

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. GEORGE H. WU, JUDGE PRESIDING

EDROP-OFF CHICAGO LLC and CORRI)
MCFADDEN,)

Plaintiffs,)

vs.)

No. CV 12-04095-GW)

NANCY R. BURKE, MIDLEY, INC.)
d/b/a PURSEBLOG.COM, and DOES)
1-10 inclusive,)

Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, October 29, 2012; 9:11 A.M.

PLAINTIFFS' MOTION FOR LEAVE TO CONDUCT DISCOVERY,
PURSUANT TO RULE 56(D) OF THE FED. RULES OF CIVIL PROC.

AND IN CONNECTION WITH DEFENDANT MIDLEY, INC.'S
MOTION TO STRIKE COMPLAINT PURSUANT TO CCP §425.16;
PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED

COMPLAINT; AND
POST-MEDIATION STATUS CONFERENCE

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1 **LOS ANGELES, CA.; MONDAY, OCTOBER 29, 2012; 9:11 A.M.**

2 -oOo-

3 THE COURT: All right. Let me call the matter of
4 eDrop-Off versus Burke. Let me have appearance of counsel.

5 MR. BALLON: Good morning, Your Honor. Ian Ballon
6 and Lori Chang for defendant Purseblog.

7 MS. SHELTON: Good morning, Your Honor. Dominique
8 Shelton, Edwards Wildman, for plaintiff eDrop-Off and Corri
9 McFadden.

10 THE COURT: All right.

11 MS. PFAFF: Good morning, Your Honor. Erin Pfaff,
12 Edwards Wildman, on behalf of the plaintiff.

13 THE COURT: All right. My understanding is the
14 matter didn't settle at the mediation.

15 MR. BALLON: There was no settlement.

16 THE COURT: Okay. So I guess the issues are where
17 we left them last time as to the plaintiffs' motion for
18 leave to amend and also plaintiffs' motion to conduct
19 discovery pursuant to 56(D).

20 Did I give an indication last time or I didn't?

21 MS. SHELTON: There was a tentative.

22 THE COURT: And the tentative was?

23 MS. SHELTON: It was a statement of the law. It
24 wasn't a tentative decision.

25 THE COURT: Oh, okay. In that case then let me

1 give you my firmer tentative at this point in time. That
2 is --

3 Before I do that, what's the status at this point
4 in time of the Illinois litigation, anything, or is it still
5 stayed or what?

6 MS. SHELTON: It's stayed pending resolution of
7 this action, Your Honor.

8 MR. BALLON: Your Honor, it's not actually stayed.
9 The plaintiffs' have agreed to continue the hearing in that
10 case after this hearing.

11 THE COURT: Okay. But what's the pending hearing
12 there?

13 MR. BALLON: No pending hearing.

14 THE COURT: There is no pending hearing.

15 MR. BALLON: There is no pending hearing. We've
16 asked the other side to dismiss. They won't dismiss. They
17 won't stay. But we've got an extension until after this
18 hearing for the next status conference.

19 THE COURT: Okay. Insofar as the motion for leave
20 to amend, I would grant the motion for leave to amend under
21 *Verizon Delaware Inc. v. Covad Communications Co.*, 377 F.3d,
22 1081 at page 1091. It's a Ninth Circuit 2004 case.

23 I think I discussed with the parties last time
24 insofar as what the law is in this area. I indicated that
25 the federal adjudication of a state anti-SLAPP motion

1 implicates the Erie Doctrine. And that's held in *Metabolife*
2 *International v. Wornick*, 264 F.3d 832 at 845, the Ninth
3 Circuit 2001 case.

4 And, specifically, in that case it held that
5 procedural state laws are not used in federal court if to do
6 so would result in a direct collision with a federal rule of
7 civil procedure. Accordingly, the Ninth Circuit has held
8 that certain procedural provisions of the California
9 Anti-SLAPP statute conflicts with the Federal Rules of Civil
10 Procedure and cannot be applied in federal court.

11 One of the examples would be is that granting or
12 denying a leave to amend after a SLAPP motion has been filed
13 is governed by Federal Rule of Civil Procedure 15(a) and not
14 California Code of Civil Procedure 425.16. And, again,
15 that's held in the *Verizon Delaware* case. And more recently
16 it's been reiterated in *Greensprings Baptist Church v.*
17 *Cilley*, 629 F. 3d 1064 at page 1066, note one. And that's a
18 2010 Ninth Circuit case.

