

The court held the Evidentiary Hearing on September 16, 2017. (Dkt. No. 187.) At the hearing, the court heard testimony from Marc Werner, Ryan Monahan, and Calisha Anderson. The evidence elicited at the hearing from all witnesses established, among other facts, that: 1) Monahan continues to provide extensive marketing services to GhostBed (September 16, 2016 Hearing Transcript at 161-64); 2) Monahan's company, Social Media Sharks, has received over \$130,000 from GhostBed, and continues to receive \$10,000 per month, for Monahan's marketing services to GhostBed, of which Monahan receives approximately half (*id.* at 25, 28-31); 3) Monahan used the title "Chief Brand Officer" of GhostBed with GhostBed's knowledge and without protest (*id.* at 84-85, 103, 120-22); and 4) Monahan helped GhostBed place competitive ads that targeted Plaintiff. (*id.* at 59, 148-49.) At the conclusion of that testimony, the court determined that Monahan and Werner had materially misrepresented the relationship between HMR and GhostBed, as well as Monahan's status as an independent journalist. (*Id.* at 165-70.) The court found the testimony of Ms. Anderson to be credible and persuasive, and it was not seriously challenged by cross-examination.² (*Id.*) After considering all the evidence presented to the court, particularly the close relationship and substantial financial ties between Monahan and GhostBed, the court entered a Preliminary Injunction. (Dkt. No. 191.)

On October 25, 2017, Plaintiff filed its Motion for Sanctions. (Dkt. No. 229.) Plaintiff argues that Defendants' willful misrepresentations prejudiced Plaintiff's case and interfered with these proceedings. (*Id.*) Plaintiff accordingly requests that the court strike Defendants' answers and defenses to Plaintiff's complaint, grant judgment in favor of Plaintiff, and dismiss GhostBed's counterclaim against it. (*Id.*) Defendants maintain that none of the challenged

² Mr. Randazza did not attend the hearing to cross-examine Ms. Anderson, despite his confident assertions that he would expose Ms. Anderson as a liar.

statements were willful, intentional, or made in bad faith, and that they do not rise to the level of sanctionable conduct. (Dkt. Nos. 247, 250.)

DISCUSSION

District Courts have “very broad discretion to exercise their inherent powers to sanction a full range of litigation misconduct that abuses the judicial process.” *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1300-01 (D. Utah 2016). However, “[d]ismissal is a severe sanction [which] should be imposed only if a ‘lesser sanction would not serve the ends of justice.’” *LaFleur v. Teen Help*, 342 F.3d 1145, 1151 (10th Cir. 2003)(quoting *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002)). The Tenth Circuit has provided five factors for a court to consider in determining the appropriateness of sanctions:

- (1) the degree of actual prejudice to the [party requesting sanctions], (2) the degree of interference with the judicial process, (3) the litigant’s culpability, (4) whether the litigant was warned in advance that dismissal was a likely sanction, and (5) whether lesser sanctions would be effective.

LaFleur, 342 F.3d at 1151 (citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)).

These factors provide a “flexible framework” to “adequately punish [the Defendants’] misconduct, remedy the prejudice to and harm suffered by [Plaintiff] and the judicial process, deter future litigants from engaging in this type of misconduct, and engender public trust in the integrity of the judicial proceedings. *Xyngular Corp.*, 200 F. Supp. 3d at 1320-21.

The Degree of Actual Prejudice to Plaintiff

The court finds that Plaintiff was significantly prejudiced by Defendants’ misrepresentations in this action. Plaintiff sought and obtained a T.R.O. in this matter, which was dissolved by the court due to the strong representations of Werner and Monahan and their counsel that they did not maintain a relevant business relationship, and that Monahan was an

independent consumer journalist. However, the evidence at the Evidentiary Hearing showed an entirely different picture. Monahan continues to maintain a significant business relationship with GhostBed and during the relevant time period effectively acted as its head of marketing. When presented with the truth regarding Monahan and GhostBed's relationship, the court reinstated the injunctive relief initially requested by Plaintiff. Plaintiff was deprived of this injunctive relief in the interim and was required to expend time and resources to obtain the requested relief the second time.

