UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SCHERER DESIGN GROUP, LLC, *Plaintiff*, - vs. - CHAD SCHWARTZ; AHEAD ENGINEERING LLC; FAR FIELD TELECOM LLC; KYLE McGINLEY, DANIEL HERNANDEZ *and* RYAN WALDRON, *Defendants*.	Docket No. 3:18-03540 (AET)(DEA) (Returnable June 4, 2018) Adjourned Due to Preliminary Injunction Briefing

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S RULE 12(b)(6) MOTION TO DISMISS COUNTS TWO AND THREE OF THE COUNTERCLAIM

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PRELIMINARY STATEMENT

In their opposition to the motion by Scherer Design Group, LLC ("SDG") to dismiss Counts Two and Three of the First Amended Counterclaim ("FACC") for failure to state a claim, defendants Chad Schwartz, Ahead Engineering, LLC, Far Field Telecom, LLC, Kyle McGinley, Daniel Hernandez, and Ryan Waldron ("defendants"), rather than address SDG's motion on the legal merits, have chosen to oppose arguments that SDG never made, fail to address the controlling law cited by SDG, and rely upon inapplicable and questionable authority.

Defendants already amended their counterclaims once in the face of SDG's motion to dismiss Counts Two and Three of the FACC. Their amended counterclaims fail to remedy the deficiencies because (1) they are still based on grounds immunized by the litigation privilege, and (2) fail to allege facts that satisfy the element of "publicity" in the privacy torts. The Court should grant SDG's motion to dismiss these two counts, with prejudice.

LEGAL ARGUMENT

I. DEFENDANTS' OPPOSITION FAILS TO ADDRESS THE ARGUMENTS AND LEGAL AUTHORITY ON WHICH SDG'S MOTION RELIES.

Defendants assert that SDG seeks to dismiss the claims in Counts Two and Three of the FACC alleging that SDG communicated defendants' Facebook messenger communications to an employee of SDG's client, Tilson, on the ground

of litigation privilege. *See* Defendants' Opp. Br. at 4. This is inaccurate; no such allegations existed when SDG filed its moving brief. SDG argued, and still does, that the acts in Counts Two and Three of Defendants' original Counterclaim based exclusively on SDG's inclusion of defendants' Facebook messenger communications in its filed Verified Complaint were subject to dismissal based on litigation privilege. *See* SDG Motion Br. at 9-10 (ECF 23-1). The flat-footed obviousness of this ground for dismissal of the counterclaims premised on the Verified Complaint is the reason defendants filed the FACC, adding new allegations regarding SDG's disclosure of the contents of the Facebook messenger conversation to a Tilson employee. *See* FACC ¶¶41 and 50 (ECF 28).

What SDG did say regarding defendants' new claims is that they do not state a claim for which relief can be granted, because the allegation that SDG divulged the Facebook conversation to a Tilson employee—a single person—does not amount to the tortious "publicity" as a matter of law. *See* SDG Reply Br. at 2-4 (ECF 30). SDG supported this argument by ample citation to authority. Defendants make no effort to distinguish *McNemar*, *Castro*, and *Dzwonar*, the cases cited by SDG, or even acknowledge their existence. Instead, to find "publicity," defendants abandon their new theory of liability and circle right back to their original allegations, asserting that the "publicity" element was met by SDG's filing of the Verified Complaint. As set forth at length in SDG's moving brief, however, publication in a

legal pleading is absolutely privileged. It cannot, therefore, be used as a bootstrap to meet legal pleading requirements premised on actionable, unprivileged communications.

Nonetheless, defendants attempt to analogize this case to *W.P. v. Princeton University*, No. CV 14-1893, 2016 WL 7493965, at *1 (D.N.J. Dec. 30, 2016), where the plaintiff sued Princeton University for requiring him with withdraw after a suicide attempt. W.P. sought leave to amend his complaint to add a count for publication of private facts based on the university's attachment of certain materials in its prior motion to dismiss, including letters concerning his medical condition from which it failed to redact his name and confidential medical information. *Id.* at *2. The district court held that W.P.'s claim was not barred by the litigation privilege because the university filed "unredacted letters containing his identity and personal medical information" and in the face of W.P.'s already-filed motion to proceed anonymously. *Id.* at *3 (emphasis original).

