UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SCOTT STEPHENS, Plaintiff,	:	Civil Action
	:	No. 1:15-cv-2217-ENV-LB
v.	:	
TRUMP ORGANIZATION LLC, DONALD J. TRUMP, ALAN GARTEN, and MICHAEL D. COHEN, Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On the brief:

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I. INTRODUCTION

Plaintiff SCOTT STEPHENS respectfully submits the following Memorandum of Law in opposition to the motion to dismiss for failure to state a claim upon which relief can be granted, filed by Defendants TRUMP ORGANIZATION LLC, DONALD J. TRUMP, ALAN GARTEN, and MICHAEL D. COHEN.

II. STATEMENT OF FACTS

On April 19, 2015, plaintiff filed his diversity complaint for defamation, tortious interference of business relations, and declaratory judgment, alleging that he was damaged by defendants' conduct in publishing false statements about his exclusive right to use the domain name "trumpestatess.com" as its lawful authorized user, registrant, or domain holder. Pursuant thereto, Plaintiff seeks this Court's determination that he is not in violation of U.S. Trademark law, the Uniform Domain Name Dispute Resolution Policy (the "UDRP" and/or "Policy") adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") on October 24, 1999, and the WIPO Arbitration and Mediation Center Rules for Uniform Domain Name Dispute Resolution Policy as a result of his status as authorized user, registrant, or domain holder of "trumpestates.com." This action also implicates the Anticybersquatting Consumer Protection Act ("ACPA"). Plaintiff's complaint was filed after an administrative panel decision in favor of Defendant DONALD J. TRUMP by the World Intellectual Property Organization ("WIPO"), which is not binding on the courts pursuant to paragraph 4(k) of the Policy.

III. STATEMENT OF LAW

In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true

and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005). "In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege a plausible set of facts sufficient `to raise a right to relief above the speculative level.' *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. U.S. 544, 555 (2007)). This standard does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

The Supreme Court clarified the appropriate pleading standard in *Ashcroft v. Iqbal*, setting forth a two-pronged approach for courts deciding a motion to dismiss. 556 U.S. 662 (2009). The Supreme Court instructed district courts to first "identify[ ] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679 (explaining that though "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations"). Second, if a complaint contains "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a `probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (*quoting* and *citing Twombly*, 550 U.S. at 556-57 (internal citation omitted)).

Further, in adjudicating a motion to dismiss, a court may consider: "(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents `integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003).

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. *See* UDRP 4(k), https://www.icann.org/resources/pages/help/dndr/udrp-en (September 4, 2015).

A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this chapter. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant. 15 U.S.C. § 1114(2)(D)(v)(2000).

IV. ARGUMENT

A. DEFENDANTS' FALLACIOUS RHETORIC AND UNFOUNDED ANALYSIS

In Defendants' Motion and supporting Memorandum of Law, Defendants request dismissal with prejudice. *See generally* Defendants' Notice of Motion to Dismiss Complaint and Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defendant's Brief"). Defendants' prayer for relief is disingenuous and inconsistent with case law showing that a complaint that is dismissed in the face of a 12(b)(6) challenge, without more, should be dismissed without prejudice, allowing a plaintiff leave to replead. *See Jordan v. Forfeiture Support Assocs.*, 928 F. Supp. 2d 588, 605, 2013 U.S. Dist. LEXIS 31069, *45, 2013 WL 828496 (E.D.N.Y. 2013). (A 12(b)(6) dismissal for pleading inadequacy warrants dismissal without prejudice with leave to amend under Rule 12(b)(6)).

Defendants contend Plaintiff's complaint is "an attempt at retribution" for Mr. Trump having prevailed in an administrative proceeding through the World Intellectual Property Association ("WIPO") to recover the internet domain name trumpestates.com (the "Domain Name"). *See* Defendants' Brief, p. 1. Defendants' apparent attempt to gloat disregards the fact that a domain name registrant whose name has been suspended, disabled, or transferred may file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful, permitting the court to grant injunctive relief. *See* 15 U.S.C. § 1114(2)(D)(v)(2000).

Defendants go on to contend Plaintiff commenced this action "[i]n clear retaliation for the WIPO proceeding "before the WIPO Proceeding could even be decided". *See* Defendants' Brief, p. 3. Rule 4(k) of the UDRP provides:

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded.

See UDRP 4(k).

Plaintiff's has a clear legal right to seek the court's guidance in protecting property Plaintiff has owned for over a decade despite the Defendants' beliefs that they or Mr. Trump alone can usurp such rights. The remaining rhetoric in the Preliminary Statement portion of Defendants' Brief is baseless and unsupported, neither requiring nor deserving a detailed explanation from Plaintiff. Defendants' attempts to claim that Plaintiff's Complaint may contain only legal conclusions is yet another red herring, evidencing only that Defendants may not have read Plaintiff's complaint and are confused as to what constitutes a fact

Defendants contend Plaintiff's alleged defamatory statements "could not possibly expose plaintiff 'to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or … induce[s] an evil opinion of one in the minds of right-thinking persons, and … deprives one of … confidence and friendly intercourse in society'." *See* Defendants' Brief, p. 5. Clearly, such legal determination for which only one of the aforementioned outcomes need be shown should be reserved to the trier of fact; the determination is clearly improper with respect to a motion to dismiss.

Defendants' later make yet another conclusory statement regarding a complex legal determination regarding the status of Plaintiff as a "cyber squatter". *See*

Defendants' Brief, p. 6. Defendants would have this court surpass all procedures in place for properly disposing of a case and determine the matter before Defendants have even supplied an answer. Nonetheless, Defendants should reserve their conclusory arguments for summary judgment, at the earliest.

B. DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THE COMPLAINT STATES FACTS ENTITLING PLAINTIFF TO RELIEF.

1. DEFAMATION.

Construing plaintiff's complaint liberally, plaintiff presents a state common law claim for defamation. Plaintiff accuses defendants of committing multiple acts of defamation, divided into four general types of statements: statements that plaintiff is "violating the law," statements that plaintiff is "cyber squatting," statements that plaintiff is infringing a trademark, and statements that plaintiff violated the Rules for Uniform Domain Name Dispute Resolution Policy as a result of his status as authorized user, registrant, or domain holder of "trumpestates.com." To succeed on his claims for defamation, plaintiff must allege 1) a false statement, 2) that was published without privilege or authorization to a third party, 3) constituted fault as judged by, at a minimum, a negligence standard, and 4) either caused a special harm or constituted defamation per se. S*ee Chao v. Mount Sinai Hosp.*, No. 10 CV 2869(HB), 2010 WL 5222118, at *6 (S.D.N.Y. Dec. 17, 2010).

It is for the court to decide whether the statements complained of are "`reasonably susceptible of a defamatory connotation,' thus warranting submission of the issue to the trier of fact." *Silsdorf v. Levine*, 59 N.Y.2d 8, 12-13, 462 N.Y.S.2d 822, 449 N.E.2d 716 (N.Y.1983). If the court concludes that the statements are reasonably susceptible of a

defamatory connotation, it then becomes a jury function to determine how the words were likely to be understood by the ordinary and average reader or listener. *See Curry v. Roman*, 217 A.D.2d 314, 635 N.Y.S.2d 391 (4th Dep't 1995). "The alleged defamatory words should be considered `in the context of the entire statement or publication as a whole, tested against the understanding of the average [listener].'" *Allen v. CH Energy Group, Inc.*, 58 A.D.3d 1102, 1103, 872 N.Y.S.2d 337 (3d Dep't 2009) (*quoting Aronson v. Wiersma*, 65 N.Y.2d 592, 594, 493 N.Y.S.2d 1006, 483 N.E.2d 1138 (1985)); *see also*, *Rossi v. Attanasio*, 48 A.D.3d 1025, 1027, 852 N.Y.S.2d 465 (2008).

To be actionable, a provable statement of fact is required; "rhetorical hyperbole" or "vigorous epithet" will not suffice. *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *see also*, *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 1163 (1993) (noting that only facts "are capable of being proven false"). Determining whether a given statement expresses fact or opinion is a question of law for the court and must be answered "on the basis of what the average person hearing or reading the communication would take it to mean." *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986).

