UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROADSPRING, INC., Plaintiff, v. CONGOO, LLC, doing business as ADIANT and ADBLADE, ASHRAF NASHED, RAFAEL COSENTINO, Defendants.	13 Civ. 1866 (JMF)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR AN ORDER DIRECTING THAT DEFENDANTS' PROPOSED VERDICT FORMS AND JURY CHARGES BE GIVEN TO THE JURY

Respectfully submitted,

KENT, BEATTY & GORDON, LLP
Jack A. Gordon
(jag@kbg-law.com)
Joshua B. Katz
(jbk@kbg-law.com)
425 Park Avenue, The Penthouse
New York, New York 10022
(212) 421-4300

Attorneys for Plaintiff Broadspring, Inc.

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Plaintiff Broadspring, Inc. ("Broadspring") respectfully submits this memorandum in opposition to Defendants' Motion For An Order Directing That Defendants' Proposed Verdict Forms and Jury Charges Be Given to the Jury. (ECF Nos. 219, 220.)

PRELIMINARY STATEMENT

By their motion, Defendants ask the Court to order itself to use their preferred verdict form and charges. Such a motion is not authorized by this Court's Individual Rules, which contemplate only *in limine* motions and pretrial memoranda. In the event the Court nonetheless chooses to consider Defendants' arguments, we respectfully refer the Court to Broadspring's pretrial memorandum (ECF No. 215), which explains why Defendants' charges and verdict form pervasively misstate the law and are inconsistent with accepted practices in false advertising and defamation cases. This opposition responds to Defendants' motion only to the extent they raise arguments that were not fully addressed in Broadspring's pretrial filings.

ARGUMENT

I. Defendants' Proposed Charges and Verdict Form Are Radically Defective

As explained in Broadspring's pretrial memorandum, Defendants' verdict form improperly gerrymanders their statements into artificial sub-groups (while, at the same time, entirely omitting most of their false statements), in contravention of the settled rule that a false advertising campaign must be evaluated as a whole. (ECF No. 215, pp. 8-11.) Indeed, Defendants would have the jury engage in the very sort of "disputatious dissection" that is forbidden in false advertising cases. *See Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007). Perhaps even worse, rather than attempt any sort of logical organization, Defendants have seemingly organized the statements based on their beliefs about what "groupings" will make it most difficult for the jury to reach a unanimous verdict.

Accordingly, their proposed charges and verdict on the false advertising claim should be rejected *in toto*.

With respect to defamation, Defendants argue that the jury must evaluate each defamatory statement "in context" to determine the issues of falsity and opinion. (ECF No. 220, Def. Mem., p. 3.) This is a transparent attempt to confuse the jury. Defendants apparently hope to distract them by focusing their attention away from the defamatory statements and onto other passages in the Squidoo Lens, the Contextly article, and the non-defamatory portions of the defamatory emails. Defendants' contention that truth or falsity must be determined by evaluating the entire document in which the defamatory statement appears has no basis in law, and should be rejected. If an author writes a lengthy biography of his subject, and somewhere in the book falsely states that the subject committed a serious crime, it obviously would be no defense that the rest of the book is accurate. Just so here with respect to Defendants' false statements. And, although context does have some relevance to determining whether a statement is fact or opinion, as explained in Broadspring's pretrial memorandum (ECF No. 215, pp. 20-21), that issue should not be submitted to the jury at all.

As for Defendants' argument that the jury must consider each defamatory statement "separately," Broadspring agrees in principle. Broadspring's proposed verdict form on defamation already contemplates that the jury will make separate liability findings as to each of the 25 statements. It makes no sense, however, to require the jury to provide a separate damages verdict for each statement, since the jury must assess the aggregate effect on Broadspring's business and reputation, a task that cannot be fulfilled by considering each statement in isolation. Indeed, as demonstrated by the examples annexed to Broadspring's pretrial declaration (ECF No.

216, Exs. 6-7), Defendants' approach contravenes the accepted practice in defamation cases that, like this case, involve a multitude of similar defamatory statements.

II. Defendants Are Not Entitled to the Protections Afforded Statements About Matters of Public Concern

In their summary judgment motion, Defendants argued that Broadspring was a limited purpose public figure. The Court rejected this argument as "without merit," noting that "the public controversy in which Broadspring is alleged to have inserted itself is the very controversy that Congoo created … ." (ECF No. 163, p. 15.) Defendants now take a slightly different tack, arguing that because Broadspring "claims that Defendants have defamed Broadspring by accusing Broadspring of promoting continuity offers that are tough to cancel and having connections to companies involved in spyware distribution and ringtone scams," their false statements address matters of public concern.[1] (ECF No. 220, Def. Mem., p. 7.)

This new argument fares no better than Defendants' attempt to turn Broadspring into a limited purpose public figure. A matter of "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). "To determine whether speech addresses a matter of public concern, we consider its 'content, form, and context as revealed by the whole record.'" *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 130 (2d Cir. 2013) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761

[1] Oddly, Defendants also assert that "the repeated warnings by Cosentino to publishers that Broadspring does not properly disclose that its ad units advertorials contain sponsored content, is clearly of interest to both publishers and the ultimate consumers." (ECF No. 220, Def. Mem. pp. 7-8.) These statements are not at issue because they are not part of Broadspring's defamation claim; rather, they relate to Defendants' counterclaims, which the Court dismissed as meritless. (ECF No. 163, pp. 21-24.)

(1985)). "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011). Here, the content, form and context of Cosentino's statements all indicate that they do not address matters of public concern.