The Degree of Interference with the Judicial Process

The court also finds that the degree of interference with the judicial process here was substantial. Defendants and their counsel adamantly defended misleading representations that Monahan and GhostBed had no meaningful association and that Monahan was a consumer journalist entitled to the fullest possible protection of the First Amendment. They vigorously asserted those misrepresentations even after the court received Ms. Anderson's declaration, which caused the court to hold a full day evidentiary hearing to determine the truth. Such a hearing could have been avoided had Defendants been honest and forthcoming regarding their relationship in the first instance.

The Litigant's Culpability

Defendants now acknowledge that the misrepresentations "lacked the level of candor and attention to detail necessary to ensure that all of the material facts were clearly stated and understood by all parties and the Court" but claim they were "made in the heat of battle." (Dkt. No. 247 at iii, 14.) While the court appreciates Defendants' acknowledgment of some responsibility, the court does not agree that these material misrepresentations were merely

inadvertent missteps. Monahan, Werner, and counsel for each were given numerous opportunities in several hearings prior to the September 16 Evidentiary Hearing to correct and clarify their previous, misleading testimony. Instead, Defendants doubled down on their statements and continued to actively conceal the truth from Plaintiff and the court. Werner and Monahan actively misrepresented the nature of their relationship for months. These misleading statements could not be reasonably classified as mere oversight.

Advance Warning

The court did not explicitly warn Defendants that misleading the court by sworn testimony was sanctionable conduct but it could hardly be expected that such a warning would be given. It is expected and presumed that parties and their counsel will not knowingly misrepresent material facts to the court. The declarations of Monahan and Werner were signed under penalty of perjury, and counsel, as officers of the court, are under strict ethical rules to be honest in all of their dealings with the court, and to never assist in the subornation of perjury. Mr. Randazza's statements at the July 7, 2017 hearing—that he would expose Ms. Anderson's statements to be lies and that he “hope[d] that there will be sanctions...[and] she'll be charged with perjury when [he could] show she has lied”—demonstrates a clear understanding that submitting a false declaration to the court could result in sanctions. Indeed, based on the court's careful consideration of the testimony given at the Evidentiary Hearing, the misrepresentations by Werner and Monahan were sufficiently egregious that perjury prosecutions would, and perhaps should be, an appropriate consideration.

Efficacy of a Lesser Sanction

All of the previous factors weigh in favor of assessing sanctions against Defendants. The court must now determine whether a sanction less than dismissal would remedy the harm to Plaintiff and “deter the errant part[ies] from future misconduct.” *Ehrenhaus*, 965 F.2d at 920. Dismissal is “an extreme sanction” and “should be used as a weapon of last, rather than first resort.” *Id.* (citing *Meade v. Grubbs*, 841 F.2d 1512, 1520 (10th Cir. 1988)). “Only when the aggravating factors outweigh the judicial system’s strong predisposition to resolve cases on their merits is dismissal an appropriate sanction.” *Meade*, 841 F.2d at 1520. Here, the court does not find that case-terminating sanctions are the only appropriate remedy for Defendants’ misconduct. However, given the egregious nature of Werner’s misrepresentations, the court finds that striking GhostBed’s counterclaims is appropriate. Furthermore, sanctions will be, and hereby are, awarded for Plaintiff’s reasonable attorneys’ fees and costs expended in pursuing its second Motion for Preliminary Injunction (Dkt. No. 115) and this Motion for Sanctions. Defendants Ryan Monahan and Honest Mattress Reviews, LLC shall jointly pay one half of those fees and costs, and GhostBed, Inc. shall pay the other half. The court will also issue an adverse jury instruction if deemed appropriate when this case goes to trial.

CONCLUSION

For the foregoing reasons, Defendant GhostBed's counterclaims are hereby stricken and sanctions are awarded for Plaintiffs' reasonable attorneys' fees and costs in pursuing its second Motion for Preliminary Injunction and Motion for Sanctions, and an adverse jury instruction shall be given if deemed appropriate at the time of trial.