19 So, insofar as the motion for leave is concerned,
20 the court would grant it. And it's my understanding that
21 the present motion -- sorry -- the present amended complaint
22 adds some new factual allegations and also a new cause of
23 action under the Lanham Act and a new cause of action under
24 Illinois Statutory Unfair Competition Laws and also a new
25 cause of action under State Common Law Torts, et cetera.

1 All right. And then as to the second motion which
2 is motion to be permitted to engage in certain discovery, it
3 depends upon the nature of the dispute at this point in
4 time. And the key issue would be whether or not the extent
5 to which the Defendant -- is it, Midley; is that right? Is
6 that the name of the defendant?

7 MR. BALLON: Yes.

8 THE COURT: -- Defendant Midley goes beyond being
9 merely a forum host and does something more active in that
10 regard because, obviously, if Midley is only acting as a
11 forum host, then there is case law that indicates that this
12 case cannot go forward. But if the defendant is acting more
13 than as a mere forum host, then there is potential for
14 liability.

15 And the court would cite to such cases as
16 *Goddard v. Google*, 640 F.Supp 2d, 1193. And that's a
17 Northern District of California 2009 case. And there's also
18 other cases, for example, *Fraley v. Facebook, Inc.*, 830 F.
19 *Supp. 2d* 785. That's also a Northern District California.
20 Then there is another one *Swift v. Zynga Game Network, Inc.*,
21 2010 U.S. Dist. LEXIS 117355. That's a 2010 Northern
22 district of California case.

23 So what's the parties' response to all of that?

24 MR. BALLON: If I may respond.

25 THE COURT: Sure.

1 MR. BALLON: Thank you, Your Honor.

2 I'd like to address the amendment first and
3 discovery after if I may. I would ask the court to
4 reconsider because amendment -- we certainly agree that this
5 is governed by federal rules, not by state rules. But under
6 the federal rules amendment should not be allowed; one, if
7 there is prejudice and; two, if the amendment would be
8 futile.

9 With respect to prejudice, the plaintiffs'
10 proposed amended complaint doesn't really add any new facts.
11 It adds new conclusions of law. It doesn't really add new
12 facts. What it does is it deletes the claims that this
13 court already ruled in June could not be dismissed without
14 prejudice because it would prejudice the defendant.

15 So, what it does is it allows an end route. It
16 allows the defendants -- it allows the plaintiffs to
17 circumvent this court's order of June of this year that said
18 that the plaintiffs could not dismiss this case without
19 prejudice in favor of the Illinois action because it would
20 prejudice the defendants in our ability --

21 THE COURT: You are arguing two different things.
22 One is whether or not the plaintiffs can amend. But you are
23 arguing something else and that is what are the consequences
24 of an amendment which eliminates those claims which give
25 rise to the Anti-SLAPP motion. I understand that.

1 The question is that is something I have not ruled
2 on and I don't know what the effect of it is. I would
3 presume -- without having done any investigation or research
4 myself, I would presume that the mere fact that you dismiss
5 those causes of action under the substantive law which is
6 the California SLAPP law that you can't get around SLAPP
7 sanctions for that.

8 MR. BALLON: That's correct. The Anti-SLAAP
9 motion will remain pending on the first complaint.

10 THE COURT: But conversely, however, I think that
11 in terms of if there are SLAPP damages, the amount of SLAPP
12 damages would be affected. Because, obviously, if somebody
13 wakes up and says, oh, my God, I have violated SLAPP even
14 though I did it initially and I got sued on it, if they were
15 to maintain those causes of action or attempt to maintain
16 them, that would increase the litigation expenses which
17 would be improper.

18 So, the mere fact that they get rid of them, I'm
19 not going to not let them get rid of them because, again,
20 there is no sense in perpetrating these causes of action if
21 in fact they might give rise to SLAPP sanctions.

22 So, it's a different question. The question is
23 what is the affect later on of having allowed them to amend
24 to get rid of those claims. It is what it is. If in fact
25 under California law or if in fact if the federal law were

1 to somehow supersede the California law in this area and
2 say, well, they could still amend and not be penalized for
3 the SLAPP aspects, well, if that in fact is the law, then,
4 hey, that's the law.

5 But I don't know what the law is at this point.
6 So, I'm not going to grant a refusal to allow them to amend.
7 All I'm saying is that even though the court is allowing
8 them to amend, whatever is the applicable law as to the
9 affects of that will occur.

