPORATIONS
22 1 through 20,

23 Defendants.
24

25 **PLAINTIFFS' JOINT OPPOSITION TO MOTION BY DEFENDANTS FORUM SHOPS,**
26 **LLC, FORUM DEVELOPERS LIMITED PARTNERSHIP, SIMON PROPERTY GROUP**
27 **LIMITED PARTNERSHIP, SIMON PROPERTY GROUP, INC. TO FILE A**
28 **"SUPPLEMENTAL MEMORANDUM" IN SUPPORT OF MOTION TO DISMISS**

1 On September 24, 2008, Defendants Forum Shops, LLC, Forum Developers Limited
2 Partnership, Simon Property Group Limited Partnership, and Simon Property Group, Inc. (the
3 “Forum Defendants”) filed a Motion with the Court seeking leave to file a “Supplemental
4 Memorandum” in support of their Motion To Dismiss, which is currently set for hearing before
5 the Court on October 7, 2008. The Forum Defendants’ Motion for leave to file the Supplemental
6 Memorandum should be denied for the following three reasons:

7 First, in filing the Supplemental Memorandum, the Forum Defendants are not responding
8 to issues raised in Plaintiffs’ Joint Sur-Reply (filed on September 12, 2008). Instead, apparently
9 recognizing the weakness of their Motion to Dismiss, the Forum Defendants are attempting to
10 raise the entirely new claim that Plaintiffs’ “sole basis” underlying their causes of action for
11 interference with contractual relations, interference with prospective business advantage,
12 injunctive relief, violation of 42 U.S.C. § 1981 and conspiracy is the “sending of four letters”
13 that the Forum Defendants assert were protected by the litigation privilege. Because the Forum
14 Defendants failed to present this issue to the Court in their Motion, Plaintiffs have not had the
15 opportunity to respond to this argument. For this reason alone, Forum's request to file a
16 Supplemental Memorandum should be rejected.¹

17 Second, there is no reason to permit the filing of the Supplemental Memorandum,
18 because the Forum Defendants’ new privilege argument encompasses factual issues which
19 cannot be decided on a motion to dismiss. *See Meltzer v. Grant*, 193 F. Supp. 2d 373 (D. Mass.
20 2002) (issue of whether pre-litigation letter was absolutely privileged could not be determined on
21 motion to dismiss).² As the Nevada Supreme Court has held, when the communication at issue
22 was “made before a judicial proceeding is initiated, it will be cloaked with immunity only if the

23 ¹ At a minimum, if the Court permits the filing of the Supplemental Memorandum, due
24 process requires that Plaintiffs be provided with an opportunity to file a supplemental brief to
address this new argument.

25 ² The case cited by the Forum Defendants, *Crockett & Myers, Ltd. v. Napier, Fitzgerald*
26 *& Kirby, LLP*, 440 F. Supp. 2d 1184 (D. Nev. 2006) is factually distinguishable because in that
27 case, the court dealt with the issue of whether an attorney should be liable for statements made to
his client during the course of representation. Here, the statements were not made by an attorney
28 to his clients, but were letters sent to Plaintiffs for the purposes of wrongfully interfering with
Plaintiffs’ contractual relationships.

1 communication is made in contemplation of initiation of the proceeding. In other words, at the
2 time the defamatory communication is made, the proceeding must be contemplated in good faith
3 and under serious consideration.” *Fink v. Oshins*, 118 Nev. 428, 433 (Nev. 2002). Thus, before
4 the Court can determine the Forum Defendants’ privilege claim, the Forum Defendants will need
5 to prove (among other things) that the letters were sent when litigation was contemplated in
6 “good faith and under serious consideration.” However, the Forum Defendants have submitted
7 no evidence of their good faith (nor could they on a motion to dismiss).

8 Indeed, to the extent that there are any facts relating to this issue, they support the
9 contrary conclusion that there was no good faith contemplation of litigation. For example, the
10 Complaint alleges that the Forum Defendants engaged in a campaign of misconduct designed to
11 harass the Plaintiffs for racially and financially motivated reasons – not to protect their legal
12 rights. *See* Complaint ¶¶27, 32. Moreover, as alleged in the Complaint, the Forum Defendants
13 sent the first letter on March 6, 2006, more than a year and a half prior to filing their lawsuit in
14 Delaware. *See* Complaint ¶43; Motion to Dismiss, Ex. E. The extreme delay between sending
15 this letter and filing the Delaware action strongly suggests that litigation was not “under serious
16 consideration” when the letter was sent. By their Supplemental Motion, the Forum Defendants
17 are improperly requesting that the Court make a factual determination that the threat of litigation
18 was made in good faith and was under serious consideration when the letters were sent, and thus
19 Plaintiffs’ claims cannot be dismissed on the basis of privilege. *See Meltzer*, 193 F. Supp. 2d at
20 381.

21 Third, the assertion that Plaintiffs’ allegations against the Forum Defendants only rest on
22 the letters attached to their Motion to Dismiss is false. The Complaint also alleges that the
23 Forum Defendants interfered with Plaintiffs’ contracts and discriminated against Plaintiffs and
24 Plaintiffs’ customers by, among other things, blaming Plaintiffs’ customers for all security
25 problems at Caesars involving African Americans and treating Plaintiffs less favorably than
26 other tenants at the Forum Shops. *See* Complaint ¶¶30, 31. Plaintiffs are not required to allege
27 every instance of wrongful conduct in the Complaint – as noted in the Complaint, the specific
28 factual allegations regarding Defendants’ wrongdoing is not “an exhaustive inventory.”

1 Complaint ¶33; *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (“a complaint is not
2 required to allege all . . . of the facts logically entailed by the claim . . . a complaint does not fail
3 to state a claim merely because it does not set forth a complete and convincing picture of the
4 alleged wrongdoing.”). Moreover, the Forum Defendants’ new position conflicts with its own
5 assertion in the Motion to Dismiss, in which it stated that the allegations against the Forum
6 Defendants include “letters and visits from Defendants regarding Chinois’ violations of the
7 lease”. Motion to Dismiss at 22 (emphasis added). Because the Forum Defendants’ premise in
8 the Supplemental Memorandum – that the letters are the sole basis of liability against them –
9 fails, so does their privilege argument.

10 * * *

11 For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Forum
12 Defendants’ Motion for leave to file the Supplemental Memorandum.

13 Dated: September 26, 2008

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19 Dated: September 26, 2008

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