IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

CASE NO. 05-20047-CIV-JORDAN/BROWN

UNIVERSAL COMMUNICATION SYSTEMS, INC. (A Nevada Corporation), MICHAEL J. ZWEBNER (individually)
Plaintiffs
vs.

TURNER BPOADCASTING SYSTEM, INC. (Georgia Corporation), CABLE NEWS NETWORK, INC. (Georgia Corporation) & WOLF BLITZER (an Individual), JOHN DOE #1 *aka* "*wolfblittzer0*" & JOHN DOE #2 *aka* "royal_octavo")
Defendants
/

PLAINTIFFS' OPPOSITION TO MEDIA DEFENDANTS' VERIFIED MOTION FOR ATTORNEY FEES

The Plaintiffs, Universal Communication Systems, Inc. (herein also "UCSY") and Michael J. Zwebner (herein also "ZWEBNER") herein respond by way of Opposition to the Media Defendants' Verified Motion For Attorney Fees.

SUMMARY OF OPPOSITION

1. The Plaintiffs have filed a Notice Of Appeal of the Order of this Court, dated August 29, 2005, annexed hereto as Exhibit "1". Accordingly, the Court no longer has jurisdiction over the subject matter of this Court's Order of August 29, 2005 [DE 43].

2. Alternatively, to the extent this Court has retained jurisdiction, the Media Defendants' entitlement to an award of attorney fees, if any, is tempered by L.R. 7.1.A.3[1], which

[1] It is understood that prior consultation between counsel, was not mandated before the Media Defendants filing of their Motion To Dismiss. Notwithstanding, upon initiation of such contact by counsel for the Plaintiffs, the counsel for the Media Defendants was professionally constrained to ignore such offer of conciliation and accommodation, in preference to Motion To Dismiss.

encourages counsel for the parties to confer in a "good faith effort" to resolve matters without Court involvement; and, the offer by Plaintiffs on January 31, 2005, to extend to counsel to the Media Defendants

> Whatever accommodation you and your client would require to minimize its participation and costs in this matter, would be acceptable to Plaintiffs, so long as not in conflict with any Court rule and/or order, (emphasis added)

Faro letter to Jimenez, dated January 31, 2005, annexed hereto as Exhibit "1"

Neither the Media Defendants, nor their counsel, have acknowledged the existence of this January 31, 2005, correspondence in either their Motion For Rule 11 Sanctions, nor in their Verified Motion For Attorney Fees. The existence of this January 31, 2005, correspondence is explicitly referenced in the time sheets attached to the Verified Motion, Jimenz and Schullman billing entries on January 31, 2005; See also facsimile confirmation report attached to the Plaintiffs' Motion Under Rule 60 Vacate And/Or Modify Court Order Of August 29, 2005, [DE 48, Exhibit "1"]

MEMORANDUM IN OPPOSTION

On September 10, 2005, the counsel for the parties met in an earnest attempt to resolve this matter; and, the undersigned offered to resolve this matter, consistent with position of the Plaintiffs taken herein. This offer was subsequently rejected on September 22, 2005.

On September 22, 2005, the Plaintiffs filed a Notice Of Appeal of this Court's Order of August 29, 2005 [DE 43], in which the Court granted the Media Defendants Motion for Rule 11 Sanctions. Accordingly, this Court has been divested of jurisdiction over this subject matter, including the determination of the amount of a reasonable attorney fee, if any, to be awarded to the Media Defendants.

On September 22, 2005, the Plaintiffs filed a motion under Rule 60 to Vacate and/or Amend The Order Of August 29, 2005, [DE 43], which granted the Media Defendants' *Motion For Rule 11 Sanctions* [DE 27] against its legal counsel. This Rule 60 Motion is herein incorporated by reference in its entirety, copy annexed hereto as Exhibit "2". Upon perfecting of the appeal of this Court' Order of August 29, 2005, the Plaintiffs shall file a motion requesting that the 11th Circuit Court of Appeals release/relinquish jurisdiction to the District Court to consider the Plaintiffs' Rule 60 Motion.

AN AWARD OF ATTORNEY FEES TO MEDIA DEFENDANTS IS UNREASONABLE UNDER THE FACTS OF THIS CASE.

In brief, an award of attorney fees to the Media Defendants, under the facts of this case, is inappropriate because:

(a) the policy objectives of the "safe harbor" provision of Rule 11 have been observed by the Plaintiffs, so as to preclude the imposition of sanctions, and/or limit the sanctions from and after January 31, 2005, that may be imposed against Plaintiffs' counsel; and/or

(b) whatever attorney fees were incurred by the Media Defendants, from and after January 31, 2005, were "self-inflicted", and therefore manifestly unreasonable.

1. AMENDED COMPLAINT - On or about January 5, 2005, the Plaintiffs filed a "tactical lawsuit" against the Media Defendants. The initial Complaint was amended on January 13, 2005, to include two additional John Doe Defendants. The objective of this litigation was to force the Media Defendants to take affirmative action to curtail the posting of misleading and defamatory postings by "wolfblittzer0" on the financial web site, Raging Bull, which is hosted the financial web site, hosted by Lycos, Inc.. The Amended Complaint is clear that Plaintiffs

did not believe the defamatory postings originated with the Media Defendants. Notwithstanding, the Plaintiffs believed and continue to believe, that the Media Defendants were in a position to compel the deletion of the offensive postings by the "Wolf Blitzer" impersonator, under "wolfblittzer0" screen name, because of the Media Defendants' ownership/proprietary interest in the "Wolf Blitzer" name.