10 MR. BALLON: Okay. So in other words, so it would
11 impact the pending Anti-SLAAP motion?

12 THE COURT: It seems to me that I understand the
13 argument that it would seem to be sort of strange that if a
14 person could do something in federal court that they could
15 not do in state court that should not occur. But
16 conversely, however, things happen all of the time where you
17 can do some things in federal court that you can't do in
18 state court. And it's kind of like, well, this is the way
19 the system operates. So, I do not know the answer as to
20 what happens if you are allowed to amend your complaint in
21 federal court and you amend out those causes of action which
22 gave rise to SLAPP in the first place.

23 MR. BALLON: The only case that we found that was
24 even close where a court was considering a plaintiff's
25 attempt to by amendment get rid of claims they weren't

1 allowed to dismiss was an unreported Sixth Circuit case.
2 That's *Jones v. Western Reserve*, 455 F.App. 640. It's a
3 2012 case, *Jones v. Western Reserve*. And the court there
4 held that they could not do that. And, again, I think it
5 does go to the prejudice. But I would just ask the court to
6 look at that. I don't want to belabor the point on
7 prejudice.

8 THE COURT: Okay.

9 MR. BALLON: But I do want to move to futility
10 because, again, an amendment even in federal court even
11 under the liberal pleading standards isn't to be allowed if
12 it would be futile. And if you look at the new complaint,
13 the only thing that they've done is they've added a second
14 string of comments which relate to this lawsuit, people
15 saying things like the plaintiff is being heavy handed.
16 She's bullying, the blog, it's impacting free speech.

17 But there is nothing in the complaint, no specific
18 comment alleged to be actionable. And the parties met and
19 conferred extensively for several hours over two days where
20 during the meet and confer process I said to opposing
21 counsel: In order for the amendment not to be futile, it's
22 not enough to just say, here are 200 pages from a blog. You
23 figure out what's actionable. You have to identify specific
24 statements that you claim are attributable to PurseBlog.
25 And the plaintiffs could not do that. Their argument was

1 that just the whole, all of the posts. And, of course,
2 there is no basis for a claim without identifying
3 specifically what's at issue.

4 Moreover --

5 THE COURT: Let me stop you.

6 MR. BALLON: Sure.

7 THE COURT: I understand your argument. This is
8 the situation as I understand it at this point. If in fact
9 if under both the original complaint and the amended
10 complaint there is not a sufficient statement of actionable
11 conduct under whatever federal -- whatever state cause of
12 action they are alleging, then I would agree with you that
13 it doesn't give them any behooves to amend because if it's
14 insufficient it's insufficient.

15 MR. BALLON: Uh-huh.

16 THE COURT: But if in fact there is some
17 statements that would give rise to some sort of liability
18 and/or if -- well, let's just put it that way. If there is
19 some statement that would give rise to some liability, then
20 the defendant also has the defense as to the fact that the
21 defendant is only a forum host and not a perpetrator or
22 initiator or somehow also producing these supposed comments
23 that are subject of some sort of action. I can understand
24 that. But the problem is that --

25 Well, I suppose what we could do is if you want to

1 make a motion on the first issue, then I would say that,
2 yeah, if you are going to only go on that then I can see the
3 argument that there isn't any need for discovery at this
4 point in time because either they have the comments or they
5 don't have the comments that are supposedly sufficient to
6 give rise to some sort of cause of action.

7 But, conversely, if they come up with that
8 argument that there is some comments that are sufficient to
9 give rise to a cause of action, then if you attempt to come
10 back with the argument that your client is only a forum host
11 I probably will allow them to go into some discovery on the
12 issue as to whether or not in fact your client is only a
13 forum host.

14 MR. BALLON: And I understand your position, Your
15 Honor, and we've at least partially briefed that. We have
16 eight of nine potential briefs that are before the court.
17 We certainly briefed the discovery and the amendment.

18 Our position is that the amendment would be futile
19 because both in the complaint on the four corners of the
20 complaint and in several hours of meeting and conferring the
21 plaintiffs were unable to identify specific statements.

22 THE COURT: No. The thing about it is is that it
23 seems to me that I would just simply -- if what you are
24 saying is true, I don't see why I wouldn't give leave to
25 amend anyway because what you are saying is that as

1 initially stated or as stated in the amended complaint there
2 is not sufficient allegations to give rise to a state cause
3 of action.

4 If that's the case, okay, I will give them leave
5 to amend and you cover both statements anyway because you
6 are going to have to cover both statements even in the
7 motion to prevent them from being given leave to amend in
8 the first option.

9 Frankly, the futility aspect of it is not
10 something that normally the courts are suppose to look at.
11 It is true that if it's absolutely futile there is no need,
12 but the appellate courts say to the trial courts don't spend
13 a lot of time on it. It's either so clearly futile that
14 it's not worth anybody's time or just allow them to amend
15 and you can address the other things in a subsequent motion
16 to dismiss.

17 MR. BALLON: Except here we also have a Ninth
18 Circuit federal policy relating to the Communications
19 Decency Act. Chief Judge Kazinski addressed that very issue
20 in the *Roommates.com* case. And, indeed, even in *Goddard v.*
21 *Google*, which the court cited, *Goddard v. Google* made
22 allegations even more severe than some of the ones in here.
23 Yet, the judge in *Goddard v. Google*, nonetheless, denied
24 leave to amend in that case.

25 THE COURT: But I don't see why. Because the

1 argument is slightly different here. If the argument is, is
2 that the statements in and of themselves are insufficient,
3 if the new statements are insufficient then why not address
4 them as well. What's the harm?

5 Either they are so obvious on their face
6 insufficient in which case you can do it so easily or they
7 may be sufficient. But if they may be sufficient, then they
8 should be allowed leave to amend anyway. So I don't
9 understand why in this type of context we wouldn't address
10 them.

11 MR. BALLON: Well, it goes to two statutes and
12 both the CDA and the Anti-SLAPP Statute. Let's start with
13 the CDA and what chief Judge Kazinski said in the
14 *Roommates.com* case.

15 THE COURT: The problem with the CDA, however, is
16 the CDA is limited to those entities which are merely forum
17 hosts or something in that category.

18 MR. BALLON: No. I respectfully disagree. Chief
19 Judge Kazinski at pages 1174 to 1175 of the en banc decision
20 said: We must keep firmly in mind that this is an immunity
21 statute we are expounding, a provision enacted to protect
22 websites against the evil of liability for failure to remove
23 offensive conduct. Websites are complicated enterprises and
24 there will always be close cases where a clever lawyer could
25 argue that something the website operator did encouraged the

1 illegality. Such close cases we believe must be resolved in
2 favor of immunity, less we cut the heart out of Section 230
3 by forcing websites to face death by 10,000 duck bites,
4 pages 1174 to 1175.

5 There are other places in *Roommates.com* where
6 Chief Judge Kazinski says very clearly that close cases have
7 to be resolved in favor of immunity. And in the *Goddard v.*
8 *Google* case the court said the reason --

9 THE COURT: Let me stop you. That's why I am
10 citing to the *Swift* case and to the *Fraley* F-R-A-L-E-Y case
11 because those are post *Roommates* cases. They talk about the
12 area and they talk about this situation, et cetera. So look
13 at those cases. I understand what the cases hold, but what
14 can I say.

15 MR. BALLON: Those cases are very distinguishable,
16 Your Honor. In the *Goddard v. Google* case the reason the
17 judge did not give leave to amend --

18 THE COURT: No. But I'm not talking about *Goddard*
19 *v. Google* at this point. I'm talking about *Fraley* and
20 *Swift*.

21 MR. BALLON: Well, *Fraley* I can speak to because
22 that one is very easy. That was a case where the website
23 itself, not the individual, created the content. *Fraley* was
24 a case involving Facebook.

25 What happened in Facebook is when users clicked

1 the like button in Facebook, Facebook would then deliver ads
2 saying Judge Wu likes Target or Ian Ballon likes Target.
3 And Facebook said, well, that's not our content because the
4 user clicked the like button.

5 And the court in *Fraley* said that's
6 distinguishable. That's different because you, Facebook,
7 delivered the ad. You, Facebook, created that text that
8 says Judge Wu likes Target. The only thing the user did was
9 click on a link indicating they like Target. That's a very
10 distinguishable case.

11 There is actually a much factually closer case
12 that we found which is the *Yelp* decision which involves
13 allegations much stronger thing than what's at issue here, a
14 very recent case *Levitt v. Yelp*. It's the Central
15 District -- I'm sorry. I believe it's the Northern
16 District, Judge Edward Chen and it's 2011 Westlaw 5079526.

17 In that case the plaintiffs alleged everything
18 that the plaintiffs in this case allege and much more. And
19 the judge would not grant leave to amend because of the
20 importance of the federal CDA preemption and because the
21 Ninth Circuit policy in *roommates* that the consequence of
22 this immunity is not just an immunity but also preventing a
23 website from the cost of litigation.

24 Because, Your Honor, if you grant leave to amend,
25 while I'm confident we can brief the issue and show that the

1 amendment would be futile and win on it, that's another 50-,
2 60-, 80-, \$120,000 and another two, three, four months of
3 litigation. And that's the concern that the court in *Levitt*
4 had addressed.

5 There are a number of cases. But I would say
6 *Levitt v. Yelp* is the one that I would recommend to look at.
7 It's a post-*Roommates* case. But even *Goddard v. Google* is
8 very clear. In *Goddard v. Google* the court rejected
9 allegations that were at least as bad as what the plaintiffs
10 are now making against us because they said allegations
11 aren't enough.

12 THE COURT: I understand what you are saying. You
13 are not convincing me. I will allow the amendment. I'm
14 going to allow it.

15 As to the issue of the discovery, what I will do
16 is I will stay ruling on that. I will give you the
17 opportunity to rephrase your motion to dismiss, if you want,
18 to include the references to the amended complaint. And I
19 will look at that and will allow obviously the defense to
20 respond.

21 If in fact what you have at the end of that is an
22 insufficiency insofar as what the content is, then I will
23 make a ruling on that. And if it turns out that, however,
24 if I make a determination that the content is sufficient to
25 give rise to some sort of cause of action, then I will allow

1 you to at that point make the motion under the -- what do
2 you call it?

3 MR. BALLON: The Anti-SLAPP statute?

4 THE COURT: No. It's always under the Anti-SLAPP
5 statute. But you are making the argument at this point
6 under the Computer, what is it?

7 MR. BALLON: Communications Decency Act.

8 THE COURT: The Communications Decency Act because
9 I presume that is one of your bases. But the problem is to
10 see if in fact the defendants are going to attempt to argue
11 that your client is doing something other than what is
12 allowed for under that particular statute. And if they are
13 attempting to do that, then I'd decide at that point in time
14 based on what they show me whether or not I will allow them
15 to do any further discovery on that issue or not.

16 MR. BALLON: Okay. So a question then
17 procedurally because I want to make sure I understand where
18 we are.

19 We have the Anti-SLAPP motion pending. And the
20 Ninth Circuit law seems to be that even if a motion to amend
21 is granted that motion remains pending.

22 THE COURT: Well, I'm allowing it to remain
23 pending. But I'm allowing you to amend it to include the
24 additional allegations in the amended complaint to address
25 them because I presume if you don't they will.

1 MR. BALLON: I see. Well, they already filed
2 their opposition to the Anti-SLAPP. The only thing we
3 haven't done is filed our reply addressing their arguments.
4 We've orally argued it but we never filed our reply.

5 THE COURT: No. My understanding was that that
6 was all done prior to my allowing the amendment.

7 MR. BALLON: Right. Okay.

8 THE COURT: What I'm saying is that I'm allowing
9 you to amend. I'm not saying to redo everything. I'm just
10 saying that if you want to you can do one of two things.
11 Either submit a new SLAPP motion based upon everything
12 including the original and the amended pleading. Or if you
13 want to, you could just do just an addendum addressing just
14 those specific additional materials in the amended complaint
15 to cover everything.

16 MR. BALLON: Okay. All right. So we will do
17 that. Then we will file an opposition, reply, court
18 hearing.

19 THE COURT: Yes.

20 MR. BALLON: Can we do that on a more expedited
21 basis?

22 THE COURT: I don't care. It's up to you guys,
23 whatever you guys want to do.

24 MR. BALLON: Okay. Thank you, Your Honor.

25 THE COURT: Let me hear from the plaintiffs'

1 counsel.

2 MS. SHELTON: Thank you, Your Honor. With respect
3 to -- I will just address the discovery issue.

4 With respect to discovery, to Your Honor's
5 question about whether PurseBlog is acting as a neutral
6 forum host, of course, we haven't been able to conduct
7 discovery yet. But from the informal conversations and the
8 declarations that we've been able to gather so far to be
9 able to identify who are the moderators, who are the
10 administrators of this blog and whether third-party content
11 is even involved, because both sides agree and the case law
12 is very clear that the CDA and Anti-SLAAP only apply to
13 third --

14 THE COURT: Let me stop you. You are talking
15 about something that is actually a couple steps down the
16 road. Initially, as I've indicated to defense counsel, a
17 determination has to be made as to whether or not those
18 alleged comments that are supposedly injuring your client in
19 fact can be a basis for some sort of cause of action. And
20 if the answer is no, then there is no sense in doing any
21 further discovery on whether or not the defendants are
22 acting more than acting as forum hosts or anything else,
23 because in fact even if they were it wouldn't make any
24 difference because the statements aren't actionable.

25 MS. SHELTON: Well, let me just address that, Your

1 Honor, with respect to the two-part process. I would like
2 to point out that what we are talking about is defamation
3 that is contained throughout the thread. What's actionable
4 are charges on that thread that our client engaged in
5 criminal activity.

