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.	)

RESPONSE TO MOTION FOR VOLUNTARY DISMISSAL

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Introduction and Summary of Argument

This action is a classic SLAPP suit — a meritless lawsuit filed to suppress speech. Julia Forte operates an Internet message board and consequently is immune from suit based on the content of postings that members of the public have posted on her message board; and plaintiffs and their counsel were aware of that statutory immunity when they filed suit. Plaintiffs and their counsel also knew, when they filed this case, that the message board posts to which they object simply repeated accusations that have been amply aired in the mainstream media, in publications such as the New York Times, the Sun Sentinel, and the South Florida Business Journal. Rather than suing such well-funded critics for libel, however, plaintiffs and their counsel hoped to use the threat of imposing litigation expenses to sanitize the plaintiffs' reputation by bullying an underfunded opponent into removing the criticisms from her message board and identifying the anonymous critics, so that they too could be bullied.

Plaintiffs refused entreaties from defendants' counsel to drop the case because it is frivolous. As recently as February 1, plaintiffs claimed that they were ready to show the Court that Forte had deliberately manipulated postings on her message board to make the plaintiffs look bad, DN 24, at 3, but requested an indefinite extension of time to oppose Forte's motion for summary judgment. Only once that request had been denied, and the time for filing that opposition was imminent, did plaintiffs try to avoid the consequences of their litigation misconduct by filing a "notice" of voluntary dismissal without prejudice. Because Rule 41(a)(1) does not authorize voluntary dismissal at this juncture, Forte construes that notice as a motion to dismiss and hence files this opposition.

It is settled law that once a defendant moves for summary judgment, voluntary dismissal is not a right but a privilege that can be denied outright, or granted subject to conditions. In this case, the dismissal without prejudice sought by plaintiffs would itself cause prejudice to Forte and her

LLC. Moreover, the record shows that plaintiffs and their counsel have litigated without basis and in bad faith, and tried to dismiss the case to avoid losing the motion for summary judgment, which would make Forte the prevailing party, eligible for an award of statutory attorney fees. Indeed, there is substantial reason to believe that the posts that plaintiffs claim to be defamatory are true, as shown by an affidavit submitted with this brief from the Director of Communications of a nonprofit group from whom plaintiffs repeatedly tried to entice business through fraudulent claims. Accordingly, plaintiffs should not be allowed to get out of this lawsuit scot-free. The Court should grant dismissal only with prejudice or subject to conditions.

STATEMENT OF THE CASE

A. Facts

This case began after several posts denouncing plaintiff Vision Media for its dishonest telemarketing appeared on 800Notes, a message board operated by defendant Julia Forte as an employee of defendant Octonet, LLC, which she owns together with her husband (both defendants are identified as "Forte"). According to the posts, and according to articles in well-respected sources linked from the posts, such as the New York Times, Vision Media preys on unsophisticated nonprofit groups by inviting them to participate in a documentary series hosted by Hugh Downs, which, the telemarketer falsely claims, will be shown on "public television." Only after the telemarketer manages to evoke real interest is it revealed that what Vision Media is really soliciting is the opportunity to be hired for $25,900 to film an advertising spot that the victim will have to pay to have aired.

A federal statute, 47 U.S.C. § 230, immunizes Forte from liability, and indeed from suit, for statements posted on the message board. Vision Media was aware of that immunity, but still wanted

to bully Forte into removing the critical comments and identifying the authors of those comments. Accordingly, its counsel wrote to Forte, warning that he was a section 230 expert and that Forte would have to bear the burden of litigation expenses and "the vagaries of litigation" unless she complied within five days with the demand that the comments be removed and their authors revealed. When Forte proved resistant, Vision Media tried to buy her off, by offering to give her a free Florida vacation and even by sponsoring her web site if she would only remove the posts and unmask the posters. Forte still refused. Plaintiffs sued her, filling their complaint with repetitive, conclusory, and false allegations that were intended to evade her section 230 immunity. Vision Media also added a count recasting its defamation claim as a meritless state-law trademark claim, trying to take advantage of the fact that section 230 immunity does not apply to "intellectual property" claims. Plaintiffs included a list of non-profit groups that had recently failed to fall victim to their blandishments, and claimed that each item of lost business was the result of that non-profit having read and been taken in by the allegedly false anonymous postings on 800Notes.