The present case bears no resemblance to the circumstances at issue in *W.P.*, which concerned the special case of public disclosure of confidential personal medical information. Not only is there no pending motion that would be analogous to the anonymity request in W.P., such as motion to seal the pleadings, but defendants fail to identify what "confidential information" would or could have been

the subject of such a request to the Court. *See* Defendants' Opp. Br. at 6.[1] Defendants cite no authority for the proposition that a party's own damning admissions are "confidential" information subject to sealing, much less that such admissions could be the subject of a privacy claim despite this Court having already ruled that they were made in a medium to which defendants had no reasonable expectation of privacy.

Nor could such a request be made now anyway, after not one, but two hearings in open court that explicitly referred to and relied on the allegations in the Verified Complaint without any attempt by plaintiff to limit the promulgation of the information in question. *See Pfizer, Inc. v. Teva Pharm. USA, Inc.*, No. CIV.A. 08-1331, 2010 WL 2710566, at *3 (D.N.J. July 7, 2010) (denying motion to seal "record" following hearing where parties claiming confidentiality made no request to close the courtroom during proceedings or otherwise refer to sealing the record beforehand and gave no other indication that the parties wished information already addressed in open court to be deemed confidential).

Besides misapplying *W.P.*, defendants' reliance on the decision is questionable because *W.P.*'s holding is not in line with all New Jersey courts that have rejected challenges to the litigation privilege and found it to be essentially

[1] In similar fashion, defendants persist in employing the mantra that the Facebook messages were "illegally obtained" by SDG, despite their repeated failure to identify a statutory or other legal basis for that characterizations and despite the Court's rulings to the contrary. *Id.*

absolute. *See Rainer's Dairies*, 19 N.J. at 562 (holding verified pleadings "absolutely privileged"). Even concerning the narrow issue of disclosure of medical information in litigation filings, *W.P.*'s holding is inconsistent with Third Circuit law rejecting the imposition of liability for such conduct because of the litigation privilege. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 n.4 (3d Cir. 1980). While the *W.P.* court was understandably concerned by the defendants' improper disclosure of protected medical information on the public docket, the appropriate remedy was to sanction the conduct in light of the procedural circumstances, not abrogate the absolute privilege. *See Offor v. Mercy Med. Ctr.*, No. 15-CV-2219, 2016 WL 3566217, at *4 (E.D.N.Y. June 25, 2016) (sanctioning attorney for filing pleading and motion with infant's unredacted medical records attached), *aff'd*, 698 F. App'x 11 (2d Cir. 2017).

In reality, unlike the tortured procedural situation presented to the Court in *W.P.*, this is a plain vanilla case to which the absolute litigation privilege applies. Defendants' motion should be seen as a belated attempt to bury the highly compromising admissions of frankly larcenous conduct and inexcusable malice by their principals. But as a matter of law, the "publicity" element of the public disclosure and false light privacy torts cannot be satisfied by a communication to which the absolute litigation privilege applies. *See, e.g.*, *Lath v. Oak Brook Condo. Owners' Ass'n*, No. 16-CV-463, 2018 WL 566825, at *2-4 (D.N.H. Jan. 25, 2018)

(dismissing, on litigation privilege grounds, privacy claims based on party's attaching emails and text messages as exhibits to the complaint). Indeed, even dissemination of information concerning pending or proposed litigation to an affected party in order "to keep parties connected to the dispute informed of events in the controversy" is also absolutely privileged. *Kanengiser v. Kanengiser*, 248 N.J. Super. 318, 344 (Law. Div. 1991) (limiting application of *Citizens State Ban*k). And that is what the counterclaim claims SDG did here. Tilson, it is undisputed, was a client of SDG's and, as is clear from the Verified Complaint, one whose business the defendants took action to direct to their new, competing enterprises. Under New Jersey's litigation privilege, SDG's communication with Tilson was privileged as well.

Thus, as set forth above, the claims in Counts Two and Three premised on publication of the Verified Complaint are manifestly meritless and should be dismissed as a matter of law on the grounds of litigation privilege. Moreover, the new allegations regarding SDG's alleged disclosure of defendants' Facebook admissions discovered on SDG's laptop computer to a "high ranking Tilson employee" can be dismissed on the alternative ground that, as argued in SDG's second brief, the "publicity" element required by the claims in Counts Two and Three is not satisfied by disclosure to a single person. Because defendants did not respond substantively to SDG's legal argument or citations on this point, they

should be deemed to have conceded it. *See Diaz v. Bullock*, No. CIV.A. 13-5192, 2014 WL 5100560, at *3 (D.N.J. Oct. 10, 2014) (failure to respond to movant's argument in opposition brief constitutes waiver of the issue).

