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 REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSE OF UNCLEAN HANDS

Respectfully submitted,

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Plaintiff Broadspring, Inc. ("Broadspring") respectfully submits this reply memorandum in further support of its motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure to strike the unclean hands defense of Defendants Congoo, LLC, doing business as Adiant and Adblade, Ashraf Nashed, and Rafael Cosentino (collectively, "Defendants").

PRELIMINARY STATEMENT

Broadspring's moving papers demonstrated that two essential elements of an unclean hands defense—unconscionable conduct with an immediate and necessary relation to Broadspring's claims—are not satisfied here as a matter of law. Nothing in Defendants' opposition rebuts that showing. Rather, Defendants offer only strained analogies and a rehashing of grievances that the Court already rejected when it granted Broadspring's motion for summary judgment. Thus, allowing this defense to remain in the case would needlessly multiply the proceedings, prejudice Broadspring, and waste the time of both the Court and the jurors. Indeed, any doubts on that score are removed by the meandering, hodgepodge character of the allegations recited in Defendants' opposition.

In that regard, although Broadspring correctly stated that Defendants' boilerplate pleading was legally inadequate, the motion to strike addressed the substance of Defendants' unclean hands defense as disclosed by their pretrial submissions. Accordingly, it makes no difference whether the Court confines its analysis to the four corners of the pleading or (as Defendants request) looks beyond their pleading and considers their pretrial submissions. In either event, the unclean hands defense is legally deficient and should be stricken.[1]

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[1] Furthermore, Defendants' opposition also exposes the disingenuousness of their attempt to exclude more than half of their defamatory statements from the trial. In Defendants' Motion *in Limine* to Exclude Certain Statements as a Basis for Plaintiff's Defamation Claim, they advocated a strict pleading standard with no basis in law, under which any defamatory e-mail not specifically quoted in the Second Amended Complaint must be excluded, despite the fact that they were fully aware of all the

ARGUMENT

I. The Court Should Entertain Broadspring's Motion to Strike

Defendants offer no credible argument why the Court should not entertain this motion. They fail even to acknowledge, much less make any effort to distinguish, the long line of cases holding the 21-day time limit "essentially unimportant" in light of the Court's authority to strike a defense "on its own" under Fed. R. Civ. P. 12(f)(1). (ECF No. 243, Pl. Mem., p. 7.) Indeed, Defendants' opposition does not even mention Rule 12(f)(1), or the fact that the unclean hands defense was addressed at length in Broadspring's timely pretrial submissions (ECF Nos. 203, pp. 10-11; 215, pp. 18-19), providing ample grounds for the Court to strike the defense *sua sponte* even in the absence of any motion.

Nor is there any dispute that Defendants did not disclose the late-breaking theory behind their unclean hands defense until it was too late to prepare a motion to strike. Instead, Defendants assert that their previous answers also alleged unclean hands, and that the defense overlaps substantially with their dismissed counterclaims. (ECF No. 255, Def. Mem., pp. 3-6.) But all of Defendants pleadings merely intone the words "unclean hands" without elaboration, and thus provide no more information than their Answer to the Second Amended Complaint. And while it is *now* apparent that there is substantial overlap between the counterclaims and the proposed defense, that does not change the fact—notably uncontested by Defendants—that they failed to disclose the overlap between the unclean hands defense and the counterclaims until it

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statements Broadspring intends to submit to the jury. (ECF Nos. 217-218; *see also* ECF No. 229, pp. 1-8.) Now, however, Defendants urge that "[a]ny purported pleading deficiency has been mooted because Plaintiff is aware of the substance of the defense … ." (ECF No. 255, p. 14.) We respectfully request that the Court consider this complete about-face when deciding the *in limine* motion.

was too late to move to strike. Thus, this is a textbook example of a motion to strike that should be entertained notwithstanding the 21-day time limit.

Defendants urge that striking their defense will not shorten or simplify the trial because the "evidence Plaintiff seeks to exclude" will still be admissible for other purposes (ECF No. 255, Def. Mem., pp. 3-5, 13-14), but that argument disregards the realities of trial and the specific statements that Broadspring claims are defamatory. First, the presence of an unclean hands defense will greatly alter the way the parties use the evidence at trial, enlarge the scope of the arguments the parties will have to make to the jury, and require Broadspring to present rebuttal evidence that otherwise would be irrelevant—all of which will prolong the trial and distract from the genuine issues in this case. That is why courts consistently hold that when "an affirmative defense is unsupportable as a matter of law, it should be stricken in order to avoid unnecessary litigation on the question." *FDIC v. Ornstein*, 73 F. Supp. 2d 277, 280 (E.D.N.Y. 1999) (striking defenses "on the eve of trial," and explaining that judicial reluctance to strike defenses "at the most preliminary stages of litigation" does not apply at that late stage).

