

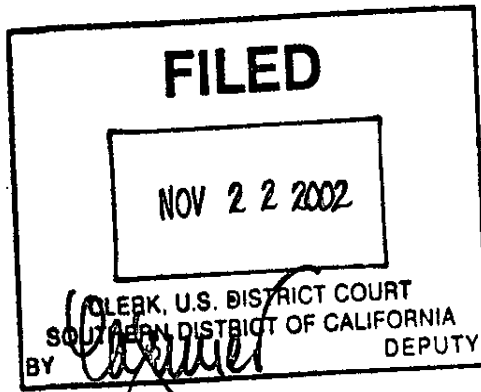


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3:01-CV-01752 BOSLEY MEDICAL V. KREMER

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O.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BOSLEY MEDICAL INSTITUTE, INC., a
Delaware corporation, BOSLEY MEDICAL
GROUP, S.C., an Illinois corporation,

Plaintiff,

v.

MICHAEL STEVEN KREMER, an
Individual, and TUCOWS, INC., a Canadian
corporation,

Defendants.

Civil No. 01-1752 K (AJB)

Order Denying Plaintiffs' Motion to Compel
[Doc. No. 37]; Denying as Moot Plaintiffs'
Motion for Order to Show Cause [Doc. No.
39]; Granting Defendant Kremer's Cross-
Motion for Protective Order [Doc. No. 44]

Plaintiffs move the Court for an order compelling Defendant Michael Steven Kremer to respond to interrogatories 3 and 4 and document requests 3, 5-9, and 11 as previously ordered by the Court on March 22, 2002. Plaintiffs also move the Court for an order compelling Kremer to appear and give deposition testimony on topics 4, 6-12, and 14 from its deposition notice, also as previously ordered by the Court on March 22, 2002. Plaintiffs have also filed a separate motion for an order to show cause why Kremer should not be held in contempt for violation of the March 22, 2002 Order.

Kremer has filed a cross-motion for protective order, asking the Court to order Plaintiffs to identify the "specific language" that forms the basis for their defamation claims before he is required to respond to the discovery or sit for deposition as previously ordered. The Court finds these motions appropriate for submission on the papers and without oral argument pursuant to Local Rule 7.1(d)(1), and the November 22, 2002 and December 12, 2002 hearing dates are VACATED. For the reasons set

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1 forth herein, the Court DENIES Plaintiffs' motion to compel, DENIES as moot Plaintiffs' motion for an
2 order to show cause, and GRANTS Defendant's motion for protective order.

3 **Background**

4 Plaintiffs' amended complaint in this case alleges, among other things, that Kremer has made and
5 continues to make defamatory statements about them on two websites. The complaint does not identify
6 with particularity the statements that Plaintiffs allege are defamatory, but instead alleges that Kremer has
7 made false statements accusing Plaintiffs "among other things, of fraud, misrepresentation, and unethical
8 practices," "of altering patient records, allowing laypersons to perform surgical procedures and using
9 false and misleading statements." Plaintiffs alleged that the false and misleading statements include
10 misrepresenting "the number of treatments patients underwent, the cost of the treatments, and the result
11 of the treatments." [First Amended Complaint, p. 20]. Kremer has previously moved to dismiss the
12 complaint based, in part, upon his belief that the allegations are insufficiently specific as to the alleged
13 defamatory statements [Doc. No. 6, pp. 22-23]. Kremer has also moved to strike portions of the
14 amended complaint under California's anti-SLAPP statute.

15 Relative to Kremer's motion to strike, Defendants moved the Court for leave to conduct limited
16 discovery. On February 5, 2002, this Court entered an order granting Bosley's motion to conduct limited
17 discovery, and ordered additional briefing by the parties regarding the proper scope of the discovery. In
18 its additional briefing, Bosley included draft discovery requests. Bosley's original draft discovery
19 requests sought information from Kremer with regard to "the content of the web sites." [Doc. No. 12,
20 Exh. A]. For example, interrogatory 3 asked Kremer to "[e]xplain whether and the means by which you
21 investigated the truth or falsity, or were otherwise made aware of the truth or falsity, of the sources that
22 you relied upon in preparing the content of the web sites . . . , including summaries prepared by you or
23 any other person." [*Id.* at p. 3].