2. MEDIA DEFENDANTS HAVE ACKNOWLEDGED THAT "RATIFICATION" OF THE PUBLICATION OF DEFAMATORY MATERIALS PROVIDES A BASIS FOR LIABIILTY FOR DEFAMATION – The Media Defendants have acknowledged, in their Motion To Dismiss, that "ratification" of a defamatory publication is an appropriate basis of extension of liability to a third party for defamatory materials authored by another, [DE 18, Motion To Dismiss @ 7]. Notwithstanding such concession, the Media Defendants assert in their Motion, that ratification is only appropriate where the party charged with ratification, is "a participant in the publication" and/or had "control" over the author of the defamatory materials, [DE 18, Motion To Dismiss @ 7]. As more fully set forth herein, the ownership of the celebrity mark, "Wolf Blitzer", includes the right to control the re-publication of the defamatory postings attributable to "wolfblittzer0".

3. FLORIDA LAW SUPPORTS COUNT II - The pertinent allegations of the Amended Complaint against the Media Defendants rely upon the legal rational of "ratification" of the initial publication by the Media Defendants, for imposition of vicarious liability against such Media Defendants for the repeated re-publication thereof, [DE 8, Paragraphs 24, 28, 31 & 33(a)] There is reasonable basis, under Florida law, for assertion of a claim for defamation,

based upon ratification of the content of the defamatory materials, which originated with another, *Franklin Life Insurance Co. v. Davy et al.*, 753 So.2d 581, 588 (1st DCA Fla. 2000). Counsel for the Plaintiffs was unaware of the *Franklin Life* at the time of the filing the Plaintiffs' Opposition to the Media Defendants Motion To Dismiss.

The law of defamation is also clear that re-publication of defamatory materials, over which a party has control, with knowledge of its falsity, is also basis for liability, even though the original authorship is attributable to another, *Norton et al. v. Glenn et al.*, 860 A.2d. 48 (Pa. 2004), cert denied . In *Norton*, the Pennsylvania Supreme Court reversed the trial court, which granted a publisher's motion for summary judgment, in respect to liability for re-publication of defamatory comments of another. The *Norton* Court held that the constitutional protection accorded to publishers did not insulate the publisher from liability for re-publication of defamatory materials where there "...is sufficient evidence to permit the conclusion that the defendant (publisher) in fact entertained serious doubts as to the truth of his publication.", citing *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1323 (1968), *Norton* @ 55. Under these circumstances, the re-publication of the defamatory materials "shows reckless disregard for the truth or falsity and demonstrates actual malice..."[2], *Norton* @ 55.

Since only the Media Defendants had a proprietary/ownership interest the "Wolf Blitzer" celebrity mark, they were the only parties having standing to seek such relief from Lycos, the publisher of the defamatory postings by the "Wolf Blitzer" impersonator. Accordingly, they were proper parties to this litigation. See *New York Stock Exchange v Gahary et al.*, 196 F.Supp.

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[2] The objectionable materials published and re-published by the "Wolf Blitzer" impersonator, "wolfblittzer0", are defamatory *per se*. Accordingly, the Media Defendants, to the extent they had control over the defamatory materials *per se*, and allowed such materials to be repeatedly re-published, their actions, or more accurately in this case, their ratification by inaction, "shows reckless disregard for the truth or falsity and demonstrates actual malice...", *Norton* @ 55.

2d 401 (S.D. N.Y. 2002) –enforcement of exclusive rights in celebrity name against internet poster; *Estate Of Elvis Presley v. Russen et al,* 513 F.Supp. 1339, 1351 (D. N.J. 1981) – standing to sue to enjoin unauthorized use of celebrity marks where there is an interest in the protection of the mark.

In the *New York Stock Exchange* litigation, the *Exchange* sought to permanently enjoin the use of the name of its chief executive office, Richard Grasso, CEO of the *New York Stock Exchange*, by a Grasso impersonator, on the Raging Bull web site hosted by Lycos, Inc. (the same financial web site involved in the instant litigation). At the time of the decision in the *New York Stock Exchange* case, Lycos had deleted the offensive posting and blocked/filtered their reappearance by the impersonator[3], *Gahary, Id.* @ 404. Notwithstanding, the *New York Stock Exchange* continued its pursuit of the impersonator, to secure injunctive relief, and thereby assure itself that the name of its CEO, and/or its organization, would no longer be used to disseminate information that could be attributable to it. Clearly, the screen name, in both the *New York Stock Exchange*, and in the instant litigation, are "proprietary" to their owners, the *New York Stock Exchange* and the Media Defendants, respectively. Thus, each of the *New York Stock Exchange*, and the Media Defendants, had the exclusive right to control the continued usage of the celebrity name, and to compel deletion of any postings, that were improperly associated by an impersonator, with their respective proprietary celebrity names. In the instant case, the Media Defendants' exclusive proprietary interests in the celebrity name, "Wolf Blitzer", provides the Media Defendants with the requisite control over the posting *per se*, associated with the impersonator "wolfblittzer0", so as empower them to compel Lycos to delete such postings. It is on of no moment that the Media Defendants did not participate in the initial

[3] It is UCSY's understanding that Lycos action to delete and block future postings was at the instigation of the *New York Stock Exchange.*

publication! It is of no moment that the Media Defendants did not control the web site on which such postings were published!

