UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 09-80396-KAM

VISION MEDIA TV GROUP, LLC,
a Florida Limited Liability Company,
et al.
Plaintiffs,

v.

JULIA FORTE, *et al.*
Defendants. /

PLAINTIFFS' MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants are objecting to the personal jurisdiction of this Court. Rather than expending the time and effort to engage in a contest about personal jurisdiction, Plaintiffs decided simply to dismiss this case without prejudice and file a federal lawsuit against the Defendants in their own backyard in North Carolina. Defendants now oppose the entry of the very relief they requested relating to the dismissal of this case. This opposition is a fee generation effort aimed solely at enriching the coffers of the Public Citizen organization. Defense counsel has undertaken a strategy to defame and disparage the Plaintiffs by interjecting personal commentary, a press release, and an absurdly inaccurate Affidavit from a biased and interested third party into this litigation. The purpose of this smear campaign by Defendants' legal counsel is two-fold:

1. To use the "Streisand Effect" to create myths and grossly defamatory and inaccurate damaging claims in order to intimidate the Plaintiffs and extricate attorneys' fees for Public Citizen's sole benefit; and

2. To abuse the litigation privilege and publish defamatory comments that directly interfere with the proof of damages in this case in such a way as to make it more difficult to establish damages attributable to the Defendants because of the breath of publication of otherwise defamatory, but seemingly privileged, outrageously false information.

FACTS AND ARGUMENT

The Defendants have submitted Affidavits that include pleadings filed in a previous case in which Vision Media was the plaintiff. Arguments proposed by legal counsel state that the suit was an attempt to "quash criticism by the filing of a spurious lawsuit." The defendant was represented by Judith Mercier, legal counsel for Defendants in the present case before the Court. The matter was settled on a basis in which both parties and their attorneys agreed to maintain the strictest of confidence with respect to the terms. The settlement agreement also contained certain non-disparagement provisions and it is improper for the same attorney to now participate in the submission of selected pleadings and characterize the previously settled lawsuit as "spurious" and improper.

Defendants' attorneys know that the terms of the settlement agreement cannot be disclosed, and the admissions, if any, cannot be disclosed. The amount of money, if any, paid by the defendants for the settlement of the case cannot be disclosed. The commitments and promises to act or refrain from taking certain actions, if any, cannot be

disclosed. The ultimate issue of whether the lawsuit itself was "spurious" or "improper" can never be meaningfully and truthfully addressed because the defendants and her counsel entered into a settlement agreement in which the terms of the settlement and other circumstances surrounding the resolution of that case cannot be disclosed. The previous lawsuit is neither relevant nor germane to the pending lawsuit.

On March 4th, Paul Levy blogged about this case ("Exhibit A" to Affidavit of Mark Miller), and then Levy likely drafted, and Public Citizen issued, a press release on March 8th ("Exhibit B" to Affidavit of Mark Miller). These communications are not only arguably defamatory in and of themselves, but were published for the purpose of generating a "Streisand Effect" attack against the Plaintiffs merely because the Plaintiffs have exercised their rights to access the courts and have a jury of their peers hear their grievances. This is an unfortunate yet common strategy used by Paul Alan Levy and Public Citizen. It serves two purposes. The first is to create such a broad swath of defamatory attacks from all corners of the web that the plaintiff is forced to forgo its constitutionally protected right to seek redress through the courts. The second purpose is to generate the publication of so many defamatory statements as to create a defense to the damages' element required in this defamation case and to make it extremely difficult to prove that damages flowed from the defamatory statements made by Public Citizen's client. This is a rank form of evidence manipulation, and it strikes at the heart of Vision Media's constitutional right to meaningfully access the courts for redress. The publication of this information by an attorney in this case is the equivalent of the attorney recruiting a mob to stand outside of the courthouse doors with sticks in hand and require that the plaintiff walk through the gauntlet as it attempts to open the doors of the court.

Defendants' counsel turns every lawsuit about speech on the Internet into a "classic SLAPP suit – a meritless lawsuit filed to suppress speech." Those are the words opening the Defendants' Response to the Motion for a Voluntary Dismissal in this matter. Every case turns into the perpetuation of attacks against the honesty, integrity, character, and legitimacy of a plaintiff, every case morphs into the defense of innocent and helpless defendants, every case demands mob intervention from online allies and the concomitant propagation of attacks against the plaintiff from all corners of the web.