DATED this 9th day of February, 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dee Benson", written over a horizontal line.

Dee Benson
United States District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

VETERANS IN POLITICS
INTERNATIONAL, INC. AND STEVE W.
SANSON,
Appellant,

vs.

MARSHAL S. WILLICK AND WILLICK
LAW GROUP,
Respondent.

S.C. NO. 72778
D.C. NO: A-17-7501716
Electronically Filed
Mar 06 2018 12:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENT'S OPPOSITION
TO "MOTION OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND NEVADA PRESS ASSOCIATION
FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF
PETITIONERS"

I. INTRODUCTION

The Motion is an attempted fraud on the Court, by one of Sanson's lawyers, attempting to file a second brief on Sanson's behalf. It should be denied. Sanctions are warranted.

II. OPPOSITION

A. Leave Should Not Be Granted Because the Motion Is False on its Face and it Does Not Comply with NRAP 29(c)

First, this Court does not require outside help in determining the appropriate standard of review. Msanson is capable of addressing the standard of review in

his Reply Brief. Because the amici brief will not be useful, the motion should be denied.¹

More to the point, Mr. Randazza presents a motion to allow filing of an Amici Curiae Brief by claiming that it is “In Support of Neither Party.” This representation was knowingly false when made. From the onset of this case, Mr. Randazza has been working with Sanson and his brief is an attempted “second bite at the apple” for Sanson. As Sanson’s ally, Randazza merely seeks to extend the length of Sanson’s briefs. However, “[s]uch amicus briefs should not be allowed.”²

When this litigation began, Respondent did research for attorneys claiming to be informed as to “anti-SLAPP” cases and contacted Mr. Randazza. On January 25, 2017, he responded to our inquiries, stating “I am indeed out of town on an 11th circuit mission. I may also have a conflict. But I will get back to you on that.” He subsequently confirmed the conflict since he was working for Sanson.

That Mr. Randazza was working for Sanson was confirmed by Alex Ghibaudo, attorney for multiple defendant parties in the underlying action, when he “advised that Mark Randazza of the Randazza Legal Group has agreed to assist

¹ 3B C.J.S. Amicus Curiae § 3 (“The court may grant or refuse leave according to whether it deems the proffered information timely, useful, or otherwise.”)

² Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997)

in the preparation, filing, and argument concerning the Special Motion to Dismiss.”¹

Randazza is no “neutral.” He has been one of Sanson’s attorney for more than a year. His failure to inform this Court of that fact is actionable.

Even if Randazza were “neutral,” his motion fails to meet the requirements of NRCP 29(c), which states that “[a] motion for leave to file an amicus brief shall be accompanied by the proposed brief.” The motion filed with this Court references an “attached brief,” but fails to actually include the attachment. For that reason alone, Randazza’s motion must be denied.

B. Collusion

Mr. Randazza collaborated with Sanson counsel Amy Levy before filing his motion. Knowing that NRCP 29(f) normally forbids application for filing an amicus brief beyond a week after the opening brief was filed, once she saw the Answering Brief, Ms. Levy requested an extension of time to file her reply brief for the purpose of delay until Mr. Randazza’s motion could be filed and heard.

C. Sanctions

This Court has repeatedly and forcefully stated that “statements [that are] not truthful . . . are not subject to First Amendment protection.” Sanson and his

¹ See email from Alex B. Ghibaudo, Esq., dated February 17, 2017, attached hereto as Exhibit A.

lawyers know this and are seeking by means both within the litigation and extra judicially, to find some way of altering this Court's review of their actions. That was the reason for Sanson's attempts to reach Justice Cherry personally, and that is the reason for Mr. Randazza's motion without admitting that he has been a Sanson lawyer for the past year.