This Court's legal conclusion, that the Media Defendants lacked control over the postings appearing on the Raging Bull web, because they did not control the "publisher" [DE 45 @ 2] is, thus, counter intuitive, because the Media Defendants did indeed have the right to control the "publication" itself, that was associated with the celebrity Defendant, "Wolf Blitzer". Accordingly, the fact that the publication appeared on the Raging Bull web site, does not lead to either the factual determination and/or the legal conclusion by the Court, that this publication was beyond the control of the Media Defendants from and after the date of its initial distribution. To the extent that Media Defendants did, in fact, have control over the continued[4] publication of the content of such postings (which were defamatory *per se*), and their inaction, comprise acquiescence and ratification of the defamatory content of such postings. Accordingly, they are responsible for the harm to Plaintiffs caused by such repeated re-publication of postings attributable to "wolfblittzer0".

4. RULE 11(C)(2) PRECLUDES, OR ALTERNATIVELY, SEVERELY LIMITS THE AMOUNT OF AN AWARD OF ATTORNEY FEES TO THE MEDIA DEFENDANTS. – Rule 11(c)(2) provides, in pertinent part, that the Court, upon Motion by the allegedly aggrieved party, may award monetary sanctions, "Subject to the limitations in subparagraphs (A) & (B). Subparagraph (A) of Rule 11(c)" which limits such an award to "reasonable expenses an attorney fees incurred in presenting or opposing the motion." As more fully set forth herein, the attorney

[4] The Amended Complaint is very clear that there was no attempt to hold the Media Defendants responsible for the original publication, only the continued accessibility and re-publication thereof in the compilation of postings maintained by the publisher, Lycos,

fees, if any, to which the Media Defendants may claim entitlement, are reduced because on January 31, 2005, before any pleading was filed by them, and before any Rule 11 Notice was given, Counsel for the Plaintiffs communicated to Counsel for the Media Defendants, which was later confirmed in writing on the same day, the following:

> This letter shall simple confirm my request of your client to cooperate with the Plaintiffs in a common effort to curtail the "*wolfblittzer0*" postings that have and continue to populate the UCSY message board on the RAGING BULL web site. I assume that this objective is also in your client's interest.
>
> At a minimum, this cooperation would involve consent/stipulation to permit Plaintiffs' third party discovery of Lycos, and possible others, to ascertain the true identify of the poster and his associates. Whatever accommodation you and your client would require to minimize its participation and costs in this matter, would be acceptable to Plaintiffs, so long as not in conflict with any Court rule and/or order, (emphasis added)
>
> Faro letter to Jimenez, dated January 31, 2005, annexed hereto as Exhibit "1"

The Media Defendants did not respond to the Plaintiffs letter, and, thereafter, undertook a vigorous defense of a claim asserted in Count II of the Amended Complaint, which this Court has characterized a obviously frivolous, [DE 45]. One of the prongs underlying the policy of Rule 11 is the avoidance of burdening the Court with litigation that can be resolved, or alternatively, contained. This was precisely the objective of this January 31, 2005, communication counsel for the Media Defendants. This policy objective is further reflected in L.R. 7 of this District Court, requiring consultation and good faith effort to minimize Court involvement in matters that are best left to private resolution among counsel, and their respective clients. Whatever legal fees and costs were incurred by the Media Defendants after January 31, 2005, were "self-inflicted", *Pollution Control Industries Of America v. Van Gundy*, 21 F.3d 152, 156 (7th Cir. 1994). The 7th Circuit decision in *Pollution Control* recognizes that the

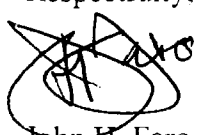
> "...party defending against a frivolous paper has a duty under Rule 11 to mitigate its legal fees and expenses by resolving frivolous issues quickly and efficiently . . . Further,

the Court must consider to what extent a defending party's injury could have been avoided or was self-inflicted. . . Id . @ 15 6

The pending litigation was of no consequence to the Media Defendants continued operation of its business, nor can it reasonably be characterized as requiring imminent attention (e.g. no pending Motion For Preliminary Injunctive Relief). Moreover, had the Media Defendants requested/insisted, Plaintiffs would have, on behalf of the Media Defendants, made whatever demands were necessary and appropriate on Lycos, Inc., to compel the deletion of the "wolfblittzer0" postings on the Raging Bull web site. Plaintiffs submit that such a demand on Lycos, Inc., by Media Defendants, for deletion of the "wolfblittzer0" postings, would have resulted in virtually immediate deletion of the offensive postings, and the subsequent blocking of "wolfblittzer0" from further posting under this celebrity screen name. UCSY would have regarded such cooperative effort as the legal equivalent of a retraction; and, thereafter, simply pursued relief whatever was available to it against the John Doe Defendants, (See above discussion of *New York Stock Exchange v Gahary et al.*, 196 F.Supp. 2d 401 (S .D. N.Y. 2002)).

In summary, the attorney fees incurred from and after January 31, 2005, were, thus, simply unnecessary; and, the expenditure thereof, from after that date, is analogous to a sporting event where the winning team engages in running up the score after the game is won. It does nothing to enhance the position of the winner. Quite the contrary, such practice reflects a lack of professionalism and character. The Court is free to draw its own conclusions, with respect to the actions of the Media Defendants and its counsel after January 31, 2005.

Respectfully,



John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiffs

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EXHIBIT "1"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

CASE NO. 05-20047-CIV-JORDAN/BROWN

UNIVERSAL COMMUNICATION SYSTEMS, INC. (A Nevada Corporation), MICHAEL J. ZWEBNER (individually) Plaintiffs	)
vs.	)
TURNER BPOADCASTING SYSTEM, INC. (Georgia Corporation), CABLE NEWS NETWORK, INC. (Georgia Corporation) & WOLF BLITZER (an Individual), JOHN DOE #1 *aka* "*wolfblittzer0*" & JOHN DOE #2 *aka* "royal_octavo") Defendants	)

NOTICE OF APPEAL OF COURT ORDER [DE 45] WHICH GRANTED THE MEDIA DEFENDANTS MOTION FOR RULE 11 SANCTIONS

The Plaintiffs, Universal Communication Systems, Inc. (herein also "UCSY") and Michael J. Zwebner (herein also "ZWEBNER") herein appeals to the United State Court Of Appeals for the 11th Circuit the District Court's Order entered on August 29, 2005, which granted the Media Defendants, Motion For Rule 11 Sanctions. A copy of this Order of August 29, 2005, is annexed to this Notice. Enclosed is a check in the amount of $255 for the Appeal Fee.

Respectfully,

John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiffs

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Miami, Florida 33130-1808
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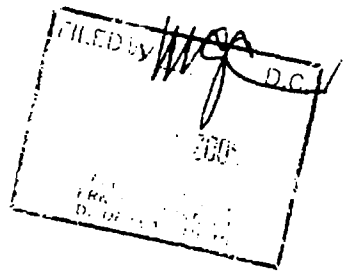
Court Order Of August 29, 2005 [DE 45]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-20047-CIV-JORDAN



UNIVERSAL COMMUNICATION SYSTEMS, INC., et al.,

Plaintiffs

vs.

TURNER BROADCASTING SYSTEM, INC., et al.,

Defendants

ORDER

On January 7, 2005, the plaintiffs filed a one-count complaint alleging a claim for defamation against the media defendants. *See* Compl. [D.E. 1]. The complaint alleges that a third party (not the media defendants) disseminated allegedly defamatory statements about the plaintiffs on the "Raging Bull" website allegedly operated by Lycos, Inc., who is not a defendant in this action. *See generally id.* On January21, 2005, the plaintiffs filed an amended complaint, containing the same defamation count against the media defendants, but adding a count for defamation against John Doe #1 and John Doe #2. *See* Am. Compl. [D.E. 8]. The John Does are not alleged to be related in any way to the media defendants. *See id.*

On February 7, 2005, the media defendants filed a motion to dismiss the amended complaint, [D.E. 17, 18], and on February 28, 2005, they filed a motion for attorneys' fees and sanctions, [D.E. 27]. On March 18, 2005, I dismissed the amended complaint for lack of subject matter jurisdiction, and alternatively for failure to state a claim upon which relief may be granted. *See* Order of Dismissal [D.E. 32]. I reserved judgment, however, on whether the media defendants would be entitled to attorneys' fees and/or sanctions under Rule 11. I now address the media defendants' motion for attorneys' fees and sanctions [D.E. 27], which is GRANTED.

"Rule 11 stresses the need for some prefiling inquiry." *See Worldwide Primates v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996). "Rule 11 sanctions are proper (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory

that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose." *See id.* (citations omitted). In the Eleventh Circuit, "a court confronted with a motion for Rule 11 sanctions first determines whether the party's claims are objectively frivolous – in view of the facts or law – and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been aware had he made a reasonable inquiry." *See id.* If the attorney failed to make a reasonable inquiry, then the court must impose sanctions despite the attorney's good faith belief that the claims were sound. *Id.* The reasonableness of the inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the violative document; or whether he depended on forwarding counsel or another member of the bar. *See id.*

Here, the plaintiffs' claim against the media defendants was objectively frivolous. As explained in the order of dismissal, the claim had no reasonable basis in fact or law. Indeed, the plaintiffs concede that the media defendants are "not the source or origin of the defamatory statements," and that the media defendants "[do] not host the Raging Bull web site, nor [are they] responsible for administration thereof." *See* Pl. Resp. Memo [D.E. 31] at 2. Further, the plaintiffs admit that their claims against the media defendants are "not based upon their origination of the defamatory posting, but rather seeks to hold [them] accountable for the misuse of [their] intellectual property . . ." *See id.* As set out in the order of dismissal, however, there is no legal basis under Florida law for the plaintiffs to sue the media defendants *for defamation* because they were not publishers of the defamatory statements. *See* Order of Dismissal at 4.