24 In response to Bosley's additional briefing, Kremer submitted an edited version of Bosley's draft
25 discovery responses. [Plaintiffs' Exhibits in Support of Motion to Compel ("Pltfs' Exhibits") 6, 7 & 8].
26 In the edited version of those requests, Kremer added a definition of "defamatory statements" as follows:
27 "those statements on the web sites whose specific language has been alleged to be among the defamatory
28 statements over which plaintiffs are suing the defendant." [Pltfs' Exhibit 6, p. 1; Pltfs' Exhibit 7, p. 2].

1 Kremer also added a note under the definition of “defamatory statements” as follows: “the foregoing
2 definition will be used throughout this response to limit the scope of the discovery sought to the specific
3 language that plaintiffs are alleging to constitute actionable defamation.” [Pltfs’ Exhibit 6, p. 2; Pltfs’
4 Exhibit 7, p. 3; Pltfs’ Exhibit 8, p. 2]. Throughout the discovery requests, Kremer edited requests for
5 information about “the content of the web sites” to “the defamatory statements,” and noted that these
6 modifications were necessary “to limit the scope of the discovery to the particular parts of the web site
7 alleged by plaintiffs as the basis for the defamation counts in the complaint.” [Pltfs’ Exhibits 6 and 7].
8 Kremer argued in his supplemental briefing that before he should be required to respond to any of the
9 discovery, “Bosley should first be required to identify, verbatim, the specific statements in the web site
10 that it alleges are false statements of fact uttered with actual malice and causing damages.” [Doc. No. 15,
11 p. 5]. Kremer argued that “[t]he Court either should require such identification by separate order, or
12 should adopt the revised wording in the attached discovery requests that would accomplish that
13 objective.” [*Id.*].

14 In the March 22, 2002 Order defining the scope of discovery relative to the motion to strike, this
15 Court concluded that Kremer’s “modifications appropriately define and narrow the scope of discovery as
16 contemplated in the Court’s prior order.” [Doc. No. 20, p. 2]. Thus, this Court required Kremer to
17 respond to specified discovery requests, and sit for deposition, according to the reworded requests [*id.* at
18 p.3].

19 Both parties filed objections to the March 22, 2002 discovery order, and Judge Keep denied those
20 objections on August 9, 2002 [Pltfs’ Exhibit 2]. According the March 22, 2002 Order, Kremer was then
21 obligated to respond to the discovery within fifteen (15) days thereafter. Following Judge Keep’s Order,
22 Plaintiffs demanded that Kremer respond to the discovery requests as ordered. Kremer argued in
23 response, however, that the reworded discovery required that Plaintiffs first identify the “specific
24 language” that they claimed was defamatory. Unless Plaintiffs identified the “specific language,” Kremer
25 argued that he could not meaningfully respond to the discovery.

26 As an attempt to resolve the discovery dispute, Plaintiffs sent a letter on October 31, 2002 stating
27 that “Bosley has agreed to identify some of the statements made on Kremer’s websites that Bosley
28

1 alleges to be defamatory for the purposes of this discovery only.” [Pltfs’ Exhibit 11]. Plaintiffs then
2 stated that

3 [F]or the purposes of this discovery only, Bosley alleges that the “10 things you should
4 know about the Bosley Medical Group . . .” posted on the bosleymedicalviolations.com
5 website are defamatory and the statements made regarding “Some of the investigation’s
6 findings included: . . .” posted on the bosleymedical.com website are defamatory.

7 [Id.]

8 Kremer replied to this identification, objecting that it was insufficiently specific. Kremer pointed
9 to several items that he argued could not possibly be defamatory, including (1) verbatim quotes from
10 state medical disciplinary documents or from transcripts of a Dateline broadcast, (2) statements that were
11 unquestionably true (such as that the California Attorney General and LA District Attorney’s Office
12 brought a consumer protection lawsuit against Bosley Medical), and (3) statements not implicating
13 Bosley (i.e. “Over half of the population (including women) experience some form of hair loss from
14 their teens to forties. The best remedy may be acceptance.”). [Pltfs’ Exhibit 10]. Kremer also objected
15 insofar as Plaintiffs purported to make such identifications “for purposes of this discovery only.”
16 Kremer argued that given the limitations imposed by the reworded discovery requests adopted by this
17 Court in the March 22, 2002 Order, the fifteen days for his response did not begin to run until an
18 adequate identification was made.

19 These cross-motions followed. Plaintiffs seek an order compelling Kremer to respond to the
20 written discovery, and sit for his deposition, arguing it has sufficiently identified the allegedly defama-
21 tory statements. Kremer seeks a protective order, that he not be required to respond until such time as
22 Plaintiffs have identified, with specificity, the particular statements on the websites that they allege are
23 defamatory.

24 Discussion

25 Kremer’s current objections are well-taken. Throughout the litigation of these discovery issues,
26 this Court has stressed that the scope of discovery relative to the motion to strike was to be narrowly
27 focused to obtain only the information necessary to allow Plaintiffs to oppose the motion. In his
28 supplemental briefing, filed prior to the issuance of the March 22, 2002 Order, Kremer explicitly asked
this Court to require Plaintiffs to identify, with particularity, the statements contained on the web sites
that they allege are defamatory. Kremer invited the Court to accomplish this either by separate order, or

1 by adopting the reworded discovery requests submitted by him. This Court chose to have Kremer
2 respond to the discovery requests, as reworded. Even though the March 22, 2002 order did not
3 specifically require Plaintiffs to identify the allegedly defamatory statements, it did order Kremer to
4 respond to the “reworded” requests, and noted that “Defendant’s modifications appropriately define and
5 narrow the scope of discovery as contemplated in the Court’s prior order.” [Doc. No. 20, p. 2]. Those
6 reworded requests (1) added a definition of “defamatory statements” (2) uniformly replaced references to
7 “the content of the web sites” to “defamatory statements,” and (3) explained that this modification was
8 necessary to focus discovery only on those portions of the web sites that Plaintiffs actually allege are
9 defamatory. Based upon the nature and scope of these modifications, Plaintiffs should have known that
10 if they were to obtain responses to the discovery, they would be required to identify, with particularity,
11 the allegedly defamatory statements. Although Plaintiffs objected to numerous other portions of the
12 March 22, 2002 order, they did not object to that portion of the order finding that the reworded requests
13 properly delineate the scope of discovery contemplated, and requiring Kremer to respond to the requests
14 as reworded. Thus, this Court will GRANT Kremer’s motion for protective order, and require Plaintiffs
15 to identify, for purposes of discovery, the verbatim statements contained on the websites that they
16 contend are defamatory. ¹

17 In meet and confer efforts prior to filing this motion, Plaintiffs identified a portion of each of the
18 two web sites that they believe are defamatory. The designated portions, however, consist of 82 separate
19 sentences. With regard to each of the 82 separate sentences or statements identified by Plaintiffs as
20 allegedly defamatory, Kremer has been asked to give the following information:

21 Interrogatory No. 3: Explain the means by which you investigated the truth or falsity, or
22 were otherwise made aware of the truth or falsity, of the sources that you relied upon in
23 preparing the defamatory statements, including summaries prepared by you or any other
24 person.

25 ¹ The Court will require this identification for purposes of discovery only because the
26 amended complaint says what it says, and is now the subject of a motion to dismiss for failure to
27 allege with sufficient specificity the content of the defamatory statements. That motion is before
28 Judge Keep. If Judge Keep agrees with Kremer’s argument, she can grant the motion and require
Plaintiffs to file a second amended complaint setting forth, in full, the allegedly defamatory
statements. Until that time, the identification of the defamatory statements should be made for
discovery purposes.

1 Interrogatory No. 4: Identify and describe any instances in which you have been made
2 aware, notified or otherwise alerted to the falsity or possible falsity of any defamatory
3 statements, whether from a person or by an inconsistency in sources relied upon . . .
4 including identifying the person or source who notified or otherwise alerted you, the date
5 you were notified or otherwise alerted, the means by which you were notified or other-
6 wise alerted, the substance of the notification, and what you did in response to the
7 notification.

8 Additionally, Kremer has been asked to produce the following documents regarding each allegedly
9 defamatory statement:

10 Document Request No. 3: All documents and things that refer or relate to the preparation
11 of and revisions to the defamatory statements, including any notes, drafts or revisions of
12 the defamatory statements on the web sites that reflect Kremer's efforts to have these
13 statements conform to the sources on which they are allegedly based.

14 Document Request No. 5: All documents that refer or relate to the public sources on
15 which Kremer relied and relies in researching and preparing the defamatory statements
16 from the dates of the web sites' creation to the present.

17 Document Request No. 6: All documents and things that refer or relate to Kremer's belief
18 or knowledge regarding the truth or falsity of the public sources on which he relied and
19 relies in preparing the defamatory statements.

20 Document Request No. 7: All documents and things that refer or relate to research or
21 other efforts made by Kremer to investigate the accuracy and the factual bases of the
22 public sources on which Kremer has relied and relies in preparing the defamatory
23 statements.

24 Document Request No. 8: All documents and things that refer or relate to the means by
25 which Kremer investigated the truth or falsity, or was otherwise made aware of the truth
26 or falsity, of the defamatory statements, even if contained in any summaries prepared by
27 Kremer or any other person.

28 Document Request No. 9: All documents and things that refer or relate to any instances in
which Kremer has been made aware, notified, or otherwise alerted as to the falsity or
possible falsity of the defamatory statements, whether from a person or by an inconsis-
tency in sources and research materials relied upon, from the time of the web sites'
creation to the present.

So long as Plaintiffs refuse to identify with particularity those statements contained on the web sites that
they allege are defamatory, the resulting discovery will be overbroad and outside what was contemplated
by this Court's March 22, 2002 Order.

As set out in this Court's February 5, 2002 Order, the purpose of the anti-SLAPP statute is to
avoid the chilling effect that SLAPP suits have on the valid exercise of constitutional rights of freedom
of speech. *Rogers v. Home Shopping Network*, 57 F. Supp. 2d 973, 975 (C.D. Cal. 1999) (citing Cal.
Civ. Code § 425.16). The motion to strike procedure under Cal. Civ. Code § 425.16(b) furthers the end
of protecting defendants from incurring legal expenses to defend against these actions. *Id.* In this case,

1 unless Plaintiffs are required to identify with particularity the alleged defamatory statements, the
2 discovery related to the motion to strike will be unduly burdensome. It is unreasonable to expect Kremer
3 to defend every word, statement or reference in each of the 82 sentences identified by Plaintiffs in their
4 meet and confer letter, unless Plaintiffs actually contend that each word, statement, or reference is, in
5 fact, defamatory. Thus, a protective order is appropriate under Fed. R. Civ. P. 26(c).

6 Plaintiffs presumably knew, when they filed their lawsuit, which statements on the websites that
7 they alleged were defamatory. Thus, Plaintiffs should be able to provide that information to Kremer by
8 November 27, 2002. Given the extensive period of time that Kremer has had to consider this discovery,
9 the Court also concludes that he should be able to respond to the to the discovery requests, and produce
10 documents, by December 4, 2002. Kremer's deposition should go forward, as previously scheduled, on
11 December 6, 2002. Counsel shall contact Judge Keep's chambers immediately to obtain a new hearing
12 date and briefing schedule for the motion to strike. Given the disposition of this motion, Plaintiffs'
13 motion for an order to show cause why Kremer should not be held in contempt for failure to comply
14 with the March 22, 2002 Order is also denied as moot.

15 **Conclusion**

16 For the reasons set forth herein, the Court hereby DENIES Plaintiffs' motion to compel [Doc.
17 No. 37], DENIES as moot Plaintiffs' motion for an order to show cause [Doc. No. 39], and GRANTS
18 Defendant Kremer's motion for protective order [Doc. No. 44]. On or before *November 27, 2002*,
19 Plaintiffs shall identify, with particularity, for purposes of discovery, the specific language contained on
20 the two disputed websites that they contend is defamatory. On or before *December 4, 2002*, Defendant
21 Kremer shall serve responses to the written discovery, and produce responsive documents. Kremer's
22 deposition shall go forward as previously scheduled, and counsel shall notify Judge Keep's chambers
23 forthwith to set a hearing and briefing schedule with regard to the motion to strike.

24 IT IS SO ORDERED.

25
26 Dated: 11/22/02



27 ANTHONY J. BATTAGLIA
28 United States Magistrate Judge

cc: Judge Keep
All Counsel of Record