IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JASON LEE VAN DYKE Plaintiff	§ §	
v.	§	Case No. 4:18cv247
THOMAS CHRISTOPHER RETZLAFF a/k/a Dean Anderson d/b/a BV Files, Via View Files L.L.C., and ViaView Files Defendant	§ § § §	

PLAINTIFF'S RESPONSE TO DEFENDANT'S FRIVOLOUS MOTION FOR SANCTIONS UNDER 28 U.S.C. § 1927

Plaintiff, Jason Lee Van Dyke, moves that this Honorable Court enter an order denying Defendant's frivolous motion for sanctions under 28 U.S.C. § 1927.

I. INTRODUCTION

1. Plaintiff voluntarily dismissed this case in anticipation of filing for a criminal protective order against Defendant at some point in the indefinite future. This was due to Defendant's continued criminal stalking behavior directed toward Plaintiff – and anyone Defendant was able to find who was associated with Plaintiff – during this litigation. See generally ECF 214. In electing to seek a purely equitable state court remedy to compel Defendant to leave him alone, Plaintiff also hoped that Defendant might spare both Plaintiff and this Honorable Court from further frivolous and vexatious filings. While such hope was always fleeting at best, Defendant's baseless motion for sanctions demonstrates that once again which of the two parties to this case has acted unreasonably and vexatiously throughout this litigation.

II. FACTS

2. This case was originally filed in the 431st District Court in and for Denton County,

Texas on March 28, 2018 after Defendant proximately caused the termination of Plaintiff's full-time employment twice during the course of a calendar year and began making false and disparaging comments about Plaintiff not only on his blog, but in direct communications to Plaintiff's supervisors utilizing the pseudonym "Dean Anderson". ECF 113, ¶ 5.8 – 5.14. Defendant removed this case to this Court on or around April 10, 2018. ECF 1. Upon removal, Defendant began making a series of bizarre and sanctionable filings before this Court. ECF 16 – 19, 28. This was until Mr. Dorrell entered his appearance on May 9, 2018 and brought at least some level of sanity to Defendant's filings. ECF 9.

3. Upon the entry of Mr. Dorrell's appearance into this case, Plaintiff immediately began working with Mr. Dorrell to reach some sort of settlement. On the *same day* Mr. Dorrell noticed his representation, Plaintiff sent Mr. Dorrell the communication attached hereto as Exhibit "1" and incorporated by reference herein. In that correspondence, Plaintiff specifically stated that, if Defendant was not in fact the same person as "Dean Anderson", he would settle this case for little more than a mutual non-disparagement agreement and the true identity of Dean Anderson. In the event that Defendant was "Dean Anderson", Plaintiff agreed to accept $75,000.00, to be paid over the course of three years, together with a mutual non-disparagement agreement. In short, Plaintiff made a reasonable attempt to settle this litigation through Mr. Dorrell on the same day he became able to speak with a rational adult on the opposite side of the table. Rather than receiving a response from Mr. Dorrell, the comment attached as Exhibit "2" appeared in the comments section of the "BV Files" blog that same day. Using his "Dean Anderson" moniker, Defendant send Plaintiff the email attached

hereto as Exhibit "3" the following day. Plaintiff responded by sending his first request (of many) to Mr. Dorrell that Defendant refrain from contacting him.

4. In a message which foreshadowed proceedings to come, Plaintiff warned Mr. Dorrell that he was willing to go all the way to the U.S. Supreme Court to get Defendant out of his life for good. See Exhibit "4". The response received by Plaintiff was disturbing: that Defendant was entirely unconcerned about defense costs and would revel in the notoriety that a trip to the U.S. Supreme Court would bring him. A copy of this correspondence is attached as Exhibit "5". Apparently, defending against Plaintiff's lawsuit gave Defendant some kind of sadomasochistic entertainment value. Ex. 5. This was confirmed by a post on the "BV Files" blog several days later. See Exhibit "6". Several days later, when Defendant's antics cost Plaintiff another client and Plaintiff complained to Mr. Dorrell, the response from Mr. Dorrell was essentially that there was nothing he could do to control his client's behavior. See Exhibit "7".