As for Defendants' suggestion that all of their unclean hands evidence will be admissible to prove the truth of their statements, the argument ignores the actual statements that Broadspring claims are defamatory. For instance, Defendants' opposition (at p. 4) quotes two passages from the Squidoo Lens that are *not* among the defamatory statements in Broadspring's proposed verdict form. (*See* ECF No. 213-6, statements (a), (o), and (r)–(t).) Likewise, the quoted statements (at p. 5) from the e-mails Defendants sent during this litigation to Journal Register Company and KSL/Deseret News are *not* the statements from those e-mails that appear in Broadspring's proposed verdict form. (ECF No. 213-6, statements (f), (x), (q) and (aa).) And

the same goes for the other exhibits and deposition testimony that Defendants seek to offer in support of their unclean hands defense. Defendants' burden, however, is to prove the truth of their defamatory statements, not the truth of other statements they made in the same email or web posting.[2] *See Rabbani v. Fisch*, 1998 U.S. Dist. LEXIS 5126, *8 (S.D.N.Y. Apr. 15, 1998) ("a plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge therein made.") (quotation omitted).

II. The Unclean Hands Defense Fails on the Merits

A. Defendants Misconstrue the Standard for Unclean Hands

As discussed, unclean hands requires unconscionable conduct with an immediate and necessary relation to Broadspring's claims. Unable to meet this standard, Defendants try to lower the bar, and even imply that there should be no standard at all. (ECF No. 255, Def. Mem., p. 7 ("Contrary to Plaintiff's attempt to impose a higher standard, '[i]n applying the doctrine of unclean hands, [a] Court is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.'") (quotation omitted). Yet the same Supreme Court decision from which that quotation originates also unequivocally states that "courts of equity … apply the maxim requiring clean hands *only* where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933) (emphasis supplied); *see also PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493

[2] None of this is to say that these statements could not be actionable; indeed, they are false or misleading. But Broadspring has exercised its prerogative not to submit these statements to the jury, in order to streamline the trial. *See In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 579 (S.D.N.Y. 2011) (in fraud case involving dozens of alleged misrepresentations, plaintiffs may "chose instead to present only a subset of those statements to the jury at the end of the trial").

(2d Cir. 2004) ("Courts apply the maxim requiring clean hands where the party asking for the invocation of an equitable doctrine has committed some unconscionable act that is directly related to the subject matter in litigation … .") (quotation omitted).

Defendants also misapprehend the degree of relatedness necessary to sustain such a defense. Courts construe that requirement so strictly that even "factually similar misconduct" is not "sufficient to create the necessary link for an unclean hands defense." *Specialty Minerals, Inc. v. Pluess-Staufer AG*, 395 F. Supp. 2d 109, 112-13 (S.D.N.Y. 2005). Rather, an unclean hands defense "requires that a plaintiff must have engaged in precisely the same behavior it accuses the defendant of conducting." *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 465 n.240 (D.N.J. 2009).[3]

This principle is confirmed by the very cases upon which Defendants rely. For instance, in *Stokely-Van Camp, Inc. v. Coca-Cola Co.*, 646 F. Supp. 2d 510, 533 (S.D.N.Y. 2009), the plaintiff "complain[ed] of Coca-Cola's touting of calcium and magnesium," but had unclean hands because it "too has marketed the advantage of adding calcium and magnesium." And in *The Proctor & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 354-55 (S.D.N.Y. 2008), the plaintiff claimed that in vitro studies were insufficient to substantiate the defendant's advertising

[3] *See also S.C. Johnson & Son, Inc. v. Clorox Co.*, 930 F. Supp. 753, 785 (E.D.N.Y. 1996) ("because the claim made in the Commercial is different in kind from the claims made by SCJ since at least 1987 that its Dursban roach baits without hydroprene 'kill roaches and the eggs they carry,' Clorox's contention that SCJ is barred from challenging Clorox's egg kill claim on the basis of 'unclean hands' likewise must fail."); *Pom Wonderful LLC v. Welch Foods, Inc.*, 737 F. Supp. 2d 1105, 1110-11 (C.D. Cal. 2010) (unclean hands allegation that plaintiff "misleads consumers to believe its juices are not from concentrate" not sufficiently "related to [plaintiff's] claims that [defendant] misleads consumers into believing that its juice blend contains more pomegranate juice than it actually does"); *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 258 F.R.D. 663, 666 (W.D. Wash. 2009) ("FSA mistakenly assumes that because the subject matter of the instant dispute is the weight of the parties' respective cranksets, any and all conduct of Campagnolo with respect to its crankset is fair game. … the unclean hands defense does not stretch that far.").

