**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**(RICHMOND DIVISION)**



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| VICTOR E. CRETELLA III | ) | |
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| Plaintiff | ) | |
| | ) | |
| v. | ) | Case No. 3:08cv109 |
| | ) | |
| DAVID L. KUZMINSKI | ) | |
| | ) | |
| Defendant | ) | |
| | ) | |

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S SECOND PRETRIAL MOTION TO DISMISS COMPLAINT AND BRIEF IN SUPPORT THEREOF**

Pursuant to Fed. R. Civ. Proc. 12(b)(6), Plaintiff, Victor E. Cretella III ("Plaintiff"), opposes the second motion to dismiss ("2d Mot. to Dismiss") filed by Defendant David L. Kuzminski ("Defendant"). For the reasons explained more fully below, the motion should be denied.

1. This is Defendant's second motion to dismiss filed pursuant to Rule 12(b)(6). The first motion was denied in part and granted in part. 5-29-8 Order & Mem. Op. (dismissing counts IV and VII but holding that the remaining counts were well pled). Defendant has not raised any new substantive challenges to the complaint. Rather, he attacks Plaintiff's motives for filing this case. None of his arguments support dismissal. It is also worth noting that Defendant has not submitted any of his facts or evidence under oath, making it inappropriate to convert his motion to dismiss into one for summary judgment.

2. First, Defendant moves to dismiss the complaint because Plaintiff seeks irrelevant

information in discovery. 2d Mot. to Dismiss at 1 (claiming that the Plaintiff's suit is a misrepresentation in that the Plaintiff wants information that is not germane to his civil suit against the Defendant"). According to him, Plaintiff has requested information from Defendant about other civil or criminal actions confronting Plaintiff's employer, PublishAmerica. 2d Mot. to Dismiss at 1 ("The Plaintiff has requested information from Defendant about other legal suits or criminal actions that his client and employer, PublishAmerica, might face"). Defendant claims that this information is irrelevant. Assuming responsive information is irrelevant, this Court should still not dismiss the case. Rather, the proper relief would be to issue a protective order under Rule 26(c).

3. In any event, the Discovery requested by Plaintiff is relevant to establishing that Defendant recklessly accused Plaintiff of committing extortion and acting unethically. According to Plaintiff's theory of the case, Defendant is trying to settle a vendetta against PublishAmerica by putting that company out of business. In furtherance of that end, Defendant has a harassed PublishAmerica and its employees by ceaselessly fomenting, encouraging and assisting frivolous legal action against his sworn enemy. This includes the false ethics and extortion charges Defendant published about Plaintiff as well as many other baseless accusations. Based upon this long history, Plaintiff plans to show that Defendant acted recklessly when falsely imputing criminal and unethical conduct to Plaintiff by showing that these statements were published as part of a single scheme to harm PublishAmerica through the publication of baseless accusations. Fed. R. Evid 404 (providing that other wrongful acts, e.g. aiding and abetting frivolous legal action, may be relevant to establish "motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident") (emphasis added). Thus, if Plaintiff is currently in the process of encouraging or assisting with any litigation against PublishAmerica or its employees, it is directly relevant to a core element of this case, i.e. whether Defendant is recklessly perpetrating a campaign to harass PublishAmerica by encouraging and assisting frivolous suits against that company and its representatives.

4. In fact, Plaintiff has circumstantial evidence establishing that Defendant is directly targeting Plaintiff with these malicious prosecutions in retaliation for Plaintiff's commencement of this case. Prior to the filing of the instant suit, Defendant encouraged authors to sue PublishAmerica in court in order to test the viability of the arbitration clause in PublishAmerica's contracts. Ex. 1 ("Yes, it's not realistic that we'll ever see PA in fifty courts or more, but it's something to aim for . . ."). Since this suit was filed, one of PublishAmerica's authors has ignored the arbitration clause in his contract with PublishAmerica and not only sued PublishAmerica but also sued Plaintiff personally. That case was baseless and has since been dismissed. Defendant knows about that suit and has publicly encouraged Mr. DeVore. Ex. 2 (reporting about the DeVore suit). Plaintiff is entitled to know if Defendant had any additional involvement in that suit. If he was encouraging, aiding or abetting Mr. DeVore's frivolous case, it would reinforce the evidence establishing Defendant's plan to harass PublishAmerica and its employees with baseless legal action and tend to show that he was acting recklessly when he attempted to instigate baseless attorney grievance proceedings against Plaintiff in 2007.

5. Second, Defendant has no grounds to complain about being "singled out" by Plaintiff. See 2d Mot. to Dismiss at 1 (suggesting impropriety because Plaintiff "has not taken

any action against any other individuals who also alleged that the Plaintiff's cease-and-desist action against Ms. Norris was extortion or sent letters to the authorities"). Plaintiff is unaware of any obligation to sue all people who may have wronged him; and Defendant cites no authority for such a proposition.

6. Furthermore, Plaintiff was perfectly justified to target Defendant. In fact, Defendant was the first person to falsely accuse Plaintiff of extortion and being unethical and then revived those defamatory statements several times long after others had let the matter drop. Accordingly, he is the most culpable of any wrongdoers. Not only is he personally liable for his own defamatory statements but he is liable for all repetitions of his defamatory statements made by anybody. Weaver v. Beneficial Finace Co., 199 Va. 196, 199, 98 S.E.2d 687, 690 (1957) ("It is well settled that the author or originator of a defamation is liable for a republication or repetition thereof by a third person, provided it is the natural and probable consequence of his act"). Since the damages caused by Defendant are more than the damages caused by any other potential wrongdoers, it makes sense for Plaintiff to target him. This is reinforced by the fact that only Defendant continued to repeat his defamatory statements for months after he first published them. While others had ceased their wrongdoing by the time suit was initiated, Defendant had not, putting his wrongdoing in a separate, and much more reprehensible, class.