Furthermore, I conclude that the plaintiffs did not have a good faith basis for seeking an extension of currently existing law. *See Fox v Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (affirming grant of Rule 11 sanctions where the plaintiffs presented "no argument, let alone good faith argument" for the reversal or modification of existing law); *Di Sisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989) (affirming grant of Rule 11 sanctions because the plaintiffs' counsel failed to acknowledge that "the binding precedent of [the Eleventh] Circuit disfavored [the p]laintiffs' position on legislative immunity," and although counsel insisted that his position was warranted by the law of another circuit, he failed to make any argument that the Eleventh Circuit's

existing law should be extended to incorporate that position).

The next question, then, is whether the plaintiffs' counsel knew, or would have known upon a reasonable inquiry, that the claims were frivolous. I conclude that Mr. Faro failed to make a reasonable inquiry into the facts on which the plaintiffs' defamation claim was predicated. Had he made such a reasonable inquiry, he would have discovered that the plaintiffs' defamation claim against the media defendants was frivolous. Indeed, a reasonable inquiry into the law of defamation would have revealed that the fundamental elements of a defamation claim were lacking, and that there was no legal authority for recovery under any of the theories the plaintiffs alleged.

Under *Worldwide Primates*, my findings thus far mandate the award of sanctions against Mr. Faro. *See* 87 F.3d at 1254. Rule 11 sanctions are even more appropriate here, however, because there is evidence that the plaintiffs filed their amended complaint in bad faith or for improper purposes. *See id.*

As the media defendants have pointed out, the plaintiffs filed several other lawsuits against Lycos, Inc. and other third parties related to the web sites also at issue in this action. *See Universal Communication Systems, Inc., et al. v. Lycos, Inc., et al.*, Case No. 04-21618 (S.D. Fla.); *Universal Communication Systems, Inc., et al. v. Lycos, Inc., et al.*, Case No. 05-20149 (S.D. Fla.); *Zwebner, et al. v. Coughlin, et al.*, Case No. 05-20168 (S.D. Fla.). The media defendants are not named in these lawsuits. Significantly, however, the plaintiffs attached to the amended complaint a letter dated January 6, 2005 – a day or two after Lycos opposed the plaintiffs' motion to compel discovery – from Mr. Faro to Johnita Due, in-house counsel for CNN. In that letter (attached as Exhibit 3 to the first amended complaint), Mr. Faro states:

> [M]y clients believe that there are both political and business pressures that can be brought to bear by CNN/AOL upon Lycos to cause them to exercise responsible internet community citizenship and, once and for all, permanently deny access to their Raging Bull web sites by individuals whom they know are abusive and misuse their web services to manipulate securities and/or extortion.

This statement evinces that the plaintiffs filed their complaint in federal court for the sole underlying purpose of exerting "political and business pressures" upon a defendant in another lawsuit, and to obtain discovery it had been denied in the other cases. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1515 (11th Cir. 1991) ("Where . . . [the court has] no direct evidence of the party's and

counsel's state of mind, [the court] must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim."). Given the plaintiffs' lack of reasonable inquiry, and the statements in Mr. Faro's letter to one of the media defendants, I conclude that an ordinary person in the plaintiffs' and Mr. Faro's shoes would not have prosecuted this claim. On the record available to me, I find strong circumstantial evidence that the plaintiffs brought this defamation suit against the media defendants for an improper purpose.

For the foregoing reasons, and pursuant to Rule 11, the media defendants' motion for attorneys' fees and sanctions [D.E. 27] is GRANTED. In accordance with Rule 11(c)(2), the media defendants are entitled to their reasonable attorneys' fees and costs related to the defense of this action from plaintiffs' counsel. If the parties cannot agree as to the amount, the media defendants shall file a more detailed motion as required by Local Rule 7.3(B) by no later than September 10, 2005.

DONE and ORDERED in chambers in Miami, Florida, this 24th day of August, 2005.

Adalberto Jordan
United States District Judge

Copy to: Magistrate Judge Klein
All counsel of record

CERTIFICATE OF SERVICE

I hereby certify that the following pleading entitled:

NOTICE OF APPEAL OF COURT ORDER [DE 45] WHICH GRANTED THE MEDIA DEFENDANTS MOTION FOR RULE 11 SANCTIONS

was forwarded, this 22nd day of September, 2005, by First Class Mail, postage pre-paid, to the individuals named on the attached DISTRIBUTION LIST.

John H. Faro, Esq.

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Date 9/22/05

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EXHIBIT "2"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

CASE NO. 05-20047-CIV-JORDAN/BROWN

UNIVERSAL COMMUNICATION SYSTEMS, INC. (A Nevada Corporation), MICHAEL J. ZWEBNER (individually) Plaintiffs	)
vs.	)
TURNER BPOADCASTING SYSTEM, INC. (Georgia Corporation), CABLE NEWS NETWORK, INC. (Georgia Corporation) & WOLF BLITZER (an Individual), JOHN DOE #1 *aka* "*wolfblittzer0*" & JOHN DOE #2 *aka* "royal_octavo") Defendants	)

PLAINTIFFS' MOTION UNDER RULE 60
TO VACATE AND/OR MODIFY COURT ORDER OF AUGUST 29, 2005 [DE 45]

The Plaintiffs, Universal Communication Systems, Inc. (herein also "UCSY") and Michael J. Zwebner (herein also "ZWEBNER"), herein move under Rule 60 to Vacate and/or Modify The Order Of August 29, 2005, [DE 45], which granted the Media Defendants' *Motion For Rule 11 Sanctions* [DE 27] against its counsel.

The grounds asserted in support of this Motion are as follows:

(a) the Court has misapprehended the law[1] relative to the attribution of responsibility for a publication of another, to a third party, under whose name such publication is authored; and

[1] In Florida, "ratification" of the defamatory content of a publication is an alternative theory for imposition of vicarious liability, not considered by the Court; and, does not require any showing of apparent authority or agency, *Franklin Life Insurance Co. v. Davy et al.*, 753 So.2d 581 (1st CA Fla. 2000). The pleading in *Franklin Life* of the "ratification" theory for the imposition of vicarious liability for defamation parallels the allegations of the Amended Complaint [DE 8 , Paragraph 24], *Id.* @ 588 The *Franklin Life* Court explicitly held that "given appellee's

(b) the policy objectives of the "safe harbor" provision of Rule 11 have been observed by the Plaintiffs, so as to preclude the imposition of sanctions, and/or limit sanctions and/or an award of attorney fees from and after January 31, 2005, that may be imposed against Plaintiffs' counsel.

MEMORANDUM OF LAW

1. AMENDED COMPLAINT - On or about January 5, 2005, the Plaintiffs filed a "tactical lawsuit" against the Media Defendants. The initial Complaint was amended on January 13, 2005, to include two additional John Doe Defendants. The allegations of the Amended Complaint (Count II) are specific as to (a) the Media Defendants exclusive rights to the Wolf Blitzer mark and derivatives thereof, [DE 8 @ Paragraph 24], (b) the date when the Media Defendants are deemed to have knowledge of the existence of the defamatory materials, [DE 8 @ Paragraph 28]; (c) the natural consequences of such defamatory materials by "wolfblittzer0" upon UCSY business, [DE 8 @ Paragraph 31]; (d) the continued dissemination (re-publication) of the defamatory materials on the financial web site, Raging Bull, without objection of the Media Defendants, and, (e) the acquiescence and approval of the re-publication of such defamatory materials by the Media Defendants inaction, [DE 8 @ Paragraph 33(a)].

The Amended Complaint, thus, affirmatively alleges that the Media Defendants' ownership over the mark provides the requisite control over the defamatory materials, which are attributable, on the face of such publication, to the Media Defendants. The subsequent failure, through in action, to prevent the repeated re-publication of the defamatory postings, which originated from the impersonator, "wolfblittzer0", constitutes a ratification of such defamatory

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pleadings (of a claim for defamation based upon ratification)...there was no basis for instructing the jury on the alternative theory of apparent agency with respect to the defamation claim", *Id.* @ 588 (emphasis added).

materials, sufficient to legally justify the imposition of liability upon the Media Defendants, after notice and reasonable opportunity to act.

The objective of the Amended Complaint was, thus, to force the Media Defendants to take affirmative action to curtail the repeated re-publication of internet posting containing misleading and defamatory postings by "wolfblittzer0" on the financial web site, Raging Bull[2]. The Amended Complaint is clear that Plaintiffs did not believe, or assert, that the defamatory postings originated with the Media Defendants. Accordingly, the Plaintiffs sought to impose liability on the Media Defendants from and after the initial publication of the defamatory materials because of their ownership of the celebrity mark; however, not before the Media Defendants first learned of the impersonator, "wolfblittzer0". The Media Defendants inaction, upon learning of the impersonator, and the continued re-publication of the "wolfblittzer0" defamatory postings, thereafter, is asserted as the basis for imposition of liability.

2. FLORIDA LAW SUPPORTS COUNT II - The pertinent allegations of the Amended Complaint against the Media Defendants (Count II) rely upon the legal rational of "ratification" of the initial publication by the Media Defendants, for imposition of vicarious liability against such Media Defendants. The damages sought against the Media Defendants are based upon the continued re-publication of such defamation, from and after the date when the Media Defendants had knowledge of such publication..

There is reasonable basis, under Florida law, for assertion of a claim for defamation, based upon ratification of the content of the defamatory materials, which originated with another,

[2] This financial web site was hosted by Lycos, Inc., who was not a party to this litigation.

Franklin Life Insurance Co. v. Davy et al., 753 So.2d 581 (1st CA Fla. 2000). Counsel for the Plaintiffs did not discover, until recently, the *Franklin Life* decision[3].

Moreover, the Media Defendants also failed to addressed the "ratification" theory of liability in any of their papers before this Court, even though the Amended Complaint explicitly alleged the continued dissemination (re-publication) of the defamatory materials from and after the date of receipt of notice thereof from UCSY, [DE 8 @ Paragraph 20 ("continue to be published"); Paragraph 32 (have and continue to be disseminated"); Paragraph 33(a) (have and continue to be published and disseminated")].

The issue of "ratification" of the tortious actions of another, relative to legal theory of a pleading of a defamation claim, arose in *Franklin Life*, when the Circuit Court erroneously instructed the jury that liability was to be predicated on the theory of "apparent agency" of an employee for his employer, which was not specifically alleged in the pleadings. The District Court reversed, , in part, based upon the requirement that the jury instructions were required to track or parallel the ratification theory of the case, as evident from the explicit allegations of the complaint. The explicit allegations in complaint, which were held to be sufficient to assert ratification of defamatory materials, in *Franklin Life*, were as follows:

> 22. Defendant MURRAY published the defamatory statements in the actual performance of his duties relative to the sale of life insurance for the defendant Company.
>
> 23. Defendant COMPANY failed to take any remedial measures concerning the defamatory publication complained of herein and that failure constitutes acquiescence and ratification of Defendant Murray's intentional tortious conduct....*Id.* @ 588 (emphasis added).