II. DEFENDANTS' ARGUMENT CONCERNING DAMAGES DOES NOT APPLY TO COUNTS TWO AND THREE.

Defendants, alternatively, argue that dismissal of Counts Two and Three is improper because "the First Amended Counterclaim more than adequately alleges . . . that they have suffered damages separate and apart from the publication of the intercepted messages in the Complaint." Defendants' Opp. Br. at 5. But the alleged damages that Defendants refer to are connected to Count One of the FACC for "Invasion of Privacy by Intrusion Upon Seclusion," not the Second and Third Counts for public disclosure and false light that are the subject of this motion. The two out-of-state cases that Defendants rely upon, *Scalzo v. Baker*, 109 Cal. Rptr. 3d 638, 645 (Ct. App. 2010) and *Kimmel v. Goland*, 793 P.2d 524 (Cal. 1990), underscore this and, in fact, demonstrate that dismissal of these claims is appropriate.

In *Scalzo*, the plaintiffs sued various parties in connection with, *inter alia*, one of the defendants surreptitiously obtaining their credit card records, which were then used in other litigation. 109 Cal. Rptr. 3d at 639-41. Citing California's codified litigation privilege, the defendant moved to strike causes of action against him, including invasion of privacy, which was based on that conduct. *Id.* at 641-42.

The appeals court held that the privilege did not apply because it "does not protect illegal conduct that results in damages unrelated to the use of the fruits of that conduct in litigation. Where . . . damages separate from the litigation are demonstrated, the alleged wrongful, potentially criminal activity, is not immunized." *Id.* at 645 (emphasis added). The *Scalzo* court relied upon the California Supreme Court's decision in *Kimmel*, 793 P.2d 524, where, "to obtain information for litigation, the [plaintiffs] had secretly tape recorded conversations, allegedly violating a criminal statute protecting against invasion of privacy." In response to their claim of litigation privilege to defeat the defendants' counterclaim for violation of the California privacy act, the "Court rejected the application of the privilege because the damages arose not from the publication of the statements in the litigation, but from their recording." *Scalzo*, 109 Cal. Rptr. 3d at 645 (explaining *Kimmel*, 793 P.2d at 529-30) (emphasis added).

Here, defendants' assertion of provable damages that flow not from SDG's publication of the Facebook excerpts in the Verified Complaint, but independently from SDG's alleged improper interception of the messages prior to initiating this litigation, are damages for "Invasion of Privacy by Intrusion Upon Seclusion," *i.e.* Count One of the FACC. *See* FACC ¶¶29-37. Defendants specifically allege in support of that first count:

> 32. Despite Hernandez having logged out of his personal and private Messenger account, SDG intentionally

> accessed this account without justification.
>
> 33. SDG continually and clandestinely accessed Hernandez' personal and private Messenger account in order to monitor private, personal, confidential and, in some instances, privileged communications between and amongst the Defendants.
>
> 34. These acts constitute an invasion of Defendants' privacy in violation of New Jersey law.
>
> 35. SDG's conduct of repeatedly accessing Hernandez' Messenger account to view private communications resulted in multiple invasions of privacy that would be considered highly offensive to a reasonable person.
>
> 36. As a result of the intrusions and invasions, Defendants are entitled to damages in an amount to be determined at trial.

These allegations—in Count One—do indeed claim the type of putatively unlawful conduct and resulting damages that the *Scalzo* and *Kimmel* courts were speaking of. And as in those cases, Count One of the FACC seeks damages "unrelated to the use of the fruits of that conduct in litigation" and "not from the publication of the statements in the litigation." *Scalzo*, 109 Cal. Rptr. 3d at 645.

In contrast, however, Counts Two and Three here for "Invasion of Privacy by Public Disclosure of Private Facts" and "False Light Invasion of Privacy" do not concern the isolated act of SDG's review of the Facebook messages via its former employee's laptop. Instead, they concern the subsequent use and publication of the messages and alleged damages resulting therefrom. *See* FACC ¶¶38-54. Thus,

the *Scalzo-Kimmel* distinction is not applicable to Counts Two and Three at issue in this motion to dismiss because the damages in these counts are different from those alleged in Count One. Thus, as set forth above, both the litigation privilege and the lack of requisite improper "publicity" require dismissal of Counts Two and Three of the FACC as a matter of law.

CONCLUSION

For all of the foregoing reasons, and those set forth in SDG's prior briefs (ECF 23-1 and 30), this Court should dismiss the counterclaims in Counts Two and Three on the grounds of litigation privilege and because defendants fail to state a claim premised on tortious "publicity" because, as a matter of law, such a claim cannot be based on allegation of communication to merely a single person.

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