In this case, plaintiff has alleged that defendants have defamed him by saying he is "violating the law," "cyber squatting," infringing a trademark, and/or violating the Rules for Uniform Domain Name Dispute Resolution Policy as a result of his status as authorized user, registrant, or domain holder of "trumpestates.com." "Defamation in word or print is cognizable in an action for libel." *Rosenberg v. Metlife, Inc.*, 453 F.3d 122, 123 n. 1 (2d Cir.2006) (*citing Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 176 (2d Cir. 2000)). "Under New York [State] law, libel consists of five elements: (1) `a

written defamatory statement of fact concerning the plaintiff; (2) `publication to a third party'; (3) `fault (either negligence or actual malice depending on the status of the libeled party)'"; (4) "falsity of the defamatory statement"; and (5) "special damages or per se actionability (defamatory on its face)." *Id.* (*citing Celle*, 209 F.3d at 176). "Damages will [] be presumed for statements that . . . would tend to cause injury to a person's profession or business." *Geraci v. Probst*, 15 N.Y.3d 336, 912 N.Y.S.2d 484, 938 N.E.2d 917 (2010); *see also Sang Lan v. AOL Time Warner, Inc.*, 11 Civ. 2870(LBS)(JCF), 2012 WL 1633907, at *2, 2012 U.S. Dist. LEXIS 65307, at *6 (S.D.N.Y. May 9, 2012) ("A writing is libelous per se under New York [State] law `if it . . . tends to disparage [him] in the way of [his] office, profession or trade.'") (*quoting Bordoni v. New York Times Co.*, 400 F.Supp. 1223 (S.D.N.Y.1975)). Thus, Defendants motion to dismiss must be denied.

2. TORTIOUS INTERFERENCE OF BUSINESS RELATIONS.

New York law provides for separate causes of action for interference with existing and prospective contractual relationships. Each cause of action is governed by separate principles, as set forth below.

First, the elements of a claim for tortious interference with an existing contract are: (1) the existence of a valid contract between the aggrieved party and a third party; (2) the alleged tortfeasor's knowledge of the contract; (3) the alleged tortfeasor's improper intentional interference with its performance without justification; and (4) damages. *Albert v. Loksen*, 239 F.3d 256, 274 (2d Cir.2001); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120 151 N.Y.S.2d 1, 5, 134 N.E.2d 97 (1956); *Nelly de Vuyst, USA, Inc. v. Europe Cosmetiques, Inc.*, 2012 WL 246673 *6 (S.D.N.Y. 2012). Intentional interference is generally evidenced by a tortfeasor "inducing or otherwise causing a third person not to

perform his contractual obligations to plaintiff." *Enercomp v. McCorhill Pub. Inc*, 873 F.2d 536, 541 (2d Cir.1989) (citations omitted).

The elements of a cause of action for tortious interference with prospective economic advantage are: (1) existence of a profitable business relationship; (2) the tortfeasor's interference with that relationship; (3) the tortfeasor's use of dishonest, unfair, improper, or wrongful means; and (4) damage to the business relationship. *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 108-09 (2d Cir.1997); *Garrison v. Toshiba Business Solutions (USA), Inc.*, 907 F.Supp.2d 301, 306-07 (E.D.N.Y.2012); *Five Star Dev. Resort Communities, LLC v. iStar RC Paradise Valley LLC*, 2010 WL 2697137 *4 (S.D.N.Y.2010); *Waste Services, Inc. v. Jamaica Ash and Rubbish Removal Co.*, 262 A.D.2d 401, 691 N.Y.S.2d 150 (2d Dep't 1999).

Importantly, a cause of action for interference with prospective (as opposed to existing) business relations, requires a plaintiff to show that the interference was accomplished by "wrongful means." *Waste Services*, 262 A.D.2d 401, 691 N.Y.S.2d 150, 151 (2d Dep't 1999) (cause of action for tortious interference with prospective contractual relations requires showing of "malice or wrongful conduct"); *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294 A.D.2d 294, 684 N.Y.S.2d 235, 239 (1st Dept.1999). "Wrongful means" includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and economic pressure. *Id.*; *see Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 633, 406 N.E.2d 445 (1980) (noting that with respect to prospective contracts "liability will be imposed only on proof of more culpable conduct on the part of the interferer"); *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190-91, 785 N.Y.S.2d 359, 818 N.E.2d 1100 (2004) (no liability

for interference with prospective contract unless "a defendant's actions must amount to a crime or an independent tort, such as fraud or misrepresentation"). *See Scutti Enterps. v. Park Place Entm't Corp.*, 322 F.3d 211, 216 (2d Cir.2003).

Here, plaintiff alleges facts that support his claim against defendants because plaintiff states that he is "in the business of buying, marketing, and selling internet domain names" and "Defendants have made false statements about Plaintiff that has harmed his reputation" and "communicated false statements to at least one third party about Plaintiff that has harmed his reputation[,]" such as plaintiff "is 'violating the law'" or "cyber squatting." *See* Dkt. 1 at 3, 6. Defendants will have the opportunity to parse through the specifics of plaintiff's damages via discovery. However, as is, plaintiff's allegations support his tort claim against defendants herein. Thus, Defendants' motion to dismiss must be denied.

3. DECLARATORY JUDGMENT

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. *See* UDRP 4(k), https://www.icann.org/resources/pages/help/dndr/udrp-en (September 4, 2015).

A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this chapter. The court may grant injunctive relief to

the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant. 15 U.S.C. § 1114(2)(D)(v)(2000).

Accordingly, Section 1114(2)(D)(v) grants domain name registrants who have lost domain names under administrative panel decisions applying the UDRP an affirmative cause of action in federal court for a declaration of nonviolation of the ACPA and for the return of the wrongfully transferred domain names. *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 18, (1st Cir. Mass. 2001) (Reversing the district court's dismissal, finding that an affirmative cause of action in federal court for a declaration of nonviolation of the ACPA and for return of the wrongfully transferred domain names.) Section 114(2)(D)(v) undoubtedly also applies to declaratory action for non-violation of the UDRP itself, as a contrary determination would necessarily be a legal non sequitur. Plaintiff's Complaint does not explicitly allege a nonviolation of the ACPA. Nonetheless, Plaintiff's allegation that Plaintiff is not in violation of U.S. Trademark law, the UDRP, or WIPO is sufficient alone to preserve both his UDRP and ACPA claims, as well as withstand the instant motion to dismiss. Thus, Defendants' motion to dismiss must be denied.

C. IF THIS COURT BELIEVES THAT PLAINTIFF HAS NOT ADEQUATELY STATED FACTS CONSTITUTING CLAIMS UPON WHICH RELIEF CAN BE GRANTED, IT SHOULD GRANT PLAINTIFF LEAVE TO AMEND.

If this Court believes plaintiff has failed to adequately allege facts to state a claim upon which relief can be granted for any count herein, he respectfully requests leave to amend his complaint. The Second Circuit has emphasized that a "complaint is to be read liberally" and "the court should not dismiss without granting leave to amend at least once

when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (quotations and citations omitted). Under Rule 15(a) of the Federal Rules of Civil Procedure, the "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). If this Court is inclined to grant the defendants' motion, plaintiff should be permitted to amend his complaint to state facts that clearly show that he is entitled to relief, especially where the plaintiff has not yet had the opportunity to file an amended pleading.

V. CONCLUSION

Based on the foregoing, plaintiff respectfully requests that this Honorable Court DENY the defendants' motion to dismiss for failure to state a claim upon which relief can be granted and order defendants to answer plaintiff's complaint within fourteen (14) days after notice of this court's order, or in the alternative, grant plaintiff leave to file a First Amended Complaint.

Respectfully submitted,

Dated: New York, New York
September 4, 2015

s/ Brian L. Ponder
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CERTIFICATE OF SERVICE

I certify under penalty of perjury that a true and correct copy of the foregoing document was served upon all parties through their attorneys of record via CM/ECF filing, email, and USPS regular mail.

Dated: New York, New York
September 4, 2015

s/ Brian L. Ponder
BRIAN L. PONDER, ESQ.