IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 5:13-CV-00143-ACC-PRL

LARRY KLAYMAN,

Plaintiff,

v.

CITY PAGES, et. al.

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION TO COMPEL AND TO ALTER THE TIME FOR RESPONDING TO THE MOTION TO COMPEL

Introduction

The motion by Defendants Voice Media Group, Phoenix New Times, City Pages, Kenneth Avidor, Aaron Rupar and Matthew Hendley (hereinafter referred to as "Defendants"), to strike Plaintiff's Motion to Compel serves little purpose but to unnecessarily expend the parties' time and money arguing over their failure to comply with the law instead of proceeding with this case on the merits. Defendants' complaints about the request for documentation which is necessary to inform the court and Plaintiff of the state of mind of Defendants and provide context for the harm done to plaintiff is more than a transparent attempt to exercise what is in effect a line item veto over allegations which have direct bearing on the dispute between the parties.

The fact that Defendants would like to bury the truth of their failure to comply with discovery law in the hopes that this honorable Court and Plaintiff will ignore their malicious intent and pretend that they come before this court as babes in the woods, is disingenuous and not credible. Defendants may not use the Federal Rules of Civil Procedure ("FRCP") 12(f) to

strike an entire motion that they are loath to have the Court consider on the merits. Defendants here simply mistake the nature of what a Rule 12(f) motion is intended to do. Where the behavior of Defendants may be "scandalous," allegations in a Motion to Compel the Production of Documents that recites such behavior are not subject to suppression by a Rule 12(f) motion to strike. While the issues raised in Defendant's Motion to Strike are better suited for an opposition to Plaintiff's Motion to Compel, nonetheless, Plaintiff opposes Defendants' Motion to Strike and submits the following:

Defendants' Motion to Strike Is Procedurally Improper

Defendants use the Motion to Strike under 12(f) as an improper vehicle to address their illegitimate issues. Pursuant to the Federal Rules of Civil Procedure, "[t]he court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Rule 12(f) only empowers a district court to strike from a **pleading**. Rule 1.110(a) of the Florida Rules of Civil Procedure provides that the term "pleading" is limited to complaints, answers, cross claims and counter claims. *See* Rule 1.110 Fla. R. Civ. P; *see also Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 72 n.3 (Fla. 3rd DCA 2000) (Cope, J., dissenting) (stating that the term "pleading" means complaint; *see also Harris v. Lewis State Bank*, 436 So. 2d 338, 340 n.1 (Fla. 1st DCA 1982) (motions are not pleadings).

In *Motzner v. Tanner*, 561 So. 2d 1336 (Fla. 5th DCA 1990), the trial court erred in striking the plaintiffs' motion to dismiss because the court found it to be a "sham pleading" pursuant to Rule 1.150. The appellate court, however, found that striking the motion to dismiss was improper because the motion to dismiss was not a pleading and thus was not subject to Rule 1.150. *Id*. at 1337. "Although commonly employed, the use of the term 'pleading' to describe all of the various papers filed in an action is incorrect . . . Accordingly, the [defendants'] use of a

motion to strike the [plaintiff's] motion to dismiss as a sham pleading was improper." *Id.* at 1338.

Here, like the motion to dismiss in *Motzner v. Tanner*, Plaintiff's Motion to Compel is not a complaint, answer, cross claim or counterclaim. Rather, it is a motion, and Rule 12(f) does not authorize the court to also strike particular motions especially since, had the Defendants acted reasonably and in good faith to begin with, the Motion to Compel would not have been necessary. The Court should therefore deny Defendants' motion to strike as procedurally improper.

Defendants Fail to Meet the Motion to Strike Standard

Even if Defendants' Motion to Strike was procedurally proper, this Court should deny it because Defendants fall far short of any conceivable legal standard under the circumstances below. "A motion to strike will 'usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Beaulieu v. Bd. of Trustees of Univ. of West Fla.*, 2007 WL 2900332 n.5 (N.D. Fla. Oct. 2, 2007) (Vinson, J.) Indeed, Rule 12(f) motions are so rarely granted that they have judicially been deemed "time wasters." *Id*. at n.7 (quoting *Somerset Pharms. Inc. v. Kimball*, 168 F.R.D. 69, 71 (M.D. Fla. 1996)); *Carlson Corporation/Southeast v. School Bd. of Seminole County, Fla.*, 778 F. Supp. 518, 519 (M.D. Fla. 1991) (characterizing motions to strike as "time wasters" and observing that such motions "will usually be denied"). "Both because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic, motions under Rule 12(f) are viewed with disfavor and are infrequently granted." *Harvey v. Lake Buena Vista Resort, LLC*, 568 F.Supp.2d 1354, 1359 (M.D. Fla. 2008). The Court continued,

> "[i]t must be shown that the allegations being challenged are so unrelated to plaintiff's claims as to be unworthy of any

> consideration as a defense and that their presence in the pleading throughout the proceeding with be prejudicial to the moving party. Thus, even when technically appropriate and well-founded, they often are not granted in the absence of a showing of prejudice to the moving party."

Id.

Thus, "a motion to strike should be denied unless the challenged allegations in the complaint [or motion as is here] 'have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *Henry v. Nat'l Housing Partnership*, 2008 WL 2277549 n.2 (N.D. Fla. May 30, 2008).

Here, the only party that would be prejudiced if the motion to strike were granted would be Plaintiff. In his complaint and subsequent motions, Plaintiff alleges that the Defendants acted with a malicious intent in publishing the defamatory statements, a prerequisite Defendants' claim Plaintiff must show as he is a public figure. Those allegations are neither impertinent nor immaterial and therefore should not be stricken. *See Henry*, 2008 WL 2277549 at *2. *See also Sinclair v. Town of Yankeetown*, 2008 WL 660089 *5 (N.D. Fla. March 5, 2008) (denying defendants' Rule 12(f) motion to strike; "the paragraphs in question create a context for understanding the violations alleged in the Complaint. They are relevant and they speak directly to Plaintiff's allegations of illegal behavior by Defendants. These paragraphs are not immaterial, impertinent or scandalous to Defendants. Nor are they unfairly prejudicial"); *Cherry v. Crow*, 845 F. Supp. 1520, 1524-25 (M.D. Fla. 1994) (denying defendants' Rule 12(f) motion to strike allegations of prior prison incidents; prior incidents were relevant to evidence defendants' custom or practice).

Because Plaintiff's Motion to Compel only requested that Defendants comply with discovery law, and because the allegations in the Complaint and elsewhere are relevant to Defendants' state of mind and therefore directly relate to their requisite malicious intent, the

request for the production of documents is neither irrelevant nor immaterial and Defendants' Rule 12(f) motion should be denied. And, discovery is permitted not just concerning what is relevant, but which may lead to relevant evidence.

Defendants' State of Mind Directly Relates to Plaintiff's Claims

The U.S. Supreme Court unequivocally ruled that the state of mind of a journalist is of central importance to the issue of malice. In *Lando*, "Petitioner instituted a diversity action in Federal District Court against the respondents, a television network and two of its employees, and a magazine, alleging that a program aired by the network and an article published by the magazine defamed him. Petitioner conceded that because he was a public figure, the First and Fourteenth Amendments precluded recovery absent proof that respondents had published damaging falsehoods with actual malice." *Herbert v. Lando*, 441 U.S. 153, 156 (1979). ("[s]tate of mind was of 'central importance' to the issue of malice."). *Id*. As is true and which is directly on point in this case before this Court, the Supreme Court held that "when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, there is no privilege under the First Amendment's guarantees of freedom of speech and freedom of the press barring the plaintiff from inquiring into the editorial process of those responsible for those publications where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action."[1] *Id*. at 157.

[1] Ironically, this binding authority that rules "when a member of the press is alleged to have circulated damaging falsehoods and is sued . . . there is no privilege under the First Amendment[]" contradicts Defendant Hendley's refusal to name his source and Defendant Hendley's counsel's objection, citing the First Amendment. Defendant Hendley should be required to name his source that provided other defamatory and disparaging false information. *Lando*, 441 U.S. at 155. *See also Garland v. Torre*, 259 F.2d 545 (2d. Cir.) *cert. denied*, 358 U.S. 910 (1958) (During plaintiff's deposition, Torre refused to disclose the name of her confidential source. Plaintiff moved to compel discovery, and the United States Court of Appeals for the Second Circuit, ordered Torre to reveal her source.). *Id*.

The documents requested bear on, or reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1979). For example, if the journalists kept notes or communications for themselves or between each other that say "Larry Klayman needs to be taught a lesson" or "Joe Arpaio should be shot by an illegal alien" or "Bradlee Dean is an a**hole," these communications bear directly on their state of mind as journalists and their malicious intent toward Plaintiff and his clients. Therefore, according to Supreme Court precedent, these types of communications must be produced.

It defies logic that there are virtually no written documents, discussions or publications that involve the articles at issue here. If there is a single sheet of paper, email, text message or otherwise – generated by or in the possession of any of the Defendants – that is relevant to this case, Defendants have yet to produce it. If they exist, Plaintiff is entitled them. And if no such documents exist, Defendants, instead of cunningly asserting that they do not obtain any such documents without further explanation, need to demonstrate to this honorable Court and Plaintiff how and in what world these documents do not exist. After all, Defendant Avidor testified that he destroyed an email he sent to Defendant Rupar and Defendant Rupar acknowledged the deletion. (Exhibit 1) This begs the question, what else did Defendants destroy in order to keep Plaintiff at a distance? For example, Defendant Avidor testified that he coauthored a book about Michele Bachmann and that Plaintiff is featured in it. Yet, neither book, nor copies from it were produced in discovery. Plaintiff had to buy his own book and the book shows the maliciousness towards Plaintiff and Bachmann, whom Plaintiff has supported. As is true with Bradlee Dean and Sheriff Joe Arpaio, Defendants attempt to harm and destroy Michele Bachmann by also attacking Plaintiff, her friend. Please consider Exhibit 2, a copy of the book cover, which is a maliciously

distorted, computer-doctored picture of Congresswoman Bachmann. The book is a hit piece on Congresswoman Bachmann and everyone associated with her, including Plaintiff, who is also disparaged in the book.

These issues, central to Plaintiff's claims of defamation and defamation by implication, are not resolved by simply reviewing the meager documents Defendant produced – most of which Plaintiff already had in his possession. The reason that the document request calls for the production of documents concerning not just Plaintiff but Sheriff Joe Arpaio and Bradlee Dean is because, as the Court can ascertain from a review of the defamatory articles at issue, Defendants attempted to harm Plaintiff and his clients Bradlee Dean and Sheriff Joe Arpaio. In this regard, by harming the clients' lawyer, Plaintiff, Defendants were able to pursue their improper political agenda and severely damage and destroy both Plaintiff and his clients. Indeed, in Defendant Aaron Rupar's article of September 28, 2012, he writes, "[i]f Dean distances himself from Klayman in light of these allegations, who will help him figure out how to reimburse Rachel Maddow and the now-defunct Minnesota Independent the nearly $25,000 in attorney's fees he owes them?" This is an attempt by Defendant Rupar to destroy fundraising and the working relationship between Bradlee Dean and his lawyer, Plaintiff.

The articles themselves demonstrate malicious intent and the fact that Defendants' try so desperately not to have to produce other related and underlying documentation bearing on malice and intent to deefam can only be taken for what it is – an attempt to hide something, mostly other malicious rantings, about Plaintiff and his clients.

This Court Has Broad Discretion to Grant the Motion to Compel

This honorable Court issued its Case Management and Scheduling Order on November 13, 2014 [ECF No. 36] and notifies the parties that the Case Management and Scheduling Order

"controls the subsequent course of these proceedings." Indeed, district courts must enter scheduling orders in actions to "limit the time to join other parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b)(3). While Defendants "warn" that the scheduling order states: "The Court **may** deny as untimely all motions to compel filed after the discovery deadline," they misconstrue (1) the Court's inherent power and (2) the simple language this Court uses in its Scheduling Order.

First, a scheduling order "controls the course of action unless the court modifies it." Fed. R. Civ. P. 16(d). This Court has full discretion to cancel or modify any scheduling order. Once in place, "[a] schedule may be modified . . . for good cause and with the judge's consent." Fed. R. Civ. Pro. 16(b)(4). Here, Plaintiff moved to have these documents produced at the depositions, which was before the discovery deadline. Indeed, it was only at the depositions that this information came to light. Defendants' said several times that the documents would be produced before discovery closed; the documents were not produced. Instead, Defendants come up with bogus objections which have no merit in fact or law. Plaintiff was led to believe that he would receive a legitimate production of documents on September 22, 2014. Not only did Plaintiff not receive the meager document production on September 22nd as it was sent by regular mail, but Plaintiff was forced to request that Defendants scan the documentation and send them via email. The original document production was not received until September 29, 2014. Because the Defendants' produced virtually nothing, Plaintiff was compelled to file the Motion to Compel. It is clear that Defendants were strategically running out the clock, only now to claim it is too late for them to be compelled to obey the law.

Second, the plain language this Court uses in its Scheduling Order does not warrant a denial of the Motion to Compel. It explicitly states that the Court *may* deny as untimely all

motions filed after the discovery deadline. The case management report does not contemplate a situation where a party intentionally delays to try to run the clock out and then produces nothing, even after telling Plaintiff Defendants would produce documentation. This documentation that Defendants so ardently are trying to hide is highly relevant according to the Supreme Court case of *Lando*.

Conclusion

Plaintiff is filing this four (4) days before the deadline of October 10, 2014, ordered by the Magistrate Judge, as time is of the essence. Plaintiff respectfully requests that Defendants Motion to Strike be denied and Defendants be compelled to produce the requested documents.

Dated: October 6, 2014

Respectfully Submitted,

/s/ Larry Klayman

Larry Klayman, Esq.
Florida Bar No. 246220
2775 NW 49th Ave., Suite 205-346
Ocala, FL 34483
(310) 595-0800
Email: leklayman@gmail.com

Plaintiff Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2014 a true and correct copy of the foregoing Plaintiff's Opposition to Defendant's Motion to Strike (Case No. 5:13-cv-00143) was submitted electronically to the U.S. District Court for the Middle District of Florida and served via CM/ECF upon the following:

Sanford Lewis Bohrer
Holland & Knight, LLP
Suite 3000
701 Brickell Ave
Miami, FL 33131
305/374-8500
Fax: 305/789-7799
Email: sbohrer@hklaw.com

Scott D. Ponce
Holland & Knight, LLP
Suite 3000
701 Brickell Ave
Miami, FL 33131
305/789-7575
Email: sponce@hklaw.com

Attorneys for Defendants

/s/ Larry Klayman

Larry Klayman, Esq.