In this case, Defendants' counsel has offered, and likely authored, an Affidavit from Jeffrey Cronin, whose relationship to the parties and issues in this litigation is presently not absolutely known. Mr. Cronin's Affidavit does not disclose his motivation for intervening or his justification for offering sworn testimony full of purported "facts" that are wrong. There is not even a general statement in the Affidavit that Mr. Cronin is independent, has no relationship with the Defendants, has no relationship with counsel for the Defendants, and has no personal or professional bias towards the Plaintiffs. And there is good reason for these omissions.

Vision Media believes that Mr. Cronin is the author of many of the defamatory posts over which the Defendants have been sued. Vision Media also believes that Mr. Cronin, through his false misrepresentations, was the source of the *New York Times* article. Mr. Cronin is the director of communications for the Center for Science in the Public Interest, a major consumer advocacy organization. It relies heavily upon contributions and grants to operate and competition is keen for the limited funds available to non-profit organizations.

The services provided by Vision Media are very attractive to non-profits against which Mr. Cronin's employer competes for funding, and the tremendous success of Vision Media's programs has raised the profile of, and strengthened, numerous non-profit organizations' fund raising abilities. One such example is the Miracle Flights for Kids organization, and a copy of a letter from the national President is attached to the Affidavit of Mark Miller as "Exhibit C". Mr. Cronin has submitted an Affidavit that is economically self-serving, biased in the essence, and merely another chapter in a bizarre, quixotic campaign against virtual windmills that simply do not exist. Cronin's Affidavit itself contains "facts" so distant from reality and truth as to render the entire document inherently incredible and unreliable. For instance, Mr. Cronin claims that a number of companies in the industry, which is now comprised of hundreds of television production businesses in South Florida, are one and the same.

Paragraphs 3 through 8 set forth accusations about a company identified as WJMK. Attached to Cronin's Affidavit within these paragraphs are articles about WJMK and references to Walter Cronkite and CNN anchor Aaron Brown. He implies that Plaintiff Vision Media is somehow responsible for WJMK's business and legal problems. Vision Media is a totally separate and distinct company; none of its owners have ever had any ownership interest or executive role at any time in WJMK.

Paragraphs 9 through 11 relate to a company called "United Media". Vision Media has never had, and does not now have, any ownership interest in this company, none of its executives or owners have ever owned an interest in this company, and it appears to be a competitor of the Plaintiffs. Cronin claims an individual by the name of "Alex Berry" was working for United Media and WJMK and notes that he is one of the

Plaintiffs listed in the pending case before the Court. Logic dictates that the businesses are therefore the same, he claims. What information Mr. Cronin does not offer to the Court is that Alex Berry is the President of H&K Enterprises, which is a business that provides marketing services to a broad range of television production related companies in South Florida, including Vision Media. He is not, and never has been, an employee of Vision Media, but is a prominent provider of sales and marketing services and solutions to the industry.

In Paragraph 12, Cronin attempts to set forth facts about the Plaintiff Vision Media in this case for the first time. Cronin describes a call he received in which he was told that the proposed "short form programming distributed to all 349 public broadcasting stations" was part of the package. This is correct and is reflected in a distribution contract between Vision Media and a distributor who will remain anonymous in order to avoid online attacks against its business. The company provides for the distribution of Vision Media's programming via satellite to all 349 public television stations. Although clearly Mr. Cronin has no knowledge as to how the industry operates, the fact is that Vision Media produces the television show, the tape is delivered to the distributor, the distributor obtains interstitial programming requests from the public television stations all across the country, and the programming is distributed by satellite to 349 public television stations throughout the country.

In Paragraph 13, Mr. Cronin recites some facts that lead him to infer that the people behind discredited WJMK are also "in all likelihood, behind Vision Media." This is apparently based on his conclusion that a "staff member", Alex Berry, was working for WJMK, United Media and Plaintiff Vision Media, but Berry's business in sales and

marketing for the entire industry has already been explained. Cronin claims that Vision Media and WJMK used the same fax number. Vision Media's main offices were in the same four-story, 40,000 square foot office building as WJMK. Vision Media partially populates two different floors, the fax machines are common to many tenants, and it therefore makes total sense that fax numbers could match up with respect to Plaintiff Vision Media and WJMK.

In Paragraph 14, Mr. Cronin discusses his conversation with Ms. August, who was indeed the producer of Vision Media's "National Medical Report". Cronin was so accusatory and abusive in that telephone call that she abruptly resigned from employment with Vision Media.

In Paragraph 15, Cronin correctly identifies the address presently being used by Vision Media as a "virtual office". WJMK ruined the address for all tenants in the building involved in television production. Anyone conducting a Google search on the address would show negative results that could, by implication, unfairly disparage Vision Media and the other innocent tenants of a building with a checkered past.