This is not the first time Vision Media has tried to quash criticism by the filing of a spurious lawsuit. In *Vision Media v Richard*, Case No. 9:08-cv-80797-KAM (S.D. Fla.), Vision Media, represented by the same attorney who filed this case, sued the owner of a small North Carolina company that makes eco-friendly clothing and whose business it tried to obtain through a false offer to feature her in a documentary for "public television." *See* Levy Affidavit ¶ 2, Exhibit H. After she learned that Vision Media was really just trying to sell its services for more than $20,000, she decided not to participate, but discussed her experiences on a web site. *Id.* Vision Media sued her, claiming that other eco-friendly businesses had decided not to hire Vision Media because they read Richard's blog, and that Richard's criticism on this one little web site had cost it $5,000,000 in

business. *See* Levy Affidavit, Exhibit G. Richard moved pro se to dismiss for lack of personal jurisdiction, reporting that she was unable to afford a lawyer. *Id.* Exhibit H. Ultimately, Richard removed criticisms of Vision Media from her blog. http://www.citmedialaw.org/threats/vision-media-tv-group-v-richard#description. Apparently, this experience emboldened Vision Media to threaten Forte in the expectation that she, too, would fold easily.

Moreover, although the motion for summary judgment does not address the truth of the anonymous postings about Vision Media, evidence obtained since that motion was filed provides reason to believe that the owners of Vision Media have been engaged in a longstanding scheme to trick non-profit companies into hiring Vision Media, and other companies apparently involving the same personnel, through a pattern of similar misrepresentation. The attached affidavit of Jeff Cronin, the director of communications at the Center for Science in the Public Interest, recounts an eight-year history of receiving similar solicitations from companies calling themselves first WJMK, then United Media, then Vision Media, and more recently Great America HD, all falsely claiming a relationship with public television and, indeed, hoodwinking well-known television news personalities including Walter Cronkite, Aaron Brown and Mike Douglas into lending their names to its programs through similar false claims of involvement with public television.

B. Proceedings to Date

Forte learned about the suit from a local firm that offered to represent her after seeing the filing; she promptly retained undersigned counsel, Mr. Levy, who contacted Vision Media's counsel and explained the many ways in which the lawsuit was legally meritless and factually false. He urged counsel not to serve the complaint, but to dismiss it. Vision Media insisted on going forward, and, indeed, added a defamation claim on behalf of a list of more than 20 supposed Vision Media

employees who had allegedly been libeled in the anonymous posts. On August 4, 2009, undersigned counsel served a Rule 11 motion, again urging Vision Media to dismiss the complaint so there would be no need for Forte to seek dismissal or summary judgment. Counsel also pointed out several flaws in the jurisdictional allegations and gave Vision Media a chance to fix them by amending its complaint. Vision Media promised to fix the jurisdictional allegations, and Forte agreed to having the complaint amended for that purpose; but, in the end, the second amended complaint simply added a count for a "preliminary injunction" compelling identification of the anonymous posters, **without** fixing the jurisdictional allegations that produced Forte's consent to the amendment.

Accordingly, Forte moved to dismiss the complaint, or in the alternative for summary judgment, attaching affidavits and exhibits showing how conclusory plaintiffs allegations trying to plead around section 230 were, and also showing that the complaint was full of false allegations. Rather than respond to the motion, plaintiffs hired a new lawyer, who filed a motion to strike the motion for summary judgment on spurious page-length grounds, asking for an indefinite extension of time to respond. In their reply in support of their motion, plaintiffs assured the Court that they were ready to make a factual showing sufficient to overcome Forte's section 230 immunity. On February 5, 2010, the Court denied the motion, and ordered plaintiffs to respond to the motion to dismiss and for summary judgment by February 25. Undersigned counsel then warned plaintiffs' counsel that he was planning to serve a new Rule 11 motion placing the new attorney, and the individual plaintiffs, in jeopardy of sanctions.

On February 17, 2010, plaintiffs filed a document that purported to dismiss this action without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. Defendants' counsel reminded plaintiffs' counsel that voluntary dismissal cannot be effected without a court

order after defendant has either filed an answer or moved for summary judgment, and that their response to the motion for summary judgment remained due. Levy Affidavit Exhibit I. At that point, plaintiffs filed a motion to amend the complaint to drop the individual plaintiffs without prejudice, and an opposition to the motion to dismiss and/or for summary judgment that dropped most of the allegations seeking to evade section 230 immunity and expressly suggested that Vision Media's trademark claims be dismissed without prejudice. Undersigned counsel have asked whether, in light of their filing of an opposition to the motion for summary judgment, Vision Media intends to withdraw its purported voluntary dismissal without prejudice. Not having received any response to this inquiry, Forte now files this opposition to plaintiffs' purported voluntary dismissal without prejudice.