5. On May 21, 2018, Plaintiff *again* made an offer of settlement to Mr. Dorrell which is attached hereto as Exhibit "8" and incorporated by reference herein. The offer was for a payment of no money, but a strictly confidential settlement agreement (with liquidated damages) in which Defendant would be compelled to do little more than what the law requires of him in the first place: to leave Plaintiff alone. Once again, the response to the settlement offer did not come directly from Mr. Dorrell - it appeared on Defendant's blog instead. See Exhibit "9".

6. From this point until July 24, 2018, the focus of the case was on Defendant's motion to dismiss under the Texas Citizen's Participation Act ("TCPA"). Of course, Defendant continued harassing Plaintiff incessantly to the point where Plaintiff became so

frustrated and annoyed with him that sent additional settlement correspondence - attached hereto as Exhibit "10" - to Mr. Dorrell. Defendant could have accepted Plaintiff's offer and obtained dismissal *with prejudice* of all claims in this lawsuit as early as July of 2018. Plaintiff strictly complied with FRCP 68 in making such an offer. Instead of accepting Plaintiff's generous offer, Defendant spent the following sixteen days disparaging Plaintiff and spreading more lies about Plaintiff to his clients.

7. Defendant's motion under the TCPA was denied by this Court on July 24, 2018. ECF 71. That order resulted in yet another settlement offer sent by Plaintiff to Defendant which is attached hereto as Exhibit "11". This time, the offer was for only nominal damages plus an agreed permanent injunction that would – once again – compel Defendant to do what the law requires of him in the first place: to leave Plaintiff alone. The ensuing discussion (over e-mail) included conferences concerning matters relating to a prospective appeal. Defendant sent a second e-mail to Mr. Dorrell the same day concerning these matters and stressing that his offer was not a "take it or leave it" offer, even suggesting that he would foregoing an agreed judgment in exchange for some type of legally enforceable contract. See Exhibit "12". Defendant made the response attached hereto as Exhibit "13" and incorporated by reference herein. His mindset is further demonstrated by another e-mail (which Plaintiff obtained during discovery in another case) which is attached hereto as Exhibit "14".

8. Shortly after these communications, activity in this case significantly slowed due to this Court's order staying further proceedings in this case in light of Defendant's appeal of this Court's order denying his motion to dismiss under the TCPA. ECF 79. It remained relatively quiet until the end of October 2018, when certain material appeared in

Defendant's blog about Plaintiff's mother and younger brother. This material is attached hereto as Exhibit "15" and incorporated by reference herein. This escalation by Defendant led to additional litigation between the parties (in the form of an injunction against harassment proceeding filed by Plaintiff against Defendant in the Superior Court in and for Maricopa County, Arizona) together with a particularly nasty series of communications which are attached hereto as Exhibits 16 – 36. It should be noted that these communications are for the month of November 2018 only.

9. Defendant's allegations in paragraph eight of his motion were, at this point, correct. Plaintiff *was* prosecuting a vendetta – one that was started, continued, and escalated entirely by Defendant for his own amusement. Plaintiff *did* (and still does) have every intention of continuing to litigate against this Defendant until such a time as Defendant leaves Plaintiff and his family alone. As this Court can see from the communications between Plaintiff and Mr. Dorrell, Plaintiff was – from the onset of this lawsuit – very open and forthcoming about the fact that this lawsuit was initiated and continued for a single purpose: to force Defendant to leave him alone. Such a purpose is not an unreasonable basis for this or any other lawsuit and, in a suit by a stalking victim against a stalker, is an entirely legitimate and lawful litigation goal. However, this is the first time this has been addressed in a motion for sanctions.