First, Cosentino was not motivated by any desire to contribute to a public debate, but rather by greed. His was purely commercial speech, aimed at destroying a competitor and enriching his own company. This weighs heavily against a finding of any public concern. *MCSi, Inc. v. Woods*, 290 F. Supp. 2d 1030, 1034 (N.D. Cal. 2003) ("The most reasonable characterization of Woods's postings in this case is speech by a competitor about a competitor. … As commercial speech, Woods' postings are not a matter of public interest."); *see also Ezekwo v. N.Y. City Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir. 1991) (statements did not address matters of public concern where speaker "was not on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation and individual development as a doctor."); *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1330 (5th Cir. 1993) (public concern not implicated where speech "was not aimed at enlightening the general public; it 'was speech solely in the individual interest of the speaker and its specific business audience.'") (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 762).

Defendants' contention that the statements relate to the matters of public concern because they "affect consumers" (ECF No. 220, Def. Mem., pp. 10) is baseless. As noted, this Court has already held that "there is no 'public controversy'" here (other than, perhaps, the one that Defendants are attempting to manufacture). (ECF No. 163, p. 15.) Further, the defamatory statements about Broadspring distributing spyware and having been shut down by the FTC

concern events that are falsely alleged to have occurred a decade ago; thus, there is no conceivable possibility that they are "of general interest and of value and concern to the public *at the time of publication*." *City of San Diego*, 543 U.S. at 83-84 (emphasis added).

Nor do the false statements regarding Broadspring's current advertising units satisfy the test for public concern. There is no ongoing public debate about Broadspring's advertising units, and it is not sufficient for Defendants merely to assert, as they do in their motion, that anything that "affects consumers" is of public concern. (ECF No. 220, Def. Mem., pp. 7-10.) As the California Court of Appeals explained in analyzing the public concern element of the California Anti-SLAPP statute, it is improper to evaluate a defamatory statement at the high level of abstraction or generality that Defendants advocate here:

> Trimedica argues that 'herbal dietary supplements and other forms of complementary medicine are the subject of public interest.' … Yet Trimedica's speech is not about herbal supplements in general. It is commercial speech about the specific properties and efficacy of a particular product, Grobust. If we were to accept Trimedica's argument that we should examine the nature of the speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute.

Consumer Justice Center v. Trimedica Int'l, Inc., 107 Cal. App. 4th 595, 601 (2003); *see also, e.g., Rivero v. Am. Federation of State, Cty. and Mun. Employees, AFL-CIO*, 105 Cal. App. 4th 913, 919, 924 (2003) (rejecting defendant's argument that statements concerning "the supervision of a staff of eight custodians" by plaintiff were of public concern on the theory that "the abusive supervision of employees throughout the University of California system is an issue of particular public interest"); *Singer v. Ferro*, 711 F.3d 334, 340 (2d Cir. 2013) (although "governmental corruption is plainly a potential topic of public concern, … it does not follow that any accusation of an employer practice that is alleged to be 'corrupt' qualifies for protection.").

Indeed, as one court pointed out, adopting Defendants' argument would have the absurd effect of turning "any lawsuit alleging trade libel, false advertising or the like in the context of commercial competition" into a suit about a matter of public concern. *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

Moreover, the "consumers" purportedly affected by the advertising units were not even Cosentino's intended audience. Rather, in accordance with Nashed's directive that "our publishers should know about [Broadspring's] background" (ECF No. 163, p. 4), the statements were addressed to web site publishers, and exhorted them not to host Broadspring's advertising units in reliance on Defendants' lies that doing so would damage their businesses. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 262 (9th Cir. 2013) (consumer warnings are in the public interest only if "they are provided in the context of information helpful to consumers.") And the fact that speech may be of interest to the web site publishers for whom Broadspring and Congoo compete does not mean the speech is a matter of interest to the general public, as required to support a public concern charge for the defamation claim. *See Snead*, 998 F.2d at 1330 ("Even if the record proves that this dispute was of particular interest to the railroad and construction industries, it does not mean it was a matter of interest to the general public.").

For all of these reasons, this case is nothing like *Stolz v. KSFM 102 FM*, 30 Cal. App. 4th 195, 207 (1994), in which the statements were made during a "two and a half hour program" on the topic of "irresponsibility in radio broadcasting." Here, in contrast, Defendants' statements were commercial speech, targeted at the web site publishers for whom the parties compete, and consisted of blatantly false statements about matters unique to Broadspring's business.

Finally, there is no merit to Defendants' argument that because they used the Internet to publish false statements, their statements should be deemed to involve a matter of public concern. (ECF No. 220, Def. Mem., pp. 10-12.) Preliminarily, many of the defamatory statements were published via e-mail. As for the defamatory statements posted on Squidoo and Contextly, the fact that web sites are often (though not always) considered public forums does not *ipso facto* make anything posted on the web a matter of public concern. On the contrary, California law is clear that "not every Web site post involves a public issue," and "mere publication on a Web site should not turn otherwise private information into a matter of public interest." *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1226 (2010) (internal quotations, alterations and ellipses omitted).

CONCLUSION

For the foregoing reasons, and the reasons set forth in Broadspring's pretrial memorandum, Defendants' proposed verdict form and jury charges should be rejected, and Broadspring's proposed forms should be used instead.

Dated: New York, New York
October 24, 2014

KENT, BEATTY & GORDON, LLP

/s/ Jack A. Gordon

Jack A. Gordon
Joshua B. Katz
425 Park Avenue, The Penthouse
New York, New York 10022
(212) 421-4300
jag@kbg-law.com
jbk@kbg-law.com

Attorneys for Plaintiff
Broadspring, Inc.