7. Third, the Court cannot dismiss this case for lack of damages. Since Defendant's statements are defamatory per se, cf. 5-29-8 Order at 13-17, damages are presumed for the embarrassment and humiliation caused by Defendant's malicious lies regardless of whether there is any direct evidence of damages. Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 334

S.E.2d 846 (1985) ("in an action brought by a private individual for defamatory words involving no matters of public concern, if the published words are determined by the trial judge to be actionable per se at common law, compensatory damages for injury to reputation, humiliation, and embarrassment are presumed"). While Defendant can argue to the jury that those presumed damages should be low because Plaintiff has a bad reputation, it is still a question for the jury. Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 146, 151, 334 S.E.2d 846, 849, 853 (1985) (noting that determination of presumed damages was for jury once court determined that statements were defamatory per se).

9. Fourth, Defendant cites to the Plaintiff's privilege log to establish some sort of collusion between Plaintiff and his employer, PublishAmerica. According to Defendant, the privilege log shows "an intertwining [between Plaintiff and his employer] so long established that it's unlikely that this suit is the sole result of the Plaintiff believing himself to have been libeled." 2d Mot. to Dismiss at 2. Defendant's argument is nonsense. The facts are simple: Defendant has been spearheading a campaign to close down PublishAmerica for close to a decade. As a result of his wrongful action, PublishAmerica has from time to time consulted with Plaintiff, its attorney, about Defendant's misconduct. In fact, Plaintiff sent a letter to David Kuzminski on behalf of PublishAmerica as early as January 19, 2001. Ex. 3. Not surprisingly, then, Plaintiff had communications with his client about Defendant as early as December 14, 2000; and he has had many other conversations with his client since then to discuss the various subsequent accusations Defendant has leveled at PublishAmerica over the years. These conversations are strictly confidential and privileged as they concern PublishAmerica's interests.

This conclusion would also hold true if Plaintiff had given any advice to PublishAmerica about the website attached as Exhibit 6 to his motion.[1]

10. Plaintiff has also had conversations with his client about this suit. On numerous occasions, Defendant has used this case as a vehicle for obtaining discovery into PublishAmerica's operations. See 7-24-7 Order (noting that Defendant planned to seek inappropriate discovery from PublishAmerica). Since Defendant's efforts to take discovery into PublishAmerica's operations in this case obviously could have repercussions on PublishAmerica, Plaintiff is entitled to have confidential conversations with his client about this case and the impact it might have on PublishAmerica.

11. Indeed, Plaintiff may be ethically bound to discuss this case with his client. This case indirectly concerns Plaintiff's representation of PublishAmerica. Specifically, Defendant's defamatory statements concern his characterization of a cease and desist letter sent by Plaintiff to a third party on behalf of PublishAmerica. Accordingly, some of the evidence relevant to this case may concern Plaintiff's representation of PublishAmerica. In order to ensure that he does not violate any client confidences in his testimony or evidence, Plaintiff is constrained to keep his client updated about the status of this suit.

12. It was also appropriate for Plaintiff to discuss Defendant's fund-raising efforts with his client, PublishAmerica. For example, on March 3, 2008, Plaintiff claimed on the Internet that PublishAmerica, and not its attorney, was suing him and asked people to help pay

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[1]On information and belief, the website was not destroyed and is still available.

for his defense against PublishAmerica's nonexistent claims. Ex. 4. Since PublishAmerica has never sued Defendant, it is not surprising that Defendant's claims to the contrary might be of interest to PublishAmerica and that it might discuss this topic with its attorney. See Privilege Log.

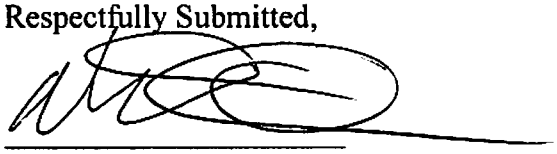
13. Defendant also makes the preposterous accusation that Plaintiff is intentionally planting viruses on Defendant's computer. However Defendant admits that he has no "concrete evidence" supporting this claim. Without such evidence, this inflammatory remark is incapable of supporting any relief, and probably should be stricken.

14. Defendant also renews his original motion to dismiss. That motion was denied by the court, and Defendant has identified no grounds for reconsideration. He has not even made new arguments supporting his motion. Accordingly, Plaintiff incorporates his prior opposition to the first motion to dismiss as if stated herein.

## III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

Respectfully Submitted,



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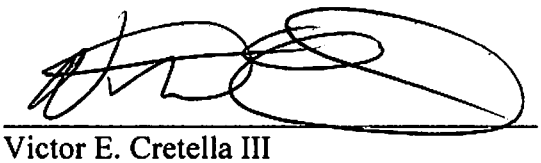
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief Supporting Plaintiff's Opposition to Defendant's Second Motion to Dismiss was sent via first class mail, postage prepaid, to:

David L. Kuzminski
2581 Pine Hurst Drive
Petersburg, Virginia

this 25th day of April, 2008.



Victor E. Cretella III