JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN SIMONI, Individually and on behalf of all others similarly situated, Plaintiff, v. AMERICAN MEDIA, INC. and DOES 1 THROUGH 10, inclusive, Defendants.	CASE NO. CV 14-573-R ORDER GRANTING DEFENDANT'S SPECIAL MOTION TO STRIKE COMPLAINT

Before the Court is defendant American Media, Inc.'s ("AMI") "Special Motion to Strike Complaint" ("Motion"), which was filed on May 22, 2014. Plaintiff Stephen Simoni filed an opposition to the Motion on June 17, 2014 and AMI filed a reply on July 7, 2014. Finding it suitable for decision on the papers, the Court took this matter under submission on July 11, 2014.

A. The Complaint

In the complaint Simoni alleges various causes of action arising from his purchase of the March 31, 2014 edition of the *National Enquirer* magazine ("the *Enquirer*"). Simoni alleges that he was tricked into buying the issue by the "knowingly false" statement in the cover headlines that the *Enquirer* had "solved" the mystery of Malaysia Airlines Flight 370. Compl. ¶ 8. After paying

for the issue he was allegedly disappointed to learn that "the publication in fact contains no news information that definitively explains what has happened to the missing flight and the 239 people on-board." *Id.* at 2.

B. Legal Standard

AMI moves to strike the complaint pursuant to California Code of Civil Procedure § 425.16(b)(1), which is known as the anti-SLAPP statute. Section 425.16(b)(1) provides that

> [a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

This statute creates a two-part test. *Bailey v. Brewer*, 197 Cal. App. 4th 781, 788 (2011). First, the moving party must show "that the cause of action arises from an act in furtherance of the right of free speech or petition—i.e., that it arises from protected activity." *Id.* "Once the defendant has met its burden, the burden shifts to the plaintiff to demonstrate the probability of prevailing on the cause of action." *Id.*

C. The Conduct Complained of is Protected Activity

In determining whether conduct is in furtherance of the right of petition or free speech in connection with a public issue, a court must look to the four statutory categories of communications under California Code of Civil Procedure § 425.16(e)(1)–(4). *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2009). Relevant here are subsections 425.16(e)(3) and (e)(4). Subsection (e)(3) covers "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3). Subsection (e)(4) covers "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* § 425.16(e)(4).

Publishing a magazine is an exercise of First Amendment rights and the mystery of Flight 370 is an issue of public interest. Simoni concedes both of these points. *See* Pl.'s Opp. (Dkt. 12) at 4; *see also Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 678 (2010) (holding that

publication of magazine article constitutes conduct in furtherance of right of free speech within the meaning of subsection (e)(4)). Further, under subsection (e)(3), the publication of the Articles and cover lines in the magazine qualify as an act made in a public forum in connection with an issue of public interest. *See Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1038 (2008). The matter complained of in the complaint is protected.

Simoni contends that AMI "forfeited" anti-SLAPP protection because the cover lines were "knowingly false" and this "illegal" speech is not protected under the statute. Pl.'s Opp. (Dkt. 12) at 3–5. In considering "whether a defendant has met its initial burden, a court does not evaluate whether defendant's conduct was lawful or unlawful." *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 954 (9th Cir. 2013). Rather, "any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the second step of the analysis when the plaintiff bears the burden to show a probability of prevailing." *Id.* A motion under the anti-SLAPP statute must be denied only in the "narrow circumstance, where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." *Flatley v. Mauro*, 39 Cal. 4th 299, 316 (2006). As discussed below, Simoni has not shown a probability of prevailing on any of the causes of action in the complaint. Therefore his contention that the speech involved here is illegal is without merit.

D. Probability of Prevailing on the Merits

1. Statutory Claims

Simoni's first three causes of action arise, respectively, under the California Consumers Legal Remedies Act (CLRA) (Cal. Civ. Code §§ 1750, *et seq.*), the California False Advertising Law (FAL) (Cal. Bus. & Prof. Code § 17500, *et seq.*), and the California Unfair Competition Law (UCL) (Cal. Bus. & Prof. Code § 17200, *et seq.*). "California's consumer protection laws, like the unfair competition law, govern only commercial speech. . . . Noncommercial speech is beyond their reach." *Rezec v. Sony Pictures Ent., Inc.*, 116 Cal. App. 4th 135, 140 (2004) (examining claims under the UCL, FAL, and CLRA). Therefore Simoni's statutory claims fail if the allegedly actionable conduct is noncommercial speech.

