UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-4095 GW (FMOx)	Date	October 10, 2013
Title	*eDrop-Off Chicago LLC, et al. v. Burke, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Erin Lee Jeanette Pfaff	Lori Chang	

PROCEEDINGS: STATUS CONFERENCE

The Court's Further Thoughts in Response to Defendant's Status Conference Statement is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the Status Conference re Defendant Midley, Inc.'s Motion to Strike [48] is continued to **October 31, 2013 at 8:30 a.m.** Status Report will be filed by noon on October 29, 2013. Parties may appear telephonically provided that notice is given to the clerk two business days prior to the hearing.

: 08

Initials of Preparer JG

eDrop-Off Chicago LLC, et al. v. Burke, et al., Case No. 2:12-cv-04095 GW (FMOx)
Further Thoughts in Response to Defendant's Status Conference Statment

The Court has reviewed Defendant Midley, Inc.'s Status Conference Statement. *See* Docket No. 136. In brief, the Court's comments are as follows.

First, to the extent Midley is concerned that the Court concluded it "waived" the argument that Plaintiffs bear the burden at the second step of the anti-SLAPP analysis, it can rest assured – that was not the Court's conclusion. Rather, the Court simply observed that Midley's second-step argument, throughout the lengthy, protracted briefing on this anti-SLAPP motion, was based on what it believed to be a successful affirmative defense. Once that defense failed to dispose of the entirety of Plaintiffs' claims – or, indeed, the entirety of any one claim – Midley could not expect: a) the Court to then take up its mantle and manufacture arguments for why Plaintiffs would not be able to sustain their own burden at the second step, or b) pounce, at the last moment possible, with its own arguments in that regard.

Second, Midley is correct that the Court's September 19, 2013 Order on Supplemental Briefing, *see* Docket No. 132, if confirmed now as a final ruling (incorporating, to the extent not inconsistent therewith, the August 9, 2013 Ruling on Special Motion to Strike Plaintiffs' Complaint with Request for Further Briefing on Single Issue, *see* Docket No. 122), would result in all of Plaintiffs' claims surviving the anti-SLAPP motion, given the Court's reliance on *Mann v. Quality Old Time Service, Inc.*, 120 Cal.App.4th 90 (2004), and *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811 (2011), and rejection of *City of Colton v. Singletary*, 206 Cal.App.4th 751 (2012).

Third, if the September 19, 2013 Order (incorporating the not-inconsistent portions of the August 9, 2013 Order) is confirmed as final, Midley would have several options, at a minimum, in responding to what it perceives to be an "unfair" result in this case: 1) take the anti-SLAPP ruling on appeal (as it has indicated it plans to do), 2) file a Rule 12(b)(6) motion, or 3) file, if possible at this stage, a summary judgment motion. Midley asks for one other option: "if the Court believes that because of the extended briefing Plaintiffs did not have a fair opportunity to

address deficiencies in their claims, [Midley] proposes that Plaintiffs be given leave to file an additional brief to demonstrate how they are likely to succeed on their claims on the basis of the 5 innocuous statements by [Vlad] Dusil and alleged deletions by [Midley] that were deemed not preempted by the CDA, and that [Midley] be given an opportunity to respond."[1] Docket No. 136, at 4:2-7.

Concerning this last option, the Court would make several observations designed to advance the parties' discussion at the status conference. Due in no small part to the added procedural complexities impacting an anti-SLAPP motion filed in federal court (and the parties' strategic calculations and miscalculations in the opening weeks of this litigation), the Court is utterly convinced that the parties have already spent far more time and money on this case (and this motion) than warranted. To the extent a limited amount of further briefing on this motion could avoid an exponential increase in the devotion of time and resources that would be necessary on an appeal, the option is inherently attractive.

On the other hand, even though Plaintiffs have the burden at the second step of the anti-SLAPP process, Midley brought this motion. The motion – at least thus far – failed. Re-jiggering the motion at this stage for *still further* supplemental briefing is essentially giving Midley a brand new anti-SLAPP motion, this time oriented towards a second-step argument that it is even surer it will win.[2]

A last point to note: if Midley insists on following – and the Court allows – the supplemental briefing route, primarily out of a belief in attorneys' fees gold at the end of the anti-SLAPP rainbow, it is exceedingly unlikely that the Court would award Midley all of the fees it has incurred in this litigation thus far, or even all of the fees it has incurred in connection with the briefing on this motion. Waiting until now to finally focus on Plaintiffs' ability or inability to sustain their affirmative claims would give Midley a solid basis to recover all or most fees incurred on future supplemental briefing, but the same could not be said for the briefing already

[1] To be clear, the Court would not conclude that Plaintiffs failed to address deficiencies in their affirmative claims "because of the extended briefing." They did not address the sufficiency or deficiency of their affirmative claims because Midley chose to make the second-step analysis in this case about the success or failure of its affirmative defense.

[2] In that regard, even if the Court is, in the end, inclined to allow further supplemental briefing, it would be Midley – the moving party – that would file the first brief, not, as Midley suggests, Plaintiffs.

completed. Given the complexities the anti-SLAPP procedure adds to the process, therefore, one is left to wonder why Midley does not simply proceed to the sufficiency of the pleadings or the merits in some other fashion.