claims, and yet the plaintiff made the same claims based solely on in vitro studies. Likewise, in the two ice cream cases, *Nikkal Industries, Ltd. v. Salton, Inc.*, 735 F. Supp. 1227, 1238 (S.D.N.Y. 1990), and *Haagen-Dazs, Inc. v. Frusen Gladje, Ltd.*, 493 F. Supp. 73, 76 (S.D.N.Y. 1980), the plaintiffs made precisely the same advertising claims that they were suing over.

In sum, under the correct standard that governs the allegedly "unclean" conduct Defendants seek to interject into this case, it is clear that there is no question of law or fact "that might allow the defense to succeed," and the "affirmative defense of unclean hands [should] therefore [be] stricken." *De Beers LV Trademark Ltd. v. DeBeers Diamond Synd. Inc.*, 2005 U.S. Dist. LEXIS 9307, *7, 10 (S.D.N.Y. May 19, 2005).

B. None of the Allegedly Unclean Conduct is Either Unconscionable Or Sufficiently Related to Broadspring's Claims

In essence, Defendants posit two categories of unclean conduct—false statements to publishers and inadequate disclosures on Broadspring's ad units and advertorials. Both categories fail as a matter of law and fact.

1. The Allegedly False Statements

Defendants argue that Broadspring's hands are unclean because it told publishers that it "had higher quality advertisers than Congoo (and other competitors)," and because "Broadspring repeatedly claimed to publishers that it always paid higher CPMs than Congoo, despite being aware of many instances in which Broadspring was unable to meet (or beat) the CPMs being paid by Congoo." (ECF No. 255, Def. Mem., p. 10 & n.5.) But as this Court explained when it dismissed Congoo's counterclaims alleging that Broadspring falsely tells publishers it has cleaner creatives and higher CPM, such statements constitute "at most, non-specific, boastful statements

regarding the superiority of [Broadspring's] product" and "fall far short of the degree of impropriety required for a tortious interference claim." (ECF No. 163, pp. 23-24.)

Recognizing that this Court's summary judgment analysis applies perforce here, Defendants assert that "courts have rejected arguments that the dismissal of a counterclaim forecloses an affirmative defense." (ECF No. 255, Def. Mem., p. 11 (citing *Calabrese v. CSC Holdings, Inc.*, 2006 U.S. Dist. LEXIS 99681 (E.D.N.Y. Mar. 6, 2006).) That is not what happened in *Calabrese*. Rather, the plaintiff had argued that a counterclaim should be dismissed as duplicative of an affirmative defense, and the Court easily rejected that "specious" argument because a counterclaim permits the defendant to obtain affirmative relief "beyond dismissal of the lawsuit." 2006 U.S. Dist. LEXIS 99681, *22-23. *Calabrese* thus provides no support for Defendants' argument that this Court's summary judgment holding is not a precedent for analyzing whether the same statements are unconscionable.

Additionally, Defendants do not even try to articulate how these allegedly false statements are related to Broadspring's claims. (*See supra*, p. 5 & n.3.) Their opposition contains only the *ipse dixit* that they are "very similar" (ECF No. 255, Def. Mem., p. 12), which is plainly not true, and in any event, even "factually similar misconduct" is not "sufficient to create the necessary link for an unclean hands defense." *Specialty Minerals, Inc.*, 395 F. Supp. 2d at 112-13.

2. The Allegedly Inadequate Advertising Disclosures

The other prong of Defendants' unclean hands defense comprises a litany of variations on their theme that Broadspring does not provide proper advertising disclosures. None of these allegations is legally sufficient to sustain an unclean hands defense.