All of those actions are reprehensible and deserving of sanctions under NRAP 38 for Sanson having "processed" his appeal "in a frivolous manner." Mr. Randazza has established that he has no problem making false representations of fact to courts, having recently been found to have made multiple false representations of fact while deliberately falsifying the relationship between parties in federal litigation in Utah.²

III. CONCLUSION

Mr. Randazza is falsely claiming to be neutral while having worked for Sanson for over a year. Ms. Levy has actively colluded by trying to get extensions to filing the reply brief for the actual purpose of facilitating his filings.

² Discipline of Hafter, No. 71744 (Unpublished Order of Suspension, Nov. 17, 2017), citing Standing Comm. On Discipline of U.S. Dist. Court for Cent. Dist. Of Cal. v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995) (holding that a statement of opinion is not protected by the First Amendment either if it is based on disclosed facts that are untrue or if it is based on implied undisclosed facts, but the speaker has no factual basis for the stated opinion)

³ See generally Purple Innovation, LLC v. Honest Reviews, LLC, No. 2:17-CV-138-DB, 2018 WL 840035 (D. Utah Feb. 12, 2018), attached hereto as Exhibit B.

The Motion fails for failure to attach the proposed Amici Curiae Brief mandated by NRAP 29(c). This Court does not need outside help in determining the appropriate standard of review. The pending motion seeking to file an amicus brief should be denied, and ~~as~~ ~~son~~, and attorneys Levy and Randazza, should be individually and collectively sanctioned for attempted fraud on this Court.

Respectfully submitted,

THE ABRAMS & MAYO LAW FIRM

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of THE ABRAMS & MAYO LAW FIRM and that on this 6th day of March, 2018, documents entitled Respondent's Opposition to Appellant's "Motion of the Reporters Committee for Freedom of the Press and Nevada Press Association for Leave to File Amici Curiae Brief in Support of Petitioners" were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorney's listed below

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

PURPLE INNOVATION, LLC, a Delaware
limited liability company,

Plaintiff,

v.

HONEST REVIEWS, LLC, a Florida
Corporation, RYAN MONAHAN, an
individual, and GHOSTBED, INC., a
Delaware corporation,

Defendants.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:17-cv-138-DB

District Judge Dee Benson

Before the court is Plaintiff's Motion for Sanctions. (Dkt. No. 229.) In its motion, Plaintiff requests sanctions for Defendants' submission of misleading and false statements to the court in opposing Plaintiff's request for preliminary injunction. Pursuant to civil rule 7-1(f) of the United States District Court for the District of Utah Rules of Practice, the court elects to determine the motion on the basis of the written memoranda and finds that oral argument would not be helpful or necessary. DUCivR 7-1(f).

FACTUAL BACKGROUND

Plaintiff is a manufacturer of bed-in-a-box mattresses and other bedding products. (Compl. ¹ at ¶¶ 19-29.) Plaintiff advertises and sells its products solely through an e-commerce platform, rather than maintaining brick and mortar stores. (*Id.* at ¶ 29.) Because Plaintiff relies strictly on an e-commerce sales strategy, online comment and review websites can have a significant impact on Plaintiff's business. (*Id.* at ¶¶ 38-39.)

¹ All references to the Complaint herein refer to the Second Amended Complaint. (Dkt. No. 266.)

In January 2017, a new mattress review website—www.honestmattressreviews.com—owned by Defendant Honest Reviews, LLC (“HMR”) and operated by HMR’s sole owner, Defendant Ryan Monahan (“Monahan”), began to post reviews of various mattress and bedding products. (*Id.* at ¶¶ 9, 10, 44.) HMR’s reviews or “articles” about Plaintiff’s products suggested a link between a white powder used on some of Plaintiff’s products and cancer-causing agents. (*Id.* at ¶¶ 47, 53-54.) For example, one article compared the powder to a “ground down...plastic mustard container” or “glass coke bottle,” which consumers will inhale every night for “eight to ten hours.” (*Id.* at ¶ 71.) The article, alluding to Plaintiff’s product, also included a video of the “cinnamon challenge,” in which people were coughing, gagging, spitting, crying, and choking on cinnamon. (*Id.* at ¶¶ 72-74.) Plaintiff received low marks on the HMR site, including an image of a large red “X,” while its competitors, including Defendant GhostBed, Inc. (“GhostBed”), received favorable marks. (*Id.* at ¶ 82.)