ARGUMENT

Voluntary Dismissal Is a Privilege, Not a Right, and Should Be Denied Here Both Because Dismissal Would Prejudice Forte and Because Vision Media's Abusive Litigation Tactics Warrant the Attachment of Conditions to the Dismissal.

Rule 41(a)(1)(A) allows a plaintiff to dismiss an action without a court order so long as the defendant has neither answered nor filed a motion for summary judgment. Once either such document has been filed, the action may be dismissed only by a stipulation signed by all parties who have appeared, Rule 41(a)(1)(B), or "by court order, on terms that the Court considers proper." Rule 41(a)(2). At that point, voluntary dismissal is a privilege to be obtained through an exercise of this Court's discretion, not a matter of right. *Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997); *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990).

The factors considered in deciding whether to allow a dismissal without prejudice include the plaintiff's diligence in bringing the motion, any "undue vexatiousness" on plaintiff's part, the

defendant's effort and expense in preparation for trial, the duplicative expense of relitigation, and the adequacy of plaintiff's explanation for the need to dismiss. *Id.* Courts deny permission to dismiss without prejudice when the dismissal is sought to avoid imminent defeat in the litigation. *Minnesota Mining & Mfg. Co. v. Barr Laboratories*, 289 F.3d 775, 783-784 (Fed. Cir. 2002); *Phillips USA v. Allflex USA*, 77 F.3d 354, 358 (10th Cir. 1996). When exercising its discretion in considering a dismissal without prejudice, the Court should consider first and foremost the interests of the defendant, for Rule 41(a)(2) exists chiefly for protection of defendants. *Fisher v. Puerto Rico Marine Mgmt.*, 940 F.2d 1502, 1503 (11th Cir. 1991). Accordingly, the existence of prejudice to the defendant from allowing the dismissal is exceptionally important. The prejudice to be considered, however, must be prejudice other than the possibility of exposure to other litigation.

Here, dismissal without prejudice should be denied **both** because of prejudice to Forte and because of the other factors described above. Voluntary dismissal should be denied when sought to avoid an anticipated loss on the merits. Forte's motion to dismiss and for summary judgment provided four independent reasons why Vision Media's trademark claim is subject to dismissal as frivolous. Moreover, Forte warned Vision Media as early as last summer that she intended to seek an award of attorney fees, which Florida law expressly allows for any "prevailing party" in a trademark case. Fla. Stat. § 495.141. Although voluntary dismissal does not avoid Forte's claim for attorney fees under Rule 11, *Cooter & Gell v. Hartmarx*, 496 U. S. 384, 394-398 (1990), many Florida cases hold that, to be a prevailing party, the defendant must have obtained a dismissal with prejudice. *Sanchez v. Swire Pacific Holdings*, 2009 WL 2005272 (S.D. Fla. July 9, 2009); *Shaw v. Schlusmeyer*, 683 So.2d 1187, 1188 (S.D. Fla. 1996); *but see VP Gables v. Cobalt Group*, 597 F. Supp.2d 1326, 1330 (S.D. Fla. 2009) (defendant was prevailing party under contractual attorney fees

clause when dismissal without prejudice followed numerous warnings that the case lacked merit); *Overman v. Imico Brickell*, 2009 WL 68826 (S.D. Fla. Jan. 6, 2009). Vision Media's attempt to avoid the need to admit the frivolous nature of its trademark claims, and hence deprive Forte of the prevailing party status she could earn by the dismissal of those claims with prejudice, constitutes prejudice to Forte, which is alone sufficient reason to deny voluntary dismissal without prejudice.

