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11
12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 SAN DIEGO COMIC CONVENTION,
15 a California non-profit corporation,

16 Plaintiff,

17 v.

18 DAN FARR PRODUCTIONS, a Utah
limited liability company;
19 NEWSPAPER AGENCY COMPANY,
a Utah limited liability company;
20 DANIEL FARR, an individual; and
BRYAN BRANDENBURG, an
21 individual

22 Defendants.

23 AND RELATED COUNTERCLAIM.
24
25
26
27
28

Case No. 14-cv-1865 AJB (JMA)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF AND
COUNTERDEFENDANT SAN
DIEGO COMIC CONVENTION'S
MOTION FOR PROTECTIVE
ORDER**

Date: July 14, 2017
Time: 1:00 pm
Courtroom: 4A
Judge: Hon. Anthony J. Battaglia

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1 Plaintiff San Diego Comic Convention (“SDCC”) respectfully submits this
2 Memorandum of Points and Authorities in Support of its Motion for Protective
3 Order and respectfully shows as follows:

4 **I. INTRODUCTION**

5 Since the inception of this dispute, Defendants have brazenly engaged in a
6 strategic public campaign to disparage SDCC and “win this case in the court of
7 public opinion.” Defendants’ public campaign has included statements made in
8 numerous press releases, news articles, on websites and on social media including
9 Facebook and Twitter. Indeed, Defendants boast they have secured more than
10 200,000 media articles reporting on the case that are “favorable” to Defendants.
11 Additionally, many of the statements made publicly by Defendants are misleading,
12 prejudicial, inflammatory, or false. These include numerous claims that SDCC lied
13 and/or committed fraud on the government in order to obtain its trademarks.
14 Defendant Bryan Brandenburg consistently disparages SDCC and/or its board
15 members on social media by suggesting SDCC lies and engages in other unethical
16 behavior. Brandenburg’s comments are designed to harm SDCC and incite others
17 on social media to engage in disparaging discussions about SDCC. Moreover,
18 Brandenburg’s comments about SDCC almost always relate to this litigation and
19 the suggestion that the dispute is frivolous. Defendants repeatedly litigate their
20 case by using media outlets to mischaracterize the parties’ positions and taint the
21 public’s perception regarding the issues in dispute in this case. Defendants’ media
22 campaign is increasing in intensity as this case nears trial. Defendants’ goal is to
23 win this case by using media outlets to tarnish the reputation of SDCC and taint the
24 jury pool. As Defendant Bryan Brandenburg stated in one of Defendants’ many
25 press releases, “I am asking for support from the community and all the powers of
26 the Universe to bring victory to us in this case.”

27 Defendants’ attempt to affect the judicial integrity of this case is in violation
28 of SDCC’s right to a fair trial and presents a serious and imminent threat to the

administration of justice. In instances such as this, it is well established that a district court may impose certain restrictions on free speech rights, particularly the free speech rights of trial participants (such as Defendants). Accordingly, and for the reasons stated herein, Plaintiff SDCC respectfully requests that this Court proscribe Defendants from making certain statements described below, which are reasonable and narrowly tailored to protect the judicial integrity of this case at trial.

II. ARGUMENT AND AUTHORITIES

A. Legal Standard.

“The right to a fair trial, both in civil and criminal cases, is of the utmost importance to the administration of justice, and many courts have held that a trial judge has the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity.” *Hammes Co. Healthcare, LLC v. Tri-City Healthcare Dist.*, Case No. 09-CV-2324, 2011 U.S. Dist. LEXIS 143494, at *54 (Dec. 13, 2011 S.D. Cal.); *see also Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 97-98 (3d Cir. 1988) (“The sixth amendment, by its terms, is applicable only to criminal actions, but ‘the right to trial by jury [is] preserved,’ in civil cases by the seventh amendment. The Supreme Court has recognized that conflict between freedom of speech and the right to a fair trial is no less troubling in the non-criminal context”). “Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (citing *Bridges v. California*, 314 U.S. 252, 271 (1941)). “Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.” *Id.* (citing *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946)). But it must not be allowed to divert the trial from the “very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.” *Id.* at 350-351 (citing *Cox v. Louisiana*, 379 U.S. 559, 583 (1965)). Among these “legal procedures” is the

1 requirement that the jury's verdict be based on evidence received in open court, not
2 from outside sources. *Id.* at 351.

3 Before a trial court can limit parties' and their attorneys' right to freedom of
4 speech, the court must make sufficient specific findings establishing that the
5 party's conduct presents a "serious and imminent threat to the administration of
6 justice." *Levine v. United States Dist. Court for Cent. Dist.*, 764 F.2d 590, 595 (9th
7 Cir. 1985); *Hammes Co. Healthcare, LLC*, 2011 U.S. Dist. LEXIS 143494, at *54.
8 It is appropriate, however, to impose greater restrictions on the free speech rights
9 of trial participants (such as parties and their attorneys) than on the rights of
10 nonparticipants. *Levine*, 764 F.2d at 595. As the Ninth Circuit noted when
11 considering a district court's order restricting statements of trial participants,
12 "several other courts have considered similar restraining orders. The overwhelming
13 majority of those courts have upheld the restraining orders." *Id.* at 596 (citing
14 numerous cases in which restraining order on trial participants were upheld).

15 The potential for injury to the integrity of the judicial process is significant
16 in cases involving trial publicity. *Id.* at 597. As the Supreme Court has noted, "The
17 theory of our system is that the conclusions to be reached in a case will be induced
18 only by evidence and argument in open court, and not by any outside influence,
19 whether of private talk or public print." *Id.* (citing *Patterson v. Colorado*, 205 U.S.
20 454, 462 (1907)). "This objective can be obtained only if publicity created by
21 private litigants is subject to reasonable restrictions." *Id.*

22 **B. Defendants are brazenly engaging in a strategic public campaign**
23 **to harm SDCC and taint the outcome of this case by adjudicating**
24 **the parties' dispute in the media instead of the courtroom.**

25 Since the inception of this dispute, Defendants have engaged in a willful,
26 open, and consistent strategy to win this case "in the court of public opinion." *See*
27 *Edge Decl. Ex. 1*, at p. 6. Through numerous press releases, articles, interviews
28 with various media outlets, and the pervasive use of social media, Defendants
(most notably Bryan Brandenburg) have been posting material and making

statements that are designed to tarnish the reputation of SDCC and thereby influence the public (including the jury pool) regarding who should prevail in this litigation. In many instances, these statements are misleading, prejudicial, inflammatory, or false. Indeed, Defendants have made their strategy and intention clear from the outset. On August 11, 2014, shortly after the dispute between the parties began, Brandenburg commented extensively in an article in Inside Counsel titled “Salt Lake Comic Con founders fight back” with the subtitle “Use the court of public opinion to combat trademark infringement claims brought by the San Diego Comic-Con.” *Id.* The article paints Defendants as “David” to SDCC’s “Goliath,” and compares SDCC to Superman’s nemesis Lex Luthor. Brandenburg is credited in the article with the following statement “[a]fter consulting with their lawyers, the team behind the Salt Lake Comic Con knew they had strong legal ground to stand on, but they didn’t want to go to court, **they wanted to win in the court of public opinion.**” *Id.* (emphasis added). Brandenburg is further quoted as saying “[o]ur strategy was, if we are going to spend legal fees vs. legal fees, we wanted to be creative. **We put it out to the public**, challenging the cease and desist letter publically.” *Id.* at p. 7 (emphasis added) (noting “anecdotally, the fans seem to be on the side of Salt Lake’s David rather than San Diego’s Goliath”).

Defendants have since launched a smear campaign against SDCC, which has only increased in intensity as this case approaches trial. For example, on June 27, 2017, Defendants issued an extensive press release that appeared in Business Wire. *See* Edge Decl. at Ex. 2. In that press release Defendants repeatedly claim SDCC and individuals associated with SDCC engaged in fraud.

- SDCC’s “trademarks in this case were obtained by fraud;”
- “Salt Lake Comic Con has shown in recently filed court documents that San Diego’s declaration was false and fraudulent;”
- “San Diego filed a fraudulent response declaration to the Trademark Examiner’s rejection, stating that ‘Comic-Con’ was exclusively used

by, and that the mark has become exclusively associated with, San Diego;”

- “The comic con term is generic and the trademarks in this case were obtained by fraud on the Patent and Trademark office;”
- “Salt Lake Comic Con seeks to add a claim to cancel the Comic-Con registration because it was obtained by fraud on the Trademark Office;”
- Quoting Brandenburg as stating “This case is unwarranted and based on fraudulent documents filed with a federal agency.”

See id at pp. 10-11.¹

These types of inflammatory and false statements by Defendants in the media are pervasive. In the Business Wire press release described above, Defendants list specific milestones Salt Lake Comic Con has achieved in connection with this dispute, including having “***secured more than 200,000 media articles reporting on the case***,” the majority of which “were overwhelmingly favorable to [Defendants’] case.” (emphasis added).² *Id.* at p. 11.

Importantly, Defendants’ public campaign is not limited to press releases and contact with news media outlets. Bryan Brandenburg has waged war against SDCC on social media as well. Brandenburg uses his Twitter feed, which has more than 5,200 followers, to comment on the dispute and disparage SDCC. *See* Edge Decl. Ex. 4. Similarly, Defendants use the Salt Lake Comic Con Twitter feed, which has more than 30,000 followers to comment on the dispute and accuse SDCC of fraud. *See* Edge Decl. Ex. 5, at p. 24. Brandenburg’s Facebook page is

¹ In addition to repeatedly stating SDCC committed fraud, Defendants present issues that are in material dispute in the litigation as factual. For example, Defendants repeatedly state that the term comic con is generic.

² In another press release issued by Defendants, Defendants boast that an article written by the Associated Press about this dispute was published in more than 160,000 news outlets worldwide and claim many media outlets have already declared Salt Lake Comic Con the winner in the court of public opinion. *See* Edge Decl. Ex. 3, at p. 17.

replete with false, disparaging, and/or inflammatory statements about SDCC in an attempt to taint the jury pool in Defendants' favor. Brandenburg's statements have the effect of inciting numerous people to "comment" by posting further inflammatory or false statements about SDCC. For example, on June 26, 2017, Brandenburg posted the comment "Busy week. Truth and Justice FTW" followed by substantial excerpts from Defendants' pleading describing Defendants' allegations of fraud against SDCC. *See* Edge Decl. Ex. 6, at p. 32. This post is followed by a further comment from Brandenburg that states "[t]his is the fraudulent statement they used to obtain their trademarks when they knew there were many comic cons out there." *Id.* at p. 33. Below Brandenburg's comment is a link to the Salt Lake Comic Con website as well as a screen shot from an SDCC filing at the USPTO transposed over an image of a smoking gun. *Id.* Numerous comments then follow from various people.

- Aimee Evans comments "So they lied? [T]hat's ridiculous. So much hard work and money has gone into this. How mean of them . . ."
- Heather Child comments "I love the smoking gun in the background! Truth!"
- Kerry Gisler comments "Their entire lawsuit was predicated on a falsehood. LOL."

Id. at pp. 33-34.

Of course, these comments are precisely what Defendants are hoping for and Brandenburg is more than happy to fan the flames. In response to Kerry Gisler's comment above, Brandenburg responds "[w]elcome to America. We have spent almost \$1 million defending ourselves against this mess of a lawsuit." *Id.* at p. 34. In a subsequent comment on the same discussion thread, Brandenburg goes on to state "[w]e're excited to have a crystal clear paper trail of false declarations to the trademark office. It's beyond our expectations in already an incredibly strong case for our defense." *Id.* at p. 35. This led an individual named Sarah Hanisko to

1 subsequently commented “Sooooooo. They lied? Isn’t there like a fine for falsifying
2 stuff?” *Id.* In direct response to that comment, Brandenburg comments “***It’s a***
3 ***Felony.***” *Id.* (emphasis added).

4 Brandenburg has not limited his false and inflammatory comments on
5 Facebook to his personal page. Brandenburg has also posted substantial content on
6 a public Facebook page called “Rate that Comic Con,” which has more than 4,800
7 members and is described as “a site to allow you the fans, creators, and vendors to
8 leave a [sic] feedback on a 5 star rating of your personal experience.” *See* Edge
9 Decl. Ex. 7. Brandenburg routinely posts comments on the Rate that Comic Con
10 Facebook page declaring that SDCC lies, is corrupt and engages in unethical
11 behavior, and is out to bully and harass the entire comic convention industry.
12 These comments include misleading statements about the frivolous nature of this
13 litigation and call on others in the industry to join Defendants in fighting SDCC.
14 In one instance, Brandenburg posted a link to an article about Robin Donlan, an
15 SDCC board member and Vice-President of events for SDCC. *Id.* at p. 53. The
16 article mentions a civil lawsuit filed by Ms. Donlan’s husband’s former employer
17 and the Securities and Exchange Commission regarding certain stock options the
18 Donlans had issued and sold. Brandenburg’s intention was clear—to attempt to
19 create the illusion of impropriety and corruption by trying to connect the lawsuit
20 against the Donlans with SDCC. At least one person responded to Brandenburg’s
21 post by commenting “As to what Bryan posted – someone who was a volunteer at
22 comic-con did something potentially illegal outside of their [SDCC] duties. So
23 what? How does that implicate [SDCC]?” *Id.* at p. 54. Brandenburg responded to
24 this by commenting “She was and I think still is a Director. ***There’s more to the***
25 ***story that will come out at trial.***” *Id.* (emphasis added).

26 In yet another example, Brandenburg posted the following on the Rate that
27 Comic Con Facebook page: “UPDATE: There is proof in the public record of the
28 Patent and Trademark Office that San Diego Comic-Con International provided

FALSE information to secure 1 or more of its ‘incontestable’ trademarks.” *See* Edge Decl. Ex. 8, at p. 61. Brandenburg’s post then goes to give a status update about the case and states “*I am asking for support from the community and all the powers of the Universe to bring victory to us in this case.*” *Id.* (emphasis added).

Additionally, on the official website for Salt Lake Comic Con, Defendants devote an entire web page to the dispute between the parties at <http://saltlakecomiccon.com/san-diego-comic-con-intl-v-salt-lake-comic-con/>. *See* Edge Decl. Ex. 9. Defendants include an immense amount of material on this web page designed to mischaracterize the parties’ positions and litigate their case to the public. In fact, there is so much information about this dispute that Defendants include a 15 part Table of Contents at the beginning of the web page. *Id.* at pp. 66-67. The information provided on the Salt Lake City Comic Con includes an article about two members of SDCC board of directors, argues the term “comic con” is generic, and includes links to *hundreds of articles* that comment on this litigation. *Id.*

C. Defendants should be proscribed from making certain public statements prior to and during the trial.

The Ninth Circuit has recognized that trial courts have a duty to take affirmative steps to ensure the fairness of trial proceedings in the face of publicity. *See Levine*, 764 F.2d at 596. In order to preserve the integrity of the judicial process and ensure a fair trial, publicity created by private litigants must be subject to reasonable restrictions. *Id.* at 597. Defendants’ public campaign to smear SDCC and win this case in the court of public opinion is aimed at tainting the jury pool and presents a “serious and imminent threat to the administration of justice.” *Hammes Co. Healthcare, LLC*, 2011 U.S. Dist. LEXIS 143494, at *54.

Importantly, as this case approaches trial, Defendants public campaign appears to be intensifying, both in frequency and rancor. There can be no doubt of

1 the pervasive nature of Defendants' efforts. Defendants boast they have secured
2 more than 200,000 media articles reporting on the case, and claim the majority are
3 overwhelmingly favorable to Defendants' case. *See* Edge Decl. Ex. 2, at p. 11.
4 The "Rate that Comic Con" Facebook page Brandenburg posts on has more than
5 4,800 members and has undoubtedly been viewed by thousands more.
6 Brandenburg uses his Twitter feed, which has more than 5,200 followers, to
7 comment on the dispute and disparage SDCC. Similarly, Defendants use the Salt
8 Lake Comic Con Twitter feed, which has more than 30,000 followers, to comment
9 on the dispute and accuse SDCC of fraud, among other things. Defendants are not
10 being coy about the purpose of their public campaign, which is to win this case in
11 the media before it ever gets to trial.³

12 As the Ninth Circuit has noted, numerous courts have considered orders
13 limiting the speech of trial participants and the overwhelming majority of those
14 courts have upheld the order. *See Levine*, 764 F.2d at 595. Accordingly, and based
15 on the serious and imminent threat to the administration of justice posed by
16 Defendants' conduct, SDCC requests that this Court proscribe Defendants from
17 making any of the following statements publicly prior to and during trial:

- 18 1. Any false or misleading statement about SDCC or any of its board
19 members;
- 20 2. Any false or misleading statement about the merits of this dispute;
- 21 3. Any statement that accuses, suggests, implies, or states that SDCC
22 lied and/or committed fraud⁴ (other than in documents to be filed with
23

24 ³ It is also worth noting that in the face of Defendants' public attacks, SDCC
25 has exercised incredible restraint and has not responded in kind. SDCC
26 believes this dispute should be litigated and decided in this Court. However,
27 if Defendants' conduct goes unchecked, SDCC will have no choice but to
28 defend itself publicly in order to protect its reputation and set the record
straight when Defendants disseminate false or misleading information. This
type of public exchange regarding ongoing litigation is not productive or
conducive to judicial integrity and SDCC hopes it can be avoided.

⁴ It is worth noting that Defendants have no cause of action for fraud.

the Court);

4. Any statement about the genericness of the term comic con (other than in documents to be filed with the Court);

5. Any statement about whether the term comic con is descriptive;

6. Any statement about whether SDCC abandoned any trademark rights (other than in documents to be filed with the Court).

This request is necessary to protect the judicial integrity of this trial and avoid tainting of the jury pool. This request is reasonable and narrowly tailored and there are no less restrictive means available to protect against the serious and imminent threat to the administration of justice posed by Defendants' conduct.

III. CONCLUSION

For the above and foregoing reasons, Plaintiff SDCC hereby respectfully requests that the Court proscribe Defendants from making any of the following statements publicly prior to and during trial, as well as any such other relief to which it may be justly entitled:

1. Any false or misleading statement about SDCC or any of its board members;

2. Any false or misleading statement about the merits of this dispute;

3. Any statement that accuses, suggests, implies, or states that SDCC lied and/or committed fraud (other than in documents to be filed with the Court);

4. Any statement about the genericness of the term comic con (other than in documents to be filed with the Court);

5. Any statement about whether the term comic con is descriptive;

6. Any statement about whether SDCC abandoned any trademark rights (other than in documents to be filed with the Court).

1 Dated: July 6, 2017

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3 /s/ Callie Bjurstrom

4 By:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing documents has been served on July 6, 2017, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail, facsimile, and/or overnight delivery.

/s/ Callie A. Bjurstrom
CALLIE A. BJURSTROM