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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Portland Division

OBSIDIAN FINANCE GROUP, LLC and KEVIN D. PADRICK,

Plaintiffs,

v.

CRYSTAL COX,

Defendant.

Civil No. CV 11-0057 HA

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. DEFENDANT HAS OFFERED NO EVIDENCE TO SATISFY HER BURDEN ON SUMMARY JUDGMENT

Defendant's "Statement of Facts/Declaration" ("SOF") demonstrates precisely why this Court should grant summary judgment in favor of plaintiffs on the issue of liability.[1] Plaintiffs' defamation claim is based on ten specific statements that Defendant Cox made about plaintiffs on her websites. Defendant does not deny that she made the ten statements—in fact, in the SOF she readily admits that she made most of them. She also does not deny that the statements are defamatory.

Most importantly, she does not offer *a single fact* to support the truth of any of the ten defamatory statements that are the basis of plaintiffs' claim. To the contrary, the SOF describes in detail that the defamatory statements are simply the product of rampant speculation about conspiracies, bribes and fraud, without a shred of factual support. Just a few examples demonstrate the outrageous and baseless nature of the statements defendant has made that led plaintiffs to file this lawsuit.

Defendant offers Mr. Padrick's appointment as a bankruptcy trustee by United States Bankruptcy Judge Randall Dunn as the basis for her statement that the plaintiffs engaged in "government fraud, corrupt [sic] and pay offs." (SOF, p. 13). She states, without any evidence, that Mr. Padrick must have bribed Judge Dunn or someone else, because "Otherwise why else would a judge suggest a bankruptcy trustee?" (SOF, p. 13). Similarly, in support of her statement that Mr. Padrick has paid off the media (in this case the Bend Bulletin), she speculates that "to me there was media manipulation or pay offs as the articles were not fact and

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[1] The SOF is not a proper declaration since defendant has failed to make the statements under penalty of perjury as required by 28 U.S.C. § 1746. The Court should not consider any of the statement made in the document as evidence for purposes of the motion for summary judgment.

I received word that the information came directly from Kevin Padrick, Obsidian Finance LLC." (SOF, p. 13).

Where Ms. Cox's statements are not her own wild speculation, she has merely asserted as fact the unfounded accusations made by third parties (who had every incentive to try to undermine plaintiffs), without conducting any independent investigation to confirm the truth or falsity of the accusations. Ms. Cox states that "Stephanie DeYoung and Mark Neuman were my primary source of information on the Summit 1031 bankruptcy and the alleged illegal activities of Obsidian Finance LLC and Kevin Padrick." (SOF, p. 18). Mr. Neuman was one of the principals of Summit Accommodators, Inc. who took millions of dollars belonging to Summit's clients and used it for their personal benefit, ultimately leading to the company's collapse and the clients' losses of millions of dollars.[2] Ms. DeYoung is his daughter. Defendant essentially admits that she repeated the accusations as her own without any effort to confirm them: "If any parts of my blogs are defamation on Government Fraud, Tax Fraud, Solar Tax Credits Kevin Padrick being a thug. Well then Stephanie DeYoung did not tell the truth and the whole truth[.]" (SOF, p. 18).

Ms. Cox has failed to provide any evidence to support the truth of the defamatory statements that she has made and continues to make. That is because no such evidence exists.

In fact, Ms. Cox's real purpose for falsely attacking plaintiffs is clear. In response to plaintiffs' December 22, 2010 "cease and desist" letter, she wrote the following by e-mail on January 19, 2011:

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[2] Mark Neuman and Brian Stevens were two of the principals of Summit who diverted Summit's client funds for their personal benefit. The United States Attorney for Oregon recently filed a felony Information against Neuman and Stevens based on their misconduct. Stevens has now pled guilty to several federal felony charges, with a sentencing range of four to eight years in prison. Copies of the Information and Mr. Stevens' plea agreement are attached as Exhibits 1 and 2 to this Memorandum.

> "Hello David, I hope this eMail finds you doing well. All said and done, looks like the Summit boys going to Jail.. and well I don't think Kevin acted with the Highest of Integrity.. however at this Point in my Life it is Time to Think of Me.
>
> So I want to Let you know and Obsidian Finance that I am now offering PR Services and Search Engine Management Services starting at $2500 a month to promote Law Firms… Finance Companies.. and to protect online reputations and promote businesses..
>
> Please Let me know if Tonkon Torp or Obsidian Finance is interested in this service.
>
> thanks for your time. . "[3]

It could hardly be clearer that Ms. Cox is attempting to use her outrageous and utterly false statements about plaintiffs as leverage to extort a payment from them. This is quite a business model – first she attempts to ruin plaintiffs' reputations and then she offers to repair them for a fee – like buying "fire insurance" from a mobster to prevent him from burning down your building. The Court should put a stop to Ms. Cox's attempted extortion immediately and grant summary judgment in plaintiffs' favor.

In reviewing defendant's filings, she raises three other arguments that could be read to bear on the pending motion for motion for summary judgment.[4] We address those arguments below.

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[3] *See* Declaration of David S. Aman in Support of Motion for Partial Summary Judgment, ¶ 2, Ex. 3.

[4] Defendant also misunderstands the nature of the conferral requirement under Local Rule 7-1. Plaintiffs' counsel properly certified that he conferred regarding the motion. As is obvious from her response, defendant did not agree to the relief sought. That plaintiffs also made a settlement demand that defendant did not accept does not mean that the parties did not confer or that they did not do so in good faith.

II. PLAINTIFFS TIMELY FILED THEIR DEFAMATION CLAIM

Defendant appears to suggest that the statute of limitations bars plaintiffs' defamation claim because (a) she began posting statements about plaintiffs on the internet more than one year before plaintiffs filed their complaint and (b) plaintiffs were aware of these postings. (Defendant's Response to Complaint ("Answer"), Docket No. 12, p. 2). Plaintiffs do not dispute either fact. However, defendant is confused about how the statute of limitations for defamation works.

Under Oregon law, a plaintiff must file a claim for defamation within one year of publication or re-publication of the particular offending statement. *See Cross v. Safeway, Inc.*, 2003 WL 23671184, *3 (D. Or.). Each offending publication of a defamatory statement is a discrete tort that has its own one-year limitations period. *Id.* In this case, the defamatory statements that are the subject of the complaint were all published within one year of filing—a fact that defendant has not disputed. (Padrick Decl., Ex. 1). That defendant made other defamatory statements earlier does not bar plaintiffs' claims for the statements made within the one-year period. Plaintiffs' defamation claim is timely.

III. DEFENDANT IS NOT A NEWS MEDIA DEFENDANT

Defendant also argues that she is a member of the news media. (Answer, p. 2). We note that defendant's status as a news media defendant would simply change one element of plaintiffs' claim for defamation—instead of being a strict liability offense under Oregon law, it would require a finding that defendant made the statements negligently. *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361 (1977). Defendant's SOF makes clear that she did not exercise due care, let alone any care, when she made the defamatory statements. They are the product of wild conjecture or are outrageous accusations made by others—who had every

incentive to provide false information to protect themselves—that she re-published with no independent investigation.

But in any event, Ms. Cox is not a member of the news media. The evidence shows that she is a private party who has a series of blogs. She is not affiliated with any news organizations or outlets. Her activities are in fact part of a private commercial enterprise where she attempts to charge for her "reputation management" services. Consistent with that private commercial enterprise, when plaintiffs as the target of her defamatory blog postings sent her a "cease and desist" letter, her response was to offer her reputation management services for a fee. (Aman Decl., ¶ 3, Ex. 2). The fact that her defamatory statements are made in writing on the internet does not make her a member of the news media—anymore than it would if she was standing in the town square making the defamatory statements to strangers and then offered to stop if plaintiffs paid her a fee. Defendant is not a member of the news media, she is a private party.

IV. OREGON'S SPECIAL MOTION TO STRIKE DOES NOT IMPACT PLAINTIFFS' CLAIMS

Defendant has also suggested that she intends to file a special motion to strike under ORS § 31.150. (Answer, p. 3). Defendant is correct that Oregon law allows a defendant in a defamation action to file a special motion to strike at the very outset of the case. The defendant has the initial burden of proving that the statements at issue fall within one of four categories of speech listed in the statute. ORS § 31.150(2). If the defendant satisfies that burden, then the plaintiff must make out a prima facie case of defamation. If the plaintiff does so, then the case proceeds. § 31.152(3), (5).

The special motion to strike statute provides no assistance to defendant here, for several reasons.

First, defendant Cox has not filed a special motion to strike under ORS § 31.150 and she is barred as a matter of law from doing so now. The Oregon Court of Appeals has held that a special motion to strike must be filed as part of a defendant's first appearance in the case, or it is waived. *See Horton v. Western Protector Ins. Co*, 217 Or. App. 443, 448-49 (2008). Since the defendant in *Horton* had filed its answer before the special motion to strike, the Court ruled that it was untimely. Similarly here, defendant Cox has already filed an answer as well as a motion to make more definite and certain. She is therefore barred from filing a special motion to strike.[5]

Second, even if the special motion to strike had been timely filed, defendant has offered no admissible evidence to satisfy her burden of showing that the statements at issue fall within any of the four categories set forth in ORS § 31.150.

Finally, plaintiffs have easily sustained their burden of proving a prima facie case of defamation, as discussed above. The special motion to strike would fail even if it were considered at all.

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[5] Even if this Court were to consider the timing requirement to be procedural rather than substantive, the result is the same under the Federal Rules. The Oregon statute states that a special motion to strike must be treated as a motion to dismiss under Oregon Rule of Civil Procedure 21A. *See* ORS 31.150(1). The *Horton* court reached its decision because under ORCP 21, a motion to dismiss had to be made before a responsive pleading, or it was waived. The federal rule – Fed. R. Civ. P. 12(b) – is the same; it requires a motion to dismiss to "be made before pleading if a responsive pleading is allowed."

V. CONCLUSION

Defendant has not offered any admissible evidence sufficient to create a genuine issue of material fact for trial on the issue of liability. She has offered no evidence of the truth of any the defamatory statements that she published concerning plaintiffs. Instead, she offers a rambling and incoherent rant that makes it clear that (1) she had no factual basis for the defamatory statements she published and (2) she performed no independent investigation of assertions made by others before publishing those assertions as her own. Defendant is responsible for the false and defamatory statements she published and re-published.

The Court should grant summary judgment in plaintiffs' favor on the issue of liability, and allow the case to proceed on the issue of damages only.

DATED this 12th day of May 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** on:

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☑ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said party's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below;

☑ by causing a copy thereof to be e-mailed to said party at her last-known email address on the date set forth below;

DATED this 12th day of May 2011

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