

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CBS BROADCASTING INC., et al.,

Plaintiffs,

v.

FILMON.COM, INC.,

Defendant.

Case No. 1:10-cv-7532-NRB

**REPLY IN SUPPORT OF MOTION TO COMPEL COMPLIANCE
WITH SECTION 5.3 OF THE SETTLEMENT AGREEMENT**

Section 5.3 of the Settlement Agreement (the “Agreement”) required FilmOn’s principal, Mr. Alkiviades David, to discontinue any activity that supported, promoted, or encouraged participation in the lawsuit he had initiated against CBS Interactive Inc. (the “California Action”) “*in any way.*” See Agreement at § 5.3 (emphasis supplied). Despite this express obligation, Mr. David has refused to take down material he posted on the Internet supporting, promoting, and encouraging participation in the California Action. Mr. David argues that he has no obligation to remove materials posted before he signed the Agreement because removing it would be unduly burdensome and violate his First Amendment rights. As explained below, however, removal of this material is required by the Agreement, imposes virtually no burden, and does not impinge upon any First Amendment rights.

ARGUMENT

I. CBS Is Not Required To File a Separate Action to Enforce its Rights

As an initial matter, Mr. David argues that the Court lacks jurisdiction to enforce the Agreement and that Section 4.3 of the Agreement requires CBS to bring a separate action for breach of contract. Opp. at 4. That is incorrect. Section 4.4 of the Agreement provides: “The

Court shall retain continuing jurisdiction over the Parties and the above captioned action to enforce this Agreement and the Stipulated Consent Judgment and Permanent Injunction entered in connection therewith.” Agreement § 4.4. Section 4.3 provided plaintiffs a limited right to sue or repudiate the Agreement in the event FilmOn failed to pay the \$1.6 million required by the Agreement. *See* Agreement § 4.3. That section, however, does not limit the Court’s ability to enforce the Agreement in the event of a breach, and does not require CBS to file a new complaint. The Court has already so stated: “There is no question that this Court retains jurisdiction over this action to enforce the parties’ settlement agreement. *See* Stipulated Consent Judgment and Permanent Injunction ¶ 4; Settlement Agreement ¶ 4.4.” Letter from the Hon. Judge Buchwald dtd. March 19, 2013.

II. Section 5.3 of the Agreement Requires Removal of All Material That Supports the California Action and Such Removal Does Not Impose an Undue Burden

Section 5.3 of the Agreement prohibits Mr. David’s participation, support, promotion, or encouragement of the California Action in any way. Nevertheless, the CBS plaintiffs were able to identify at least five websites that plainly support, promote, and encourage participation in the California Action. For example, the website at <<http://www.cbsyousuck.com>> provides a form that enables visitors to that site to participate in the California Action. The inflammatory anti-CBS material on the other websites identified by the CBS parties similarly supports, promotes, and encourages participation in the California Action--the very conduct specifically addressed by Section 5.3 of the Agreement.

Mr. David does not contest any of this. Instead, he argues he has no obligation to remove material that he posted on the Internet before the Agreement was signed, and that it would be burdensome for him to remove it. But the Agreement by its terms was not limited to Mr. David’s removal of material posted on the Internet after the Agreement was signed. Indeed, it was the

inflammatory material already posted on the Internet that was the reason for the broad language in Section 5.3.

As for burden, Mr. David can remove this material in a manner of minutes. He knows exactly where the material is, since he is the one who posted it on various websites and he is the one who controls those websites.

III. Mr. David Has Provided Insufficient Support for His Claim that He Has Ceased Funding the California Action

Mr. David points to his withdrawal as a plaintiff in the California Action and a self-serving declaration that he has ceased funding the claimants in that action. But Mr. David, who conceived, originated, and promoted the California Action, has not provided copies of any of the documentation setting out how the litigation was and is being funded. Mr. David's counsel acknowledged the existence of such materials during the May 2, 2013 conference call with the Court, but has not shared any of it. Absent such documentation, CBS has no way to know whether Mr. David is, in fact, complying with the obligation under Section 5.3 to cease funding the California Action.

IV. IV. Compliance with Section 5.3 Does Not Violate Mr. David's First Amendment Rights

CBS recognizes the importance of free speech, including pointed and critical speech. But that does not entitle a litigant who has agreed, as part of a settlement, to discontinue support of a lawsuit to disregard that settlement agreement and continue to promote that lawsuit.

CONCLUSION

CBS respectfully requests that the Court enter an order requiring Mr. David to remove promptly all content from the sites listed in CBS' Motion because they violate the terms of the Agreement, and all remaining material inconsistent with his obligations under Section 5.3 of the Agreement. In addition, counsel for Mr. David should promptly provide CBS with the written

materials identified during the May 2, 2013 conference call that allegedly establish that Mr. David is no longer providing financial support to the California Action claimants. Finally, CBS respectfully requests that the Court award CBS its fees and costs incurred in connection with this motion pursuant to Section 12 of the Agreement.



By: _____

Peter L. Zimroth
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000
peter.zimroth@aporter.com

-- and --

Robert Alan Garrett
Hadrian R. Katz
C. Scott Morrow
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
robert.garrett@aporter.com
hadrian.katz@aporter.com
scott.morrow@aporter.com

Counsel for CBS Broadcasting Inc.

Dated: July 29, 2013

CERTIFICATE OF SERVICE

This is to certify that on this the 29th day of July 2013 I served the foregoing on the following parties via electronic mail:

Ryan Baker, Esq.
Jaime Marquart, Esq.
10990 Wilshire Blvd, Fourth Floor
Los Angeles, CA 90024

rbaker@bakermarquart.com
jmarquart@bakermarquart.com

424.652.7800 tel
424.652.7850 fax

Counsel for FilmOn.Com, Inc. and Mr. Alkiviades David

ARNOLD & PORTER LLP



C. Scott Morrow