The Articles and cover lines do not constitute core commercial speech because they do

"more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). This is because the cover lines refer to the contents of the publication. *See Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 638–39 (9th Cir. 1982) (distinguishing between the commercial purposes of a "tear out" subscription advertisement and the First Amendment protection of headlines and cover display); *see also Hilton*, 599 F.3d at 905 n.7 (deciding that a greeting card is not commercial speech because the "card is not advertising the product; it is the product. It is sold for a profit, but that does not make it commercial speech for First Amendment purposes.").

In *Bolger*, the Supreme Court concluded that the combination of three factors—advertising format, product references, and underlying economic motive of the speaker—though not dispositive, provide a helpful analytical framework for determining whether a publication is properly characterized as commercial speech. *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 955 (9th Cir. 2012)

First, the cover lines and Articles are not in an advertisement format and AMI does not concede that they are advertisements. Second, the specific products that the challenged speech references are the Articles contained within the publication itself, and the Ninth Circuit has clarified that "[f]aced with the need to ensure that First Amendment-protected expression is not unduly chilled by the threat of tort actions that would otherwise prevent the truthful promotion of protected expressive works, under certain circumstances we extend an advertised work's First Amendment protection to advertisements for the work." *Charles v. City of Los Angeles*, 697 F.3d 1146, 1153 (9th Cir. 2012). "Doctrines extending noncommercial status from a protected work to advertising for that work are justified only to the extent necessary to safeguard the ability to truthfully promote protected speech." *Id.* at 1156. Here, the adjunct use exception applies to AMI's cover lines, as the cover lines are adjunct of the Articles, and extending the noncommercial status of the protected Articles to the cover lines is necessary to safeguard the ability to truthfully publicize protected speech. *See Dex Media West*, 696 F.3d at 961 ("[I]t is important that the commercial speech doctrine not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.").

The communication at issue here does not constitute commercial speech under either the

definition of core commercial speech or the *Bolger* factors.

Simoni has not shown that he has a probability of succeeding on the merits of his statutory claims because the respective statutes do not reach the complained of conduct.

2. Common Law Claims

Under California law, unjust enrichment is not an independent cause of action. *Smith v. Ford Motor Co.*, 462 F. App'x 660, 665 (9th Cir. 2011); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009) (unjust enrichment claim "will depend upon the viability of the Plaintiffs' other claims"). Accordingly, Simoni has not demonstrated a probability of success on the unjust enrichment cause of action.

Simoni's fifth cause of action for fraud alleges that AMI falsely represented that the magazine "contains hard news information that it, in fact, does not contain." Compl. ¶ 50. Under California law, the "indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).

In this context and given the wide array of theories reported by other media outlets regarding Flight 370, Simoni cannot show that the cover lines or Articles were false representations or that the cover lines represented that the Articles would reveal the location of the missing plane.

Even if the cover lines were determined to be false representations, Simoni would not be able to establish reasonable reliance. "Fraud that should be apparent even to the plaintiff is not actionable [and] if the conduct of the plaintiff in light of his own intelligence and information was manifestly unreasonable he will be denied a recovery." *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 975–76 (9th Cir. 2002) (applying California law). To the extent the cover lines could be construed as a representation that the plane had been found, Simoni's status as an educated attorney combined with the fact that the *Enquirer* is a well-known tabloid publication makes any purported reliance on those representations unreasonable. *See Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 n.5 (9th Cir. 1992) (noting that "[r]eaders of reputable magazines . . . are far more likely to trust the verbatim accuracy of the stories they read than are the readers of

supermarket tabloids or even daily newspapers, where they understand the inherent limitations in the fact-finding process."). Simoni has not demonstrated a probability of success on his fraud claim.

Simoni's final cause of action for breach of contract requires privity of contract between the plaintiff and the defendant. *See Windham at Carmel Mountain Ranch Assn. v. Superior Court*, 109 Cal. App. 4th 1162, 1169 (2003). Simoni's breach of contract claim fails because Simoni does not meet his burden of demonstrating the requisite privity of contract between himself and the *Enquirer*'s publisher, AMI. *Pfau v. Mortenson*, 858 F. Supp. 2d 1150, 1161 (D. Mont. 2012). Simoni has not demonstrated a probability of success on his breach of contract claim.

The conduct complained of in the complaint is protected activity and Simoni has not demonstrated that it is probable he will succeed on any of his claims. Therefore the complaint is stricken pursuant to California Code of Civil Procedure § 425.16(b)(1).

E. Leave to Amend is not Justified

Simoni's request for leave to amend is denied because the complaint could not be saved by any amendment. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

Any motion for attorneys' fees must be filed within 14 days of the entry of this order.

IT IS HEREBY ORDERED that the Motion is granted as stated herein and the complaint is dismissed without leave to amend.

Dated: July 22, 2014.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE