THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ATIGEO LLC, a Washington limited liability company; and MICHAEL SANDOVAL, an individual,

Plaintiffs,

v.

OFFSHORE LIMITED D, a California business organization, form unknown; OFFSHORE LIMITED D, a California partnership; DENNIS MONTGOMERY, individually and as a partner of Offshore Limited D; ISTVAN BURGYAN, individually and as a partner of Offshore Limited D; DEMARATECH, LLC, a California limited liability company; and DOES 1-10, inclusive,

Defendants.

Case No. 2:13-cv-01694 JLR

PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND SPECIAL MOTION TO STRIKE

NOTED ON MOTION CALENDAR:

November 22, 2013

ORAL ARGUMENT REQUESTED

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Pursuant to Local Civil Rule 7(g), Plaintiffs request that the Court strike the Declaration of Dennis Montgomery (Dkt. 37) (the "Montgomery Declaration") filed by Defendants in support of their Rule 12(b)(6) Motion to Dismiss/Anti-SLAPP Motion to Strike and the arguments in Defendants' reply brief that rely on the Montgomery Declaration. As detailed below, the Montgomery Declaration indisputably contains "new" arguments and information not previously proffered by Defendants to support their Motion to Dismiss and Special Motion to Strike (the "Motion"). This tactic to submit "uncontroverted" evidence in support of their Motion constitutes sandbagging and should not be countenanced.

It is improper to introduce new facts and arguments for the first time on reply. *See Thompson v. Comm'r*, 631 F.2d 642, 649 (9th Cir. 1980) ("The general rule is that [parties] cannot raise a new issue for the first time in their reply briefs."); *Bach v. Forever Livings Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1122 n.6 (W.D. Wash. 2007) ("It is well established in this circuit that courts will not consider new arguments raised for the first time in a reply brief.").[1]

The reasons for this rule are clear – allowing a moving party to submit new evidence and legal argument on reply deprives the opposing party of any meaningful opportunity to respond. *Thompson*, 631 F.2d at 649. A party that attempts to do so does not merely deprive their opponent of an opportunity to respond – it also deprives the Court of the meaningful adversarial exchange that sequential briefing is designed to accomplish. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994).

Accordingly, when a moving party introduces new matters for the first time on reply, the court should either (1) strike the offending material or (2) give the opposing party an opportunity to respond before the hearing on the motion. *See Tovar v. United States Postal Serv.*, 3 F.3d 1271, 1273 n. 3 (9th Cir. 1993) (striking portions of reply that relied on new evidence outside the

[1] Stated differently, "[i]t is improper for the moving party to 'shift gears' and introduce new facts or different legal arguments in the reply brief than presented in the moving papers." Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial*, § 12:107 (The Rutter Group 2013) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-895 (1990) (striking supplemental affidavits)); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("district court need not consider arguments raised for the first time in a reply brief").

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record); *Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 308 F. Supp. 2d 1208, 1214 (W.D. Wash. 2003) (granting motion to strike new evidence submitted on reply).

The Montgomery Declaration violates these basic rules of fair play and should be stricken in its entirety. ***First,*** Defendants' Motion to Dismiss Plaintiffs' claim for violation of the Anti-Cybersquatting Protection Act ("ACPA") was centered *solely* on Plaintiffs' purported failure to adequately *plead* allegations of bad faith intent to profit. *See* Dkt. 31-1 at 7-8. In response, Plaintiffs' opposition brief clearly set forth, allegation-by-allegation in the *Complaint*, Defendants' scheme to tarnish the Atigeo mark as punishment for Plaintiff's refusal to give in to Defendants' extortionist conduct. Such conduct indisputably constitutes bad faith intent to profit under the ACPA. Recognizing this, Defendants now purport to introduce the Montgomery Declaration to "disavow" any bad faith on the part of Defendants. *See* Dkt. 36 at 2:19-20. Of course, a motion to dismiss properly challenges the allegations contained in the four corners of the complaint, or matters that are properly the subject of judicial notice. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). There is no reason Defendants could not have raised these alleged facts originally. The "new," extraneous facts contained in the Montgomery Declaration cannot form the basis of a motion to dismiss. *See Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 (9th Cir. 1998)("new" facts contained in a pleading filed in opposition to a motion to dismiss are irrelevant for Rule 12(b)(6) purposes).

Second, in support of their anti-SLAPP motion to strike Plaintiffs' libel claim, Defendants' argument centered *solely* on their contention that the false statements published about Plaintiffs concerned a "public issue," purportedly protected under subsections (e)(3)-(4) of the California Anti-SLAPP statute. *See* 31-1 at 10-12. Nevertheless, Defendants acknowledged (Dkt. 31-1 at 1, 9) that, under California law, even if the statements at issue concerned a "public issue," their motion must be denied if Plaintiffs can demonstrate sufficient probability of success. However, in their motion, Defendants made no effort to establish that Plaintiffs' are unable to prevail on their libel claim. Indeed, Defendants did not even attempt to establish the truthfulness of their statements or any other defense to a libel claim.

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Now, for the first time on reply, Defendants attempt to proffer the Montgomery Declaration to establish (1) "Montgomery's reasonable belief in publishing the statements in the instant case" (Dkt. 36 at 11:20-21) and that (2) "Montgomery reasonably believed (and still does believe) his statements regarding plaintiffs to be true" (*id.* at 12:20-21). In other words, Montgomery now wants to argue and submit new purported "evidence" on reply that the statements Defendants published about Plaintiffs were in fact true and, therefore, Plaintiffs cannot prevail. Defendants' waiting until their reply brief to make this argument prevents Plaintiffs from responding. The Local Rules of this Court and the law of this Circuit do not allow this (irrespective of the inadmissibility of the evidence on its face).

Remarkably, the Montgomery Declaration reveals, for the first time, that the basis for Montgomery's "belief" in the truth of the statements Defendants published about Plaintiffs is an unverified complaint filed by Edra Blixseth in 2008 in the King County Superior Court. The complaint is attached to the Montgomery Declaration as Exhibit 2 (Dkt. 37-1). Defendants also claim that this complaint undermines the affidavit of Edra Blixseth submitted by Plaintiffs in opposition to Defendants' Motion. *See* Dkt. 36 at 13:9-10. However, Defendants neglect to inform this Court (and the general public) that the King County Superior Court ***dismissed*** Blixseth's complaint in its entirety ***with prejudice***. Blixseth did not appeal from that ruling and its stands final. Moreover, *nowhere* on Defendants' website do they attribute their false statements to the allegations of this dismissed, unverified complaint. Instead, the false statements published by Defendants are stated as facts, *not* opinions or allegations of a dismissed complaint. Indeed, Defendants have only confirmed their liability.

For the foregoing reasons, Plaintiffs respectfully request that the Court strike the Montgomery Declaration in its entirety as "new" information and argument submitted for the first time on reply. In the event the Court decides to consider such "new" information and arguments, Plaintiffs respectfully request leave to file a surreply to address the new information.

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DATED: November 27, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following participants:

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s/ Melissa Wood
Melissa Wood, Legal Secretary
Dated at Seattle, WA on November 27, 2013

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