Dismissal without prejudice should also be denied because of the frivolous and vexatiousness of Vision Media's complaint in this case, which was brought to try to force Forte to remove from the Internet criticisms that Vision Media did not want to have available to potential customers, and to try to force her to identify Vision Media's anonymous critics to save herself the expense of defending a frivolous lawsuit. Vision Media knew that it had no basis for suing Forte, because of section 230, and it now admits that it could not use federal court to sue a Doe defendant (because a Doe defendant has no citizenship) and hence cannot use this case as a platform to obtain a federal court subpoena to try to force Forte to identify its anonymous critics. Despite his knowledge of these limits, plaintiffs' lawyer threatened Forte with the "vagaries" and the "expense" of litigation to try to get by threats relief that plaintiffs knew they could not obtain in the form of a judgment. And the record makes clear both that Vision Media's suit against Forte is part of a pattern of bullying litigation, *see* Levy Affidavit, Exhibits G and H, and that the misleading marketing techniques cited in the anonymous messages over which Vision Media is suing here is part of a pattern dating back several years. *See generally* Cronin Affidavit. Plaintiffs offered to bribe Forte with sponsorships and with free travel for Florida, and they threatened to run up her costs, and when she refused to give in they sued her. Only when Forte's motion to dismiss and/or for summary judgment put the handwriting of imminent defeat on the wall, and Vision Media failed to obtain an extension of time

to oppose summary judgment, did Vision Media try to drop the case without prejudice. Vision Media has offered the Court no explanation why it seeks to dismiss the case, and why it chose to try to dismiss the case now. The timing speaks volumes about its motives.

In comparable cases, federal judges in Florida have either refused to grant dismissal without prejudice, or they have allowed dismissal but required payment of litigation expenses including attorney fees. *Pezold Air Charters v. Phoenix Corp.*, 192 F.R.D. 721, 728 (M.D. Fla. 2000) (court refused to dismiss because defendant filed counterclaims without any evidence, but for the purpose of increasing plaintiffs' litigation costs; "Outright dismissal should be refused . . . when a plaintiff seeks to circumvent an expected adverse result"); *Tesma v. Maddox-Joines, Inc.*, 254 F.R.D. 699, 701-702 (S.D. Fla. 2008) (plaintiff sought voluntary dismissal only after defendant moved to dismiss; court grants dismissal with prejudice but awards attorney fees as condition of dismissal because "[d]efendant has been forced to litigate this case without reason" and plaintiff dismissed "because he recognizes that it lacks all merit"); *Sobe News v. Ocean Drive Fashions*, 199 F.R.D. 377, 378 (S.D. Fla. 2001) (dismissal of complaint filed in January 2000 conditioned on payment of defendants' expenses, including attorney fees). *See also Ortiz v. D & W Foods*, 657 F. Supp.2d 1328, 1330-1331 (S.D. Fla. 2009) (fees granted both as condition of dismissal and under 28 U.S.C. § 1927); *Witbeck v. Embry Riddle Aeronautical Univ.*, 219 F.R.D. 540, 542 (M.D. Fla. 2004) (motion to dismiss denied outright when filed in response to motion for summary judgment). In this case, too, the motion to dismiss without prejudice should be denied, or granted only subject to the condition that plaintiffs pay Forte's expenses including reasonable attorney fees.

The one possible exception is the dismissal of claims by some of the individual plaintiffs. Vision Media's memorandum supporting its motion for leave to file an amended complaint asks that

the individual plaintiffs should be dismissed without prejudice because some of the plaintiffs' names were misspelled in the complaint; because one of the individual plaintiff was identified only by her given name "and therefore is not a proper Plaintiff"; and because some of the plaintiffs "may no longer be a sales or marketing representative of the Plaintiff." DN 32, at 1-2; *see also* the supporting affidavit of Mark Miller, ¶¶ 9-10. The reasons given for dismissing the individual plaintiffs suggest that some of them may have been listed without having been consulted, or without their consent. To the extent that an individual is a party to this case only because somebody other than that individual decided that her or she should be listed as a plaintiff, that individual should not have to suffer any adverse consequences, including the issuance of a judgment of dismissal with prejudice. However, it is respectfully suggested that the Court should require a specific showing about such plaintiffs so that, if it concludes that Vision Media or its counsel caused any individuals to be added to the complaint without their consent, appropriate consequences can be imposed on any person — whether Vision Media or its counsel — who caused that listing.

CONCLUSION

Except for any individual plaintiffs who are shown to have been added to the action as plaintiffs without their specific consent, the motion to dismiss without prejudice should be denied and dismissal with prejudice should be entered by the Court. The Court should either award attorney fees as a condition of dismissal, or postpone that issue pending a motion for award of fees.

Respectfully submitted,

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March 4, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that March 4, 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 attached 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/ Judith M. Mercier

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United States District Court, Southern District of Florida

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