The HMR website repeatedly stated that it was not influenced by any mattress company and that it did not receive financial compensation for its reviews. (*Id.* at ¶¶ 155-64.) Some of those statements included that HMR “receives zero affiliate commissions,” “does not have any affiliate commission sales relationships with mattress companies,” and is “free from corporate or conglomerates...[that] silence or shape editorial narratives and truths.” (*Id.* at ¶¶ 158-63.) The site also asserted that the posts on HMR “have total editorial independence” for which “[n]o one has influence.” (*Id.* at ¶ 163.) The HMR website also stated that it is not interested in “influencing a purchase decision to promote a company” or in “a few large companies controlling the narrative.” (*Id.* at ¶ 164.)

Plaintiff filed its Complaint on February 24, 2017, alleging claims for false advertising and false association under the Lanham Act and Utah common law, tortious interference with economic relations, defamation, trade libel and injurious falsehood, civil conspiracy, and violation of the Utah Truth in Advertising Act. (Compl. at ¶¶ 220-72.) Plaintiff alleged that the statements made about its products, including their connection to cancer-causing agents, are false. (*Id.* at ¶¶ 221-25.) Plaintiff also alleged that the statements on the HMR website regarding its intellectual and financial independence from any mattress company are false, and that Monahan, the sole owner and operator of HMR, was closely affiliated with Plaintiff's direct competitor, GhostBed. (*Id.* at ¶ 168.) Accordingly, Plaintiff concluded that HMR's purported "reviews" were actually commercial advertising and promotion that "materially misrepresented the nature, characteristics, and qualities" of Plaintiff's products, while failing to disclose the close affiliation with its competitor. (*Id.* at ¶¶ 222-23.)

On February 27, 2017, Plaintiff requested an ex parte Temporary Restraining Order to prohibit Defendants from posting false or misleading statements regarding its products. (Dkt. No. 8.) The court originally denied Plaintiff's motion for ex parte relief, holding that the Plaintiff had "failed to meet its burden to show what efforts ha[d] been made to provide notice, why notice should not be required in this case, and whether immediate irreparable injury [would] result before the adverse party [could] be heard in opposition." (Dkt. No. 13.) Following entry of that Order, Plaintiff's attorney submitted an additional declaration outlining multiple efforts made to notify Defendants of the case, including indications that Defendants had received actual notice and that Defendants appeared to be avoiding service of process. (Dkt. No. 14.) Based on this showing, along with Plaintiff's evidence of a strong showing of an affiliation between

Defendants and substantial likelihood of irreparable harm, Defendants requested Temporary Restraining Order.

The following day, on March 1, 2017, Defendants filed a Declaration titled “Why Defendants Should Not Be Held Liable for the Alleged Defamation of Plaintiff’s Reputation” (“Declaration”) in which Defendants argued that Defendants had failed to respond to Plaintiff’s Motion, instead, posted an inflammatory article on Plaintiff’s website. Defendants opposed the Motion and filed Motion for Summary Judgment (Dkt. No. 36.) In support of their Motions, Defendants submitted a Declaration from Marc Werner (Dkt. No. 31) and the Declaration from Plaintiff.

In his Declaration, Marc Werner stated that he is not affiliated with Plaintiff and does not have any affiliation whatsoever with Plaintiff. (“Declaration” (Dkt. No. 31 at ¶ 6.) Werner stated that he does not control or contribute to honestmattressreviews.com, does not remunerate Mr. Monahan or Honest Mattress Reviews, and does not work with the honestmattressreviews.com website. Werner stated that he is not, and has never been, an employee of Plaintiff, and that when Monahan identified himself on Plaintiff’s website as a representative of GhostBed, he did so “mistakenly.” (Dkt. No. 31 at ¶ 7.) Werner, a member of GhostBed’s marketing department, stated that he does not have an office, phone extension, or email address. Werner stated that Monahan has “no monet