In Paragraph 16, Cronin advises that he is aware of a *New York Times* article in 2008 that was "unfavorable" to Vision Media, but failed to disclose that he was a major source and actually precipitated the unfavorable press coverage in the *New York Times*. Cronin then uses as a reference the "Consumerist" blog that is simply a far left wing, free speech expansionist haven for spewing criticisms about businesses. Plaintiffs believe that Cronin himself has participated in posting information on this blog site. Cronin goes on to claim that PBS has placed a disclaimer on its website explaining that Vision Media and certain other companies have no relationship with public television. This is proven false

merely by going to the PBS website and reading the disclosure. PBS does not claim that Vision Media and other companies have no relationship with "public television". It claims that these companies do not have a relationship with PBS itself, which is correct. This distinction, lost on Cronin and Defendants, is critical.

In Paragraph 17, Cronin makes it appear as if "Great America HD" is a separate company from Vision Media but has the same executives involved, thereby attempting to create the appearance of a shell game played by Vision Media. In reality, Great America HD is a product offered by Vision Media and the contract clearly identifies "Vision Media TV Group, LLC" as the owner of the television series.

The sworn statements and conclusions from Cronin could only be the result of total and complete ignorance of how the television production industry works, coupled with a profound disregard for conducting due diligence to get facts correct, layered with strained logic evidencing a complete absence of intellectual honesty, and buttressed by a seemingly blind eye for truth but a rabid need to defame and disparage Vision Media for his employer's financial gain.

Vision Media has provided services to many Fortune 500 businesses over the four years of its existence. Vision Media consistently rates in the "A" range with the South Florida Better Business Bureau. Conspicuously absent from all of these crazy allegations about fraud and misrepresentations is a single client who is dissatisfied. Vision Media is simply a high quality company providing high quality services to sophisticated businesses and charitable organizations all across the country. Clients understand the difference between "PBS" and "public television", a distinction that is totally, and apparently hopelessly, lost on Public Citizen, Mr. Cronin, and the Defendants. Vision

Media distributes through "public television" and Mr. Cronin and others have decided that the word "public television" actually should mean "PBS". Public Citizen and Cronin then create a claim that was not made and criticize Vision Media for making the very claim it did not make. Wikipedia explains the difference between PBS and public television as follows:

> PBS is the most prominent provider of programming to U.S. public television stations, distributing series such as *PBS NewsHour*, *Masterpiece*, and *Frontline*. . . .However, PBS is not responsible for all programming carried on public TV stations; in fact, stations usually receive a large portion of their content (including most pledge drive specials) from third-party sources, such as American Public Television, NETA, and independent producers. This distinction is a frequent source of viewer confusion.

Vision Media is one of the independent producers mentioned in the definition. Paul Levy, Public Citizen, Defendants' defense counsel, and Mr. Cronin could have spent the thirty seconds necessary to look up the definition to learn about the terminology used in the industry before filing evidence and sworn testimony.

CONCLUSION

Vision Media has never misrepresented its business methodology of distribution of content through public television. The manner by which Vision Media operates is not unusual, and Vision Media has over the past four years performed production and distribution services for hundreds of satisfied businesses, many of which are Fortune 500 companies. Vision Media has never received an Attorney General complaint, a Federal Trade Commission complaint, an inquiry from any law enforcement officer or any other type of legal assertion of fraud or improper business practices from any authority.

This Court is not dealing with a consumer-facing business enterprise. Individual consumers are not targeted as prospective clients by Vision Media. Vision Media's

clients are savvy business people who understand the industry and the marketplace relating to advertising and content distribution to public television stations.

The entire defense being put forth by Defendant Forte, her lawyers, and Mr. Cronin is for the improper purpose of inciting the passions and prejudices of the blogosphere and trying to force the Plaintiffs to travel through a gauntlet of free speech fanatics wielding virtual sticks on both sides of the sidewalk as Vision Media attempts to open the courtroom doors and exercise its constitutionally-protected rights of access to the courts and its constitutionally-protected right to have its grievance heard by a jury of its peers.

Consequently, in light of the recent filings by the Defendants, Plaintiffs may elect when this matter is maturely before the Court to ask for the dismissal of this case without prejudice so that it can be re-filed in North Carolina. However, given the most recent developments, Plaintiffs request that the Motion to Dismiss Without Prejudice be held in abeyance and be considered by the Court, upon request of the Plaintiffs, at or after the time of the disposition of the pending Motions.

March 11, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Lee E. Levenson, Jr.

SERVICE LIST
Vision Media TV Group, LLC, et al. v. Julia L. Forte, et al.
Case No. 09-cv-80936-KAM
United States District Court, Southern District of Florida

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