6 The issue from *Roommates.com* and the standard is
7 whether PurseBlog elicited, encouraged and solicited those
8 comments from third parties, a; and/or; b, whether they
9 themselves contributed to the thread.

10 First, with respect to the first question, the
11 extent to which PurseBlog elicited, encouraged and solicited
12 the comments that appear from other users on the blog,
13 that's an issue that is completely within PurseBlog's
14 control.

15 THE COURT: Let me stop you. Again, you are going
16 two steps ahead because I understand what you are saying in
17 terms of the comments. I haven't made a ruling on that. If
18 in fact I find that the comments are not actionable, there
19 is no need to go any further in this matter because that
20 will end the case.

21 If I find that the comments are actionable in some
22 way, then if the defense at that point in time seeks to
23 raise the Communications Decency Act or anything else, you
24 know, any sort of other defenses that says that the
25 defendants would not be liable because either they are not

1 the source or they did not contribute or whatever, then at
2 that point in time if you can make a successful argument to
3 me that in order to rebut that you need to do some discovery
4 into certain things, then I can understand that. But it
5 depends on my ruling on the first issue.

6 MS. SHELTON: I understand, Your Honor, and we
7 submit to that. I just wanted to point out two issues; that
8 we are talking about the entirety of the thread, not just
9 the specific comments. We don't first of all know to what
10 degree, we don't know the names of all of the moderators.
11 We don't know the names of all of the administrators because
12 no discovery has been conducted.

13 And the informal investigation that we've been
14 able to obtain by people coming forward who have identified
15 that PurseBlog is engaged in a practice of trashing
16 businesses to drive up ad revenue, we've learned -- we've
17 identified some moderators. In counting those up in the two
18 threads, we have 72 comments from who we believe are
19 PurseBlog moderators as well as administrators.

20 THE COURT: I understand you are going to make
21 that argument later on. But why would I entertain it now?
22 Why would I even need to know about it now?

23 All I need to indicate is there might be a
24 possibility that there is something of that sort. But I
25 don't need to rule on it because, again, if the comments are

1 insufficient they are insufficient. If the comments are
2 sufficient, then I understand that you are going to be
3 raising this type of argument if the defendant raises the
4 Communications Decheance Act --

5 MR. BALLON: Yes.

6 THE COURT: -- or some other type of defense that
7 would attempt to separate their defendants from the
8 comments. And then I could understand your argument is
9 that, well, we have some information that shows that
10 indicates that they are either the source or contributing
11 some way to the comments, and we want to get further
12 discovery to oppose a motion to dismiss on that point.
13 Because at that point in time it is a factual determination
14 as to whether or not they are or are not contributing. And
15 then it puts it more from a motion to dismiss to more akin
16 to something that would be akin to a summary judgment type
17 situation, which in the context of federal court allows you
18 to do discovery, unlike state court.

19 MS. SHELTON: Yes, Your Honor. And agreed.

20 The only additional point I would add is that we
21 are talking about from plaintiffs' perspective the entirety
22 of the thread, not just the 72 comments that we've been able
23 to glean.

24 THE COURT: I understand that.

25 MS. SHELTON: And I just would also point out that

1 defendants have changed their position. They originally in
2 their opposition had talked about their motion being
3 analogous to a summary judgment motion at their opposition
4 at page four, line eight. But I will certainly submit to
5 Your Honor's tentative.

6 MR. BALLON: We have not changed our position.
7 We've just pointed out that not only is it supported by
8 evidence but just the allegations aren't sufficient.

9 THE COURT: All right. Anything else we need to
10 discuss? Have we decided on a schedule yet or not?

11 MR. BALLON: Well, what Your Honor had done, but
12 not issued a formal order, was you had stayed everything
13 else in the case which is extremely important to us because,
14 as the court recalls, there were a lot of ex partes, there
15 were a lot of additional briefing.

16 THE COURT: Yes. I'm staying everything at this
17 point in time. Except I'm allowing an amendment of the
18 Anti-SLAPP motion. And then I'm going to have a response
19 from the plaintiff and then a reply.

20 So if you guys can agree amongst yourselves on
21 that schedule, then I will sign off on it and then we will
22 see what happens then. And then depending on how I rule on
23 that, then we can decide thereafter on a schedule if it's
24 necessary for a further motion insofar as whether or not the
25 defendants are contributors or originators of the purported

1 actionable comments.