10. Plaintiff's emails cited by Defendant – in which he suggested that the appropriate method to settle the dispute between the parties may have been three five-minute rounds under the Uniform Rules of Mixed Martial Arts – should be treated as yet another settlement request, or alternatively, a request for a highly unorthodox form of alternative dispute resolution. See ECF 230-3. If this case has done anything, it has

demonstrated that there are some disputes between individuals that are incapable of being settled through traditional judicial means. While Plaintiff is unaware of any modern case in which a legal dispute was settled in such a manner, there is no law or court rule expressly prohibiting litigants in any type of dispute from agreeing to meet for lawful, mutual, and appropriately supervised unarmed combat subject to the "Queensbury Rules", the Uniform Rules of Mixed Martial Arts, or similar guidelines. Furthermore, there is no law or court rule prohibiting those same litigants from dismissing their claims against each other regardless of the outcome of such an event. Perhaps court dockets would be resolved more quickly if judges in cases such as this – where the Court has observed that the parties hate each other – expressly permitted parties to resolve their differences in such a manner. To the extent that is can be considered as little more than a request for a brawl, such a request can certainly be understood – if not condoned – considering Defendant's ongoing unwanted correspondence to Plaintiff. See *supra* ¶ 8.

11. On or around November 25, 2018, the post attached hereto as Exhibit "37" and incorporated by reference herein was published on Defendant's blog. It was at that point that Plaintiff, enraged by the fact that Defendant was continuing to stalk him, determined that no judicial remedy would sufficiently protect him from Defendant and filed a motion to dismiss on December 3, 2018. ECF 84. Still engaging in a baseless fight for attorney fees and sanctions under the TCPA, Defendant *opposed* Plaintiff's motion. ECF 85.

12. Plaintiff filed a motion to withdraw his previously-filed motion to dismiss (among other motions) on July 8, 2019 due to ongoing criminal behavior directed toward him by

Defendant including, but not limited to, the stalking of Plaintiff and the harassment of Plaintiff's former clients. ECF 91. Plaintiff repeatedly attempted to re-open this case, but his motions were not granted until this Court received a mandate from the Fifth Circuit Court of Appeals and lifted the stay in this cause on January 22, 2020. ECF 115. It should be noted that, although this case had been on filed for nearly two years, neither side yet had any opportunity to engage in discovery.

13. Defendant filed multiple documents requesting that this Court deny him permission to file his third amended complaint and requesting dismissal of this action under FRCP 12(b)(6). ECF 109, 110, 120. Plaintiff was ultimately granted permission to withdraw his December 3, 2018 dismissal motion and amend his complaint. ECF 124, 125. A third motion to dismiss under FRCP 12(b)(6) was filed March 1, 2020. ECF 129. Plaintiff responded to this motion on March 4, 2020. ECF 135. As Defendant's motion and Plaintiff's response fully address nearly all of the arguments made in Defendant's motion for sanctions, Plaintiff incorporates both documents herein by reference.

14. On or around March 20, 2020, Defendant began filing multiple frivolous lawsuits against Plaintiff seeking a protective order against him. He filed such lawsuits in the 431st District Court in and for Denton County, Texas, the 271st District Court in and for Wise County, Texas, and the Superior Court in and for Maricopa County, Arizona. As Plaintiff has previously demonstrated, Defendant lost all three lawsuits. In fact, his lawsuit in the 431st District Court was dismissed as a sanction due to outrageous litigation misconduct by Defendant (it should be noted that Mr. Dorrell did not represented Mr. Retzlaff in any of these proceedings). Plaintiff attaches the following documents as Exhibits:

Exhibit 38: Judgment from 271st District Court

Exhibit 39: Judgment from the Superior Court in and for Maricopa County, Arizona.

Exhibit 40: Judgment from the 431st District Court.

Although he did not represent Mr. Retzlaff in these actions, it was almost immediately after the first of these lawsuits was filed that Mr. Dorrell sent to Plaintiff the correspondence attached hereto as Exhibit "41" and incorporated by reference herein. It demanded dismissal of this lawsuit and payment in the amount of $500,000.00 in exchange for dismissal of the frivolous protective order proceedings. Plaintiff refused the offer.