First, Defendants contend that a screen shot of HowLifeWorks.com that Defendants reportedly captured in March 2013 does not disclose that it is an advertorial. (ECF No. 255, Def. Mem., pp. 8-9.) But as the vertical scroll bar on the right-hand side of the screen shot indicates, Defendants cropped the article. (*Id.*, p. 9.) The bottom half (*i.e.*, the part that Defendants omitted) discloses that it is "sponsored by Online Trading Academy." (Reply Declaration of Jonathan Markiles in Support of Motion to Strike, dated November 20, 2014 ("Markiles Decl."), ¶ 2, Ex. 1.) The same is true for the other How Life Works articles on Defendants' exhibit list. (*See, e.g.,* Def. Tr. Ex. AT, p.2 ("This article sponsored by Test X180"); Def. Tr. Ex. AU, p.1 ("This article sponsored by Quibids").)

Accepting Defendants' unclean hands defense, therefore, would require the Court to find that it was not merely incorrect but *unconscionable* for Broadspring to place the disclosures at bottom of the page rather than the top. Put bluntly, that proposition is ridiculous. Significantly, the FTC's disclosure guidelines make clear that the "ultimate test is not the size of the font or the location of the disclosure … the ultimate test is whether the information to be disclosed is actually conveyed to the consumer" (Def. Tr. Ex. AX, p. 1), and that the ideal location for a disclosure will vary depending on the unique features of the advertisement (*see, e.g., id.*, p. 8 (explaining that disclosures are "more likely to be effective" when placed in close proximity to the "triggering claim")). Thus, the agency charged with regulating online advertising has rejected the categorical approach advocated by Defendants in favor of a flexible case-by-case inquiry. And, not only does the FTC evidently find nothing unconscionable about Broadspring's disclosures, but Congoo does not genuinely believe such conduct is unconscionable either. Before it became convenient to take a contrary position in this litigation, Congoo used to run

advertorials that contained no disclosures at all, as the examples annexed to the accompanying Markiles Reply Declaration demonstrate. (Markiles Decl. ¶ 3, Ex. 2.) These examples also establish that the statement in Defendants' opposition (at p. 14) that Congoo "has always disclosed that its advertorials are sponsored" is false.[4]

Second, based on two new documents that do not even appear on Defendants' trial exhibit list, Defendants irresponsibly represent that Broadspring is "currently" running advertorials on TopKit and Knoworthy that contain no disclosures. (ECF No. 255, Def. Mem., p. 9.) This, too, is false. The TopKit review of an outdoor pizza oven (Alexander Decl. Ex. D) is not an advertorial. It was not sponsored by the maker of the oven or anyone else, and Broadspring received no remuneration for the review. (Markiles Decl. ¶ 4.) In fact, almost none of the reviews on TopKit are sponsored, and the few that are sponsored are identified as such. (*Id.*) Also not an advertorial is the article from Knoworthy. (Alexander Decl. Ex. E.) None of the three travel web sites discussed in that article paid Broadspring any compensation for publishing the article, and it generated no revenue whatsoever. (Markiles Decl. ¶ 5.)

Third, Defendants assert that some of Broadspring's advertising units do not adequately disclose that they are advertisements. But Defendants fail to mention that the units display a question mark that the viewer can click to learn more about the ad units (the same approach used by Google's AdChoices advertising network). (Markiles Decl. ¶ 6.) A user who clicks on this question mark receives much more information than Congoo's bare-bones disclosure. In fact,

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[4] For the same reasons, Defendants' effort to portray the How Life Works screen shot in Broadspring's memorandum (which was chosen literally at random) as an attempt to mislead the Court takes them nowhere. There is no material difference between an advertorial that contains a disclosure at the top of the page and one that contains a disclosure at the bottom, and neither the FTC nor anyone else shares Defendants' feigned obsession with the location of Broadspring's disclosures.

Congoo is currently running advertising units on Radar.com that contain no disclosures at all. (*Id*. ¶ 7.) More fundamentally, the relevant question is not whose disclosures are "better," but whether Broadspring's disclosures are unconscionable. Plainly, they are not.

Furthermore, none of these disclosure-related allegations is sufficiently related to Broadspring's claims, a point that Defendants inadvertently concede by arguing only that they are "directly analogous." (ECF No. 255, Def. Mem., p. 12.) Unclean hands requires more than an analogy; it requires that the conduct be the same. (*See supra*, p. 5 & n.3.) Equally important, there is simply no parallel between Broadspring's advertising disclosures and Defendants' campaign to use multiple fake identities to spread defamatory statements about a competitor. And it is precisely because the parties' advertising disclosures are so unrelated to Broadspring's claims that the defense is highly prejudicial.

CONCLUSION

Broadspring respectfully requests that the Court strike Defendants' affirmative defense of unclean hands, and grant Broadspring any other relief deemed proper.

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