[3] Neither the Media Defendants' Motion To Dismiss and/or its Reply to the UCSY Opposition, ever addressed the issue of liability resulting from the re-publication (continued dissemination) of the defamatory materials on the Raging Bull, financial web site.

Accordingly, in *Franklin Life*, the attribution of the defamatory materials to the Company, was presumed to be based the same legal theory, as asserted in the Amended Complaint, specifically, ratification by "acquiescence". This Court has never addressed the potential liability of the Media Defendants to UCSY based upon the repeated or continued re-publication of the defamatory materials, from and after the date the Media Defendants the initial publication of the defamatory materials by the impersonator. Moreover, this Court has never addressed, or considered the implication of ownership of the celebrity mark, in respect to the ability of the Media Defendants to control the re-publication of the defamatory materials, per se, which are associated with their proprietary celebrity mark.

As a direct incident to the ownership the celebrity mark, Wolf Blitzer, and derivatives thereof, including "*wolfblittzer0*", the Media Defendants necessarily have control/right to control the repeated re-publication of the defamatory materials (postings), *per se*, See *New York Stock Exchange v Gahary et al.*, 196 F.Supp. 2d 401 (S.D. N.Y. 2002).

In the *New York Stock Exchange* litigation, the *Exchange* sought to permanently enjoin the use of the name of its chief executive office, Richard Grasso, the CEO of the *New York Stock Exchange*, by a Grasso impersonator, on the Raging Bull web site hosted by Lycos, Inc. (the same financial web site involved in the instant litigation). At the time of the decision in the *New York Stock Exchange* case, Lycos had deleted the offensive posting and blocked/filtered their reappearance by the impersonator[4], *Gahary, Id.* @ 404. Notwithstanding, the *New York Stock Exchange* continued its pursuit of the impersonator, to secure injunctive relief, and thereby assure itself that the name of its CEO, and/or its organization, would no longer be used to disseminate information that could be attributable to it. Clearly, the screen name, in both the

[4] It is UCSY's understanding that Lycos took action to delete and block future postings at the instigation of the *New York Stock Exchange.*

New York Stock Exchange, and in the instant litigation, are "proprietary" to their respective owners, the *New York Stock Exchange* and the Media Defendants.. Thus, each of the *New York Stock Exchange,* and the Media Defendants, had the exclusive right to control the continued usage of the celebrity name, and to compel deletion of any postings to prevent their re-publication, that were improperly associated by an impersonator, with their respective proprietary celebrity names. The inaction by the Media Defendants to act, under the facts of this case, reinforces the implication that the Media Defendants intended to harm UCSY and its management[5].

In summary, it is of no moment to an analysis of the attribution of liability, *vel non*, based upon a re-publication of the defamatory materials that the Media Defendants did not participate in the initial publication! It is of no moment to an analysis of the attribution of liability, *vel non*, based upon a re-publication of the defamatory materials, that the Media Defendants did not control the web site on which such defamatory publication first appeared!

This Court's legal conclusion, that the Media Defendants lacked control over the postings appearing on the Raging Bull web, because they did not control the "publisher" [DE 45 @ 2] is, thus, counter intuitive, because the Media Defendants did indeed control the defamatory materials *per se*, by virtue of the association thereof with their celebrity Defendant, Wolf Blitzer.

---

[5] Where the offensive materials are defamatory *per se*, the party responsible for re-publishing such offensive materials, is also liable for defamation where "...there is sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice, *Norton v. Glenn et al.*, 860 A.2d 48 (Pa. 2004), cert. denied

3. RULE 11(C)(2) PRECLUDES, OR ALTERNATIVELY, SEVERELY LIMITS THE AMOUNT OF AN AWARD OF ATTORNEY FEES TO THE MEDIA DEFENDANTS. – Rule 11(c)(2) provides, in pertinent part, that the Court, upon Motion by the allegedly aggrieved party, may award monetary sanctions, "Subject to the limitations in subparagraphs (A) & (B). Subparagraph (A) of Rule 11(c)" which limits such an award to "reasonable expenses an attorney fees incurred in presenting or opposing the motion." As more fully set forth herein, the attorney fees, if any, to which the Media Defendants may claim entitlement, are reduced because on January 31, 2005, before any pleading was filed by them, and before any Rule 11 Notice was given, Counsel for the Plaintiffs communicated to Counsel for the Media Defendants, which was later confirmed in writing on the same day, the following:

> This letter shall simple confirm my request of your client to cooperate with the Plaintiffs in a common effort to curtail the *"wolfblittzer0"* postings that have and continue to populate the UCSY message board on the RAGING BULL web site. I assume that this objective is also in your client's interest.
>
> At a minimum, this cooperation would involve consent/stipulation to permit Plaintiffs' third party discovery of Lycos, and possible others, to ascertain the true identify of the poster and his associates. Whatever accommodation you and your client would require to minimize its participation and costs in this matter, would be acceptable to Plaintiffs, so long as not in conflict with any Court rule and/or order, (emphasis added)
>
> Faro letter to Jimenez, dated January 31, 2005, annexed hereto as Exhibit "1"

The Media Defendants did not respond to the Plaintiffs letter, and, thereafter, undertook a vigorous defense of a claim asserted in Count II of the Amended Complaint, which this Court has characterized a "objectively frivolous", [DE 45]. One of the prongs underlying the policy of Rule 11, is the avoidance of burdening the Court with litigation that can be resolved, or alternatively, contained. This was precisely the objective of this January 31, 2005, communication counsel for the Media Defendants. This policy objective is further reflected in

L.R. 7.1 of this District Court, requiring consultation and good faith effort to minimize Court involvement in matters that are best left to private resolution among counsel, and their respective clients.