15. Defendant also unreasonably and vexatiously multiplied proceedings in this case with a quixotic quest to depose James McGibney, which ultimately resulted in intervention from the office of the United States Attorney and two additional proceedings in both this Court and the U.S. District Court for the Western District of Texas. See ECF 170, 178, 182, 183, 189, 191, 193, 225, 226, and 227.

15. As Defendant was focused on his baseless protective orders, Plaintiff sought discovery in this case for the purpose of obtaining evidence necessary to substantiate all of his allegations against Defendant at trial. This included discovery related to the true identity of "Dean Anderson" and the individuals responsible for the publication of the "BV Files" blog. It also included information specifically related to Plaintiff's claim for malicious criminal prosecution – including correspondence which likely would have established Plaintiff's innocence with respect to the charge that Defendant falsely accused him of. Defendant refused to respond to all, or substantially all, of Plaintiff's

discovery requests – election to invoke a highly questionable claim of privilege under the First Amendment as well as claims of privilege under the Fifth Amendment. Plaintiff diligently sought an examination of Defendant concerning his claims of privilege. ECF 164. This Court made no rulings on Defendant's request for an examination or whether Plaintiff would be entitled to an adverse inference against Defendant at trial due to his invocation of privilege.

16. Defendant also filed two separate summary judgment motions in this cause as well. See ECF 175, 196, and 213. This Court did not rule on either motion. Plaintiff brings these motions and their respective responses to this Court's attention as many of the arguments relevant to this motion were fully briefed by the parties in urging and opposing summary judgment. See also ECF 179 and 206.

17. On September 18, 2020, less than eight months after this case was reinstated, Plaintiff elected to voluntarily dismiss this action in favor of seeking a state court remedy in the form of a criminal protective order against Defendant. ECF 214. This Court granted Plaintiff's motion on November 9, 2020. ECF 228. Remarkably, shortly after Plaintiff requested dismissal, Defendant sent threatening correspondence to Plaintiff stating that he would file this motion unless Plaintiff *withdrew* his request for dismissal. A copy of that correspondence is attached hereto as Exhibit "42" and incorporated by reference herein.

III. LEGAL BASIS FOR A 28 U.S.C. § 1927 MOTION

18. The provisions of § 1927 are penal in nature and must be strictly construed. *Monk v. Roadway Express, Inc*., 599 F.2d 1378, 1382 (5th Cir. 1979), aff'd sub nom., 447 U.S. 752. Under the plain language of the statute, an award of sanctions under § 1927 must

satisfy three essential elements: (1) the attorney must engage in "unreasonable and vexatious" conduct; (2) that "unreasonable and vexatious" conduct must be conduct that "multiplies the proceedings;' and (3) the dollar amount of the sanction must bear a financial nexus to the excess proceedings. *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997); *Stewart v. Courtyard Mgmt. Corp.,* 155 Fed. App'x 756, 760 (5th Cir. 2005). Defendant's motion fails on its face to meet any of these elements.

19. As Defendant points out, conduct is "unreasonable and vexatious" if there is evidence of the "persistent prosecution of a meritless claim" and of a "reckless disregard of the duty owed to the court." *Morrison v. Walker*, 939 F.3d 637 – 638 (5th Cir. 2019). An attorney acts with "reckless disregard" of his duty to the court when he, without reasonable inquiry, advances a baseless claim despite clear evidence undermining his factual contentions. *Id*. Defendant conveniently fails to point out that the footnotes provided by the Court in the *Morrison* opinion provide that "repeated filings despite warnings from the court, or other excessive litigiousness" as an example of such conduct (as well as conduct which demonstrably violates FRCP 11). *Id*. at n. 14 – 15.

IV. ARGUMENT

A. All of Plaintiff's Claims Were Meritorious

20. The conduct sanctioned in the *Morrison* case involved evidence that the attorney continued asserting claims against a judge for conduct that was undoubtedly protected under the doctrine of judicial immunity. *Id* at 636 – 637. Of specific importance to the *Morrison* case was the fact that the attorney baselessly asserted that the conduct at issue in a case occurred in the courtroom of a different judge when, in fact, it occurred in the courtroom of the judge that the plaintiff had sued (a fact that any attorney would have

discovered with reasonable diligence). *Id*. at 638 – 639. The contrasts between the *Morrison* case and this case are overwhelming and his motion is – for the most part - nothing more than a frivolous reassertion of previous motions that were either denied by this Court or upon which this Court declined to rule prior to dismissing this case on November 9, 2020.

B. Defendant's False and Defamatory Assertions Concerning Plaintiff Are Not Protected by the First Amendment

21. Defendant remains under the impression that the First Amendment allows him to say whatever he wants about Plaintiff, with no accountability whatsoever, so long as he couches his statements as opinion or rhetorical hyperbole. ECF 230, ¶ 9 – 10. The issue of whether Defendant's false and defamatory statements are protected under the First Amendment was fully briefed by Plaintiff in his response to Defendant's motion to dismiss under FRCP 12(b)(6). See ECF 135, ¶ 3.26 – 3.40.

22. Plaintiff's argument is unchanged. A defamatory statement, under Texas law, is one that injures a person's reputation. See *Bedford v. Spassoff*, 520 S.W.3d 901, 905 (Tex. 2017); *Hancock v. Variyam*, 400 S.W.3d 59, 62 (Tex. 2013). Texas law also provides for liability if the "gist" of a collection of statements conveys a false and defamatory impression, even if each statement is literally correct. *Turner v. KTRK Television, Inc*., 38 S.W.3d 103, 116-17 (Tex. 2000). There is no question that each of the statements complained of by Plaintiff meets the statutory definition of libel in Texas. See Tex. Civ. Prac. & Rem. Code § 73.001. There is also no legitimate dispute that terms like "Nazi" and "white supremacist" have a defamatory meaning. See *Armstrong v. Shivrell*, 596 Fed.Appx. 433, 442 (6th Cir. 2015) (noting that courts have held that words like "liar" and "racist" have clear, well understood meanings, which are capable of being

defamatory.) What Defendant calls "opinion" or "rhetorical hyperbole" is actionable in defamation if it expressly or impliedly asserts facts that can be objectively verified. *Bentley v. Bunton*, 94 S.W.3d 561, 580 (Tex. 2002) (adopting the standard set forth in *Milkovich* by the U.S. Supreme Court).

C. Defendant's Claim of Immunity Has No Basis in Law or Fact

23. Throughout this litigation, Defendant has persisted in the factually baseless contention that this lawsuit was filed due to allegations made in state bar grievances. ECF 230, ¶ 11(i). Plaintiff's Third Amendment Complaint clearly states that Defendant is not being sued for any of the material contained in any of the approximately twenty grievances he has now filed against Plaintiff with the State Bar of Texas. See ECF 113, ¶ 5.33.

24. There is no question that Defendant made false and defamatory statements in fact in many (if not all) of the bar grievances he filed against Plaintiff. – but that is not why he was sued. Defendant was sued because he repeated those same false and defamatory assertions in a time and at a place where he was not entitled to immunity. By means of an example: Judge Layne Walker was entitled to immunity because he made his allegations of perjury concerning Stella Morrison while presiding over a trial. If Judge Walker had taken it upon himself to publish a blog in which he continuously repeated those same allegations or perjury, or if he had sent those allegations of perjury by e-mail to everyone Morrison had a business relationship with, he would not have been entitled to judicial immunity. For the same reason, Defendant's argument that he is entitled to immunity in this case is frivolous.

D. Defendant Refused to Answer Plaintiff's Discovery in This Case

25. Defendant complains that Plaintiff never brought forth extrinsic evidence that he was

the owner of the "BV Files" blog or the author of any content appearing on it. ECF 230 ¶ 11(ii). However, the evidence that Defendant is one and the same person as "Dean Anderson" – as well as the owner and sole author of content on the "BV Files" blog – is overwhelming.

26. Prior to filing suit, Plaintiff had in his possession a total of three affidavits (filed in other proceedings) from Defendant's family members which tied him to the blog. These affidavits are attached to this motion as Exhibits "43", "44", and "45" respectively. When Plaintiff sent Defendant discovery concerning his ownership of the BV Files blog (and authorship of the material thereon), Defendant invoked a highly questionable claim of privilege under the First Amendment as well as his privilege against self-incrimination under the Fifth Amendment. See *supra* ¶ 15. Defendant seeks to use his assertions of privilege as both a shield and a sword. He made assertions of privilege to all, or substantially all, or Plaintiff's written discovery in this case. Now, after refusing to materially participate in discovery himself, Defendant makes multiple complaints that Plaintiff had no evidence to support one or more material elements of his claims. ECF 230, ¶ 15(ii), 11(iv) – (ix).

E. Subsequent Decisions from Texas Intermediate Appellate Courts Have Superceded *Tubbs v. Nichol*.

27. The question of whether Plaintiff's defamation and business disparagement claims were barred by failure to comply with the Defamation Mitigation Act was submitted to this Court in the form of a motion for summary judgment. ECF 175. Defendant's motion was based upon Fifth Circuit precedent in *Tubbs v. Nichol*. 675 Fed. App'x 437 (5th Cir. 2017). As Plaintiff pointed out in his response, the problem with Defendant's argument is that he not only denied publishing the materials for which he was sued, he

invoked legal privilege with respect to the identity of the person who did. ECF 179, ¶ 2.2. – 2.5 (arguing that applying the DMA in a case where the identity of the publisher of a defamatory statement remains a disputed fact results in a legal absurdity). Additionally, Plaintiff cited case law from intermediate Texas appellate courts following *Tubbs* that reached the opposite conclusion of the Fifth Circuit and which cast a shadow on whether the Fifth Circuit's holding in *Tubbs* remains good law. ECF 179, ¶ 2.9 – 2.14. There was, and remains, a circuit split on the issue in Texas which has yet to be resolved by the Texas Supreme Court. ECF 179 ¶ 2.13.

E. Plaintiff Is Neither A Public Figure Nor Is He A Limited Purpose Public Figure

28. The issue of Plaintiff's status as either a public figure or a limited purpose public figure were fully briefed with the Court. This Court never made any type of ruling on the question of whether, at the time Defendant's tortious behavior occurred, Plaintiff was either a public figure or a limited purpose public figure. See ECF 135 ¶ 3.3 – 3.19.

29. Plaintiff denies that he was required to prove actual malice in this case. In fact, it is worth noting that the proposed jury instructions submitted by the parties in their final pre-trial order are based upon the "negligence" level of fault; not actual malice. See ECF 223-1. However, it ultimately doesn't matter in this case: Defendant clearly acted with actual malice. See ECF 135, ¶ 3.20 – 3.24. In fact, this was a case involving a Defendant who charted new waters in the territory of actual malice because he simply didn't care whether his statements were truthful or not: his sole pre-determined goal was to torment Plaintiff and destroy his career because he saw entertainment value in doing so. *Id*.

F. Defendant's Assertions Concerning Plaintiff's Claim for Intrusion on Seclusion Are False

30. Defendant false claims that he was sued for intrusion on seclusion solely for Retzlaff having unlawfully interfered with Plaintiff's private employment. ECF 230, ¶ 15(v). While Plaintiff continues to assert that such an intrusion on a person's private affairs would be "highly offensive to a reasonable person", it was not the only intrusion complained of. Plaintiff's Third Amended Complaint specifically referenced the numerous unwanted communications from Defendant to Plaintiff and to members of Plaintiff's family following repeated demands by Plaintiff to Defendant's counsel that Defendant cease and desist making such communications. ECF 113, ¶ 5.23 – 5.32 and 6.19 – 6.20. This motion itself contains numerous examples of such communications. See also *supra* ¶ 8.