2 MS. SHELTON: Thank you, Your Honor.

3 MR. BALLON: There is one other housekeeping
4 matter --

5 THE COURT: Sure.

6 MR. BALLON: -- which is the Electronic Frontier
7 Foundation sought leave to file an amicus brief. We would
8 want that considered in connection with our renewed motion.
9 Obviously, I don't have standing to argue for them. But I
10 would just alert the court that it's pending and we believe
11 that it will be relevant to the addendum that we are going
12 to be filing.

13 THE COURT: All right. You are opposing I
14 presume?

15 MS. SHELTON: Yes, Your Honor.

16 THE COURT: Do I have all of the papers on that or
17 not?

18 MS. SHELTON: No, you don't. You don't have our
19 opposition yet, Your Honor --

20 THE COURT: Okay.

21 MS. SHELTON: -- because the stay was entered so
22 we didn't file it.

23 THE COURT: All right. I will lift the stay on
24 that aspect of it so I can rule on that issue as well. And
25 if you have a schedule for that too. In other words, if you

1 need to have that issue resolved prior to the hearing on the
2 motion to dismiss vis-a-vis the comments, then -- although,
3 that may be actually going more towards the later motion, if
4 there is a later motion.

5 MR. BALLON: Well, it goes to the Anti-SLAAP. You
6 had asked us to file either a new Anti-SLAAP on the new
7 complaint or an addendum addressing the new complaint. So
8 it actually is that motion. And that's why I would ask if
9 you would to --

10 THE COURT: Let me stop you. It would go to what?
11 In other word, I've made a ruling today on the motions for
12 leave to amend which I've granted. And the motion for leave
13 to conduct discovery I'm staying until I resolve the motion
14 to dismiss the initial SLAPP motion to dismiss based on the
15 sufficiency of the comments.

16 MR. BALLON: We would like to incorporate by
17 reference the EFFR in our addendum.

18 THE COURT: Then you should have me rule upon
19 whether or not I will consider it prior to that motion
20 because if I rule that I'm not going to consider it then
21 don't rely on their arguments, you have to make them
22 yourselves in your own materials. So include that in your
23 schedule in other words so I can resolve it at some point in
24 time prior to that motion the issue of whether or not I'm
25 going to allow that amicus briefing to be filed.

1 MR. BALLON: Thank you, Your Honor.

2 MS. SHELTON: Thank you, Your Honor.

3 THE COURT: All right. Anything else?

4 MR. BALLON: No.

5 THE COURT: Okay. Have a very nice day.

6 However, you know, you might really still want to
7 settle this case. In the end this is just going to go on
8 and on. And there is going to be a huge bill at the end.

9 MR. BALLON: I would agree. But I would ask you
10 to talk to the magistrate judge because there was a material
11 change in the plaintiffs' position. You will recall at the
12 last hearing the plaintiffs stated on the record they were
13 proposing a walk-away. We talked after that. That wasn't
14 our position. We wanted compensation.

15 THE COURT: Will both sides walk away?

16 MR. BALLON: Well, what happened was we got a
17 letter demanding \$500,000.

18 THE COURT: No, that's not my question. Will both
19 sides walk away?

20 MS. SHELTON: Your Honor, we wrote in our
21 confidential brief to Magistrate Olguin that we would be
22 willing to walk away. And it's also a statement that
23 PurseBlog sent us letters saying we understand that in
24 putting your demand you are trying to get to a walk-away
25 which is unacceptable to them.

1 THE COURT: In other words, will both sides walk
2 away. But the only problem with a walk-away -- in other
3 words, everything that happened prior to this point in time
4 would go away.

5 MR. BALLON: That's the problem.

6 THE COURT: But what happens in the future if
7 there is a future type of conduct? Again, I do agree that
8 the parties should resolve the case. But obviously you
9 can't resolve a case if the next day something happens that
10 gives rise to the same controversy in the same way because
11 then you've already started this, you might as well resolve
12 this.

13 So the question really is can both sides agree
14 upon a walk-away, but with an understanding about the
15 parameters of what we are talking about in the future?
16 Because, obviously, the defense is going to be arguing that
17 if in fact they are only acting as forum hosts under the
18 Communications Decency Act, they get a get-out-of-jail card.

19 But, conversely, however if your clients are not
20 acting solely as the forum hosts but are actually either
21 doing something else to initiate comments or directing
22 comments or whatever, then there is a problem if the
23 comments themselves are actionable.

24 MR. BALLON: Your Honor, with all due respect, my
25 client doesn't want to accept the walk-away at this point.

1 Because while we had proposed it many times and we had
2 several runs of settlement negotiations, the walk-away
3 proposal came once the legal fees exceeded \$300,000. At
4 that point my client wanted some compensation.