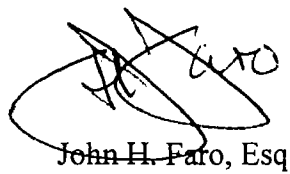
Whatever legal fees and costs were incurred by the Media Defendants from and after January 31, 2005, were "self-inflicted", *Pollution Control Industries Of America v. Van Gundy*, 21 F.3d 152, 156 (7th Cir. 1994). The 7th Circuit decision in *Pollution Control* recognizes that the

> "...party defending against a frivolous paper has a duty under Rule 11 to mitigate its legal fees and expenses by resolving frivolous issues quickly and efficiently...Further, the Court must consider to what extent a defending party's injury could have been avoided or was self-inflicted...Id. @ 156

The pending litigation was of no consequence to the Media Defendants continued operation of its business, nor can it reasonably be characterized as requiring imminent attention (e.g. no pending Motion For Preliminary Injunctive Relief). Moreover, had the Media Defendants requested/insisted, Plaintiffs would have, on behalf of the Media Defendants, made whatever demands were necessary and appropriate on Lycos, Inc., to compel the deletion of the "wolfblittzer0" postings on the Raging Bull web site. Plaintiffs submit that such a demand on Lycos, Inc., by Media Defendants, for deletion of the "wolfblittzer0" postings, would have resulted in virtually immediate deletion of the offensive postings, and the subsequent blocking of "wolfblittzer0" from further posting under this celebrity screen name. UCSY would regarded such cooperative effort as the legal equivalent of a retraction; and, thereafter simply pursued relief whatever was available against the John Doe Defendants (See *New York Stock Exchange v Gahary et al.*, 196 F.Supp. 2d 401 (S.D. N.Y. 2002)).

L.R. 7.1 Attorney Certification – Prior to the filing of the instant *Motion* the met with counsel for Media Defendants, Adolfo Jimenez, Esq., on September 13, 2005, pursuant to this Court's Order and L.R. 7.3B, and apprised him of the undersigned's intent to rely upon the January 31, 2005, letter (Exhibit "1") in opposition to the Media Defendants demands for attorney fees. The Counsel for the parties also discussed possible compromise of the Media Defendants claims for attorney fees, based upon the enclosed January 31, 2005, correspondence. Insofar no agreement was reached, USCY is forced to bring this matter to the attention of the Court.

Respectfully,



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Attorney For Plaintiffs

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EXHIBIT "1"

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44 West Flagler Street – Suite 1100
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*John H. Faro**

**Registered Patent Attorney*

Telephones: *(305) 424-1112*
Facsimile: *(305) 424-1114*
Cellular *(305) 761-6921*

January 31, 2005
Via Facsimile (305)789-7799

Adolfo E. Jimenez, Esq.
Holland & Knight, LLP
701 Brickell Avenue
Suite 3000
Miami, FL 33131

Dear Mr. Jimenez:

Re: Confirmation Of Teleconference Of January 31, 2005
Universal Communication Systems, Inc. et al v. Turner Broadcasting System, Inc. et al, Case No. 05-20047-CIV-JORDAN/BROWN

This letter shall simple confirm my request of your client to cooperate with the Plaintiffs in a common effort to curtail the *"wolfblittzer0"* postings that have and continue to populate the UCSY message board on the RAGING BULL web site. I assume that this objective is also in your client's interest.

At a minimum, this cooperation would involve consent/stipulation to permit Plaintiffs' third party discovery of Lycos, and possible others, to ascertain the true identify of the poster and his associates. Whatever accommodation you and your client would require to minimize its participation and costs in this matter, would be acceptable to Plaintiffs, so long as not in conflict with any Court rule and/or order.

Sincerely,

John H. Faro

cc: Michael Zwebner

Mr. Michael Zwebner
The Green Diamond Building
4775 Collins Avenue - Suite 4104
Miami Beach FL 33140

CERTIFICATE OF SERVICE

I hereby certify that the following pleading entitled:

**PLAINTIFFS' MOTION UNDER RULE 60
TO VACATE AND/OR MODIFY COURT ORDER OF AUGUST 29, 2005 [DE 43]**

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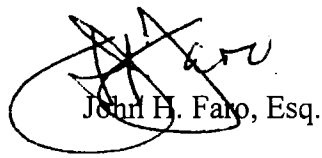

John H. Faro, Esq.

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PLAINTIFFS' OPPOSITION TO MEDIA DEFENDANTS' VERIFIED MOTION FOR ATTORNEY FEES

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John H. Faro, Esq.

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