G. Plaintiff's Claims for Tortious Interference Were Meritorious

31. Plaintiff's claims for tortious interference with contract and alternatively for tortious interference with prospective relations were meritorious. There is no question that the Texas Supreme Court has long recognized a remedy for tortious interference with at-will employment relationships. *Sterner v. Marathon Oil Co*., 767 S.W.2d 686, 689 (Tex. 1989); *Juliette Fowler Homes, Inc. v. Welch Associates, Inc*., 793 S.W.2d 660, 666 (Tex. 1990). In Sterner, the court recognized the contractual nature of an at-will employment relationship for the purpose of a tortious interference claim and intermediate courts have followed. See e.g. *In re: Swift Transportation Co*., 311 S.W.3d 484, 489 (Tex. App. – El Paso 2009, no pet. ("Texas courts have for many years considered an employment-at-will agreement to be a contract"); *Whitehead v. University of Texas Health Science Center at San Antonio*, 854 S.W.2d 175, 180 (Tex.

App. – San Antonion 1993, no writ) ("We do not disagree with the argument that all employment relationships are implicitly contractual"); *Crouch v. Trinque*, 262 S.W.3d 417, 425-26 (Tex.App.-Eastland 2008, no pet.) (cause of action exists " for tortious interference with a contract of employment terminable at will").

32. The notion that Defendant had no knowledge of the relationship between Plaintiff and Karlseng, LeBlanc & Rich L.L.C. ("KLR") is absurd on its face; if he had not known about the relationship, he would never have been able to contact then concerning Plaintiff or post false and defamatory material concerning Plaintiff's supervisors on his blog. Defendant's behavior with respect to Plaintiff and his former employer was independently tortious or unlawful because it constituted both libel and criminal stalking – of which there was more than substantial evidence.

H. Plaintiff Was Innocent of The Charge That Defendant Falsely And Maliciously Accused Him Of.

33. There is no serious dispute that Defendant was responsible for procuring the unlawful arrest of Plaintiff for the third-degree felony offense of obstruction or retaliation. There is no question that Plaintiff was no-billed for that offense (after it was reduced by the state *sua sponte* to a lesser included misdemeanor). Furthermore, Plaintiff never admitted that the evidence in the underlying case was sufficient to show his guilt. What Plaintiff admitted was the simple fact that his plea of nolo contendere – standing alone – constituted legally sufficient evidence for use by the *Commission for Lawyer Discipline* in that particular case. Plaintiff denies, and continues to deny, that he committed the offense of false report to a peace office. See also Ex. 49.

34. Defendant is a career criminal with prior convictions in Texas for theft, tampering with a government record, and tampering with or fabricating physical evidence. He is

currently facing a felony charge for forgery in the Superior Court in and for Maricopa County, Arizona. A copy of his criminal history is attached hereto as Exhibit "46" and incorporated by reference herein. Plaintiff has repeatedly asserted his innocence under oath. Additionally, a key witness (Isaac Marquardt) has repeatedly invoked his Fifth Amendment privilege with respect to that case and others – as well as the nature of the communications between him and Defendant. A copy of that affidavit is attached hereto as Exhibit "47" and incorporated by reference herein. There is strong circumstantial evidence demonstrating that Defendant contact Mr. Marquardt, manipulated him into accessing Plaintiff's home and/or office computers (possibly through remote means), and coerced him into sending the messages in question through such means. See also ECF 206-1.

I. Defendant's Possession of Alleged Recordings

35. The recording referenced in paragraph 15(x) of Defendant's motion is perhaps the most ridiculous part of his motion. First and foremost, Retzlaff is a criminal with a well-known and well-documented history of tampering with records and fabricating evidence. See Ex. 47. He is presently facing four felony charges in Arizona for forgery, computer tampering and taking the identity of another in the Superior Court in and for Maricopa County Arizona. This is proven by the documents attached hereto as Exhibit "48" and incorporated by reference herein. Defendant's relationship with the truth is so tenuous that, if he were to testify that his name was "Thomas Christopher Retzlaff", a competent attorney would be well-advised to check his birth certificate. This Court should give no weight to the sworn testimony of a career felon.