5 Your Honor, with all due respect, the reason we
6 didn't have the mediation -- we were going to mediate even
7 knowing that the plaintiff wanted a walk-away. When the
8 plaintiff changed their position and sent us a letter saying
9 that our position now is we want you to pay \$500,000, the
10 magistrate judge himself, not me, concluded that at that
11 point it would not make sense. If the plaintiffs want to
12 revise their position, we are certainly open to it.

13 THE COURT: Again, what happened in the past is
14 what happened in the past. If you want to settle this
15 case -- let me put it this way. This case will not settle
16 with either side paying any side's amount of money simply
17 for the fact that they just simply won't. I'm not that
18 naive to think that you can get a settlement in this
19 particular situation.

20 What you really want to do if possible is to put
21 this thing behind both sides at this point in time. After
22 this point in time it's going to get even more expensive,
23 because you are talking about two litigations, one here and
24 one in Illinois. Who knows what's going to happen? What
25 can one say?

1 On the one hand, I suppose if they get a judgment
2 in their favor, there are damages of one sort or another,
3 and potentially with defamation there is punitive damages
4 too and stuff of that sort. So there is a risk to the
5 defense, not to say they are going to win but there is a
6 risk.

7 Conversely, however, if they win under SLAPP they
8 also get attorneys' fees and stuff like that, there is a
9 risk to your client. There is a risk to both sides. And I
10 have not reviewed in detail the nature of the comments to
11 say, oh, these are horrible or something like that. But you
12 are going to be trying this in front of a jury and jurors
13 aren't going to be too impressed with this.

14 MR. BALLON: Your Honor, with all due respect, we
15 believe that --

16 THE COURT: You are saying "with all due respect."
17 You don't have to say that.

18 MR. BALLON: We feel this is a frivolous case. We
19 have proposed multiple times reasonable settlements. The
20 plaintiffs had a strategy which is not atypical in these
21 kinds of cases of trying to force the defendant to spend so
22 much money that they'd have to walk away.

23 The problem is that at this point the defendant
24 has spent so much money and because it has a statutory right
25 and because we believe we can prevail, it won't. And the

1 one thing I would say is -- with all due respect.

2 THE COURT: Stop. Stop. Stop. Don't keep on
3 saying "with all due respect." It's really kind of
4 insulting.

5 MR. BALLON: I'm sorry. I would ask if plaintiffs
6 will agree to waive it that you speak to the magistrate
7 judge, because I believe that he will give you a different
8 impression of where we are and why the case had not resolved
9 if plaintiffs agree to that.

10 THE COURT: Let me stop you. Settlements are
11 voluntary things by nature. And, technically, the judicial
12 officer or the mediator, whoever, cannot force a settlement.
13 Both sides have to realize the problems that are in
14 existence by going forward.

15 But I have all of the time situations where one
16 side gets an offer of one sort or another, doesn't take it
17 and the consequences are catastrophic. Sometimes it happens
18 to the defendant. Sometimes it happens to the plaintiff.
19 It's not all that uncommon.

20 MS. SHELTON: Your Honor, may I just point out one
21 thing because some statements were made about the history of
22 settlement discussions?

23 From the inception, and as has been stated in
24 letters, the defense have been very clear that they expect
25 payment of their fees. That was really from the time that

1 they fought to keep the case here.

2 THE COURT: Let me stop both sides. You don't
3 have to talk about -- technically, you are not even suppose
4 to talk about what was said in settlements, because, again,
5 it's not something that affects the litigation. The mere
6 fact that some party is unreasonable in their settlement
7 doesn't necessarily mean that there is going to be an
8 adverse consequence because they may ultimately prevail. So
9 that's just what happens in a settlement. And sometimes one
10 party that has the better case decides not to settle and
11 they lose.

12 That's not uncommon too. So all that being said,
13 the parties should seriously talk about trying to resolve
14 the case. And if you want to I can get involved. I don't
15 mind getting involved but you have to have a written
16 permission from your clients.

17 Okay. So we have future dates now. We have
18 everything. So go ahead and try to settle. But if not,
19 then there is the dates that we have.

20 MR. BALLON: Thank you, Your Honor.

21 MS. CHANG: Thank you, Your Honor.

22 MS. SHELTON: Thank you, Your Honor.

23 (At 9:51 a.m. proceedings were adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: November 8, 2012

/S/ WIL S. WILCOX

U.S. COURT REPORTER
CSR NO. 9178

Los Angeles, California; Monday, October 29, 2012; 9:11 A.M.

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