36. The audio file referenced in Defendant's motion clearly meets the criteria for a

"recording" under the best evidence rule. FRE 1001(b). Plaintiff objects to the admissibility of this recording because Defendant has not demonstrated that he is the individual who made this recording, and therefore, is incapable of demonstrating that it is an original recording or an exact duplicate of an original as required by FRE 1002 and 1003. Plaintiff objects to the admissibility of any such recording under the best evidence rule.

37. Assuming this Court considers Defendant's testimony to be reliable, FRE 901(5) only permits Defendant to testify concerning his opinion as to whether the voice on the recording is the voice of Plaintiff. This alone is insufficient to admit the recording into evidence because federal courts have repeatedly held that the proponent of a tape recording must demonstrate the following: (1) the person operating the recording equipment was competent; (2) the equipment functioned accurately; (3) the recording had not been materially altered; and (4) the speakers' identities. *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977); *United States v. Lively*, 803 F.2d 1124, 1129 (11th Cir. 1986). The alleged recording cited by Defendant apparently came from YouTube. Defendant cannot offer competent testimony concerning any of these factors, and accordingly, the recordings cannot be admitted as evidence against Plaintiff in this proceeding.

38. Plaintiff tenders to this Court his own unsworn declaration concerning this recording and Defendant's continued false allegations that Plaintiff is a "Nazi" and a "white supremacist". A copy of that documents is attached hereto as Exhibit "49" and incorporated by reference herein.

V. ORAL HEARING

39. Defendant's motion is groundless and sanctionable. Plaintiff denies that an oral hearing is necessary on Defendant's motion.

VI. CONCLUSION

40. Defendant's motion is completely devoid of any evidence that Plaintiff engaged in unreasonable or vexatious conduct designed to multiply the proceedings and there is no evidence that these proceedings were unreasonably multiplied by any conduct attributable to Plaintiff. At no point did Plaintiff engage in repeated filings despite adverse rulings from the Court. Instead, the evidence shows that Defendant elected to interfere with Plaintiff's personal and professional life – and continued doing so after he was sued – for no reason other than for his own amusement. Plaintiff made multiple attempts to settle this case in a way that would allow him to live his life without ever having to hear the name "Thomas Retzlaff" again. The most common response from Defendant was for Plaintiff "to fuck himself long and hard."

41. Defendant refused to answer discovery in this case. Instead, he pursued the deposition of a non-party in multiple courts as a means through which to obtain additional materials for his blog. It was Defendant who unreasonably and vexatiously filed frivolous protective order cases – three proceedings in two states - against Plaintiff in an effort to extort money from him. After Defendant was thoroughly crushed in these proceedings, Plaintiff decided that a protective order would be more effective than a money judgment at compelling reasonably sane behavior from his adversary. Faced with the loss of the notoriety, attention, and entertainment resulting from such a dismissal, Defendant's threat to Plaintiff was clear and unequivocal: "In any event, you

want to withdraw your motion [to dismiss], fine by me. But understand I will oppose it and we will be seeking sanctions. Judge Mazzant will have no choice but to grant it based on 5th Circuit's precedence and your bar card will be suspended until fully paid. Or you withdraw it and no sanctions motion." Ex. 42.

42. Defendant doesn't lament the loss of monies expended in attorney fees; he laments the loss of the entertainment value he received from this lawsuit. His motion is frivolous and sanctionable in its own right under FRCP 11. It should be denied.

III. PRAYER

42. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Honorable Court enter an order denying Defendant motion for sanctions in all things. Plaintiff also asks for all such further relief, in law and in equity, to which he may show himself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically filed on the CM/ECF System, which will automatically serve a Notice of Electronic Filing on Jeffrey Dorrell, Attorney for Defendant.

/s/ Jason Lee Van Dyke
JASON LEE VAN DYKE