

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

PARK WEST GALLERIES, INC.,  
a Michigan corporation,

Plaintiff/Counter-Defendant,

Case No. 2:08-CV-12247

v.

Hon. Lawrence P. Zatkoff  
Mag. Virginia M. Morgan

GLOBAL FINE ART REGISTRY, L.L.C.,  
an Arizona limited liability company

Defendant/Counter-Plaintiff/  
Third-Party Plaintiff

and

THE SALVADOR DALI GALLERY,  
INC., a Nevada corporation, THERESA  
FRANKS, an ARIZONA resident, and  
BRUCE HOCHMAN, a California resident,

Defendants.

and

GLOBAL FINE ART REGISTRY, L.L.C.,  
an Arizona limited liability company,

Third-Party Plaintiff

v

BERNARD EWELL, an individual

Third-Party Defendant

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**GLOBAL FINE ART REGISTRY'S RESPONSE TO THIRD PARTY DEFENDANT  
BERNARD EWELL'S MOTION TO DISMISS UNDER RLE 12(B)(6)**

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**GLOBAL FINE ART REGISTRY'S RESPONSE TO THIRD PARTY DEFENDANT  
BERNARD EWELL'S MOTION TO DISMISS UNDER RULE 12(B)(6)**

Global Fine Art Registry (hereinafter "FAR" or "Fine Art Registry"), for its Response to Third-Party Defendant Bernard Ewell's Motion to Dismiss Under Rule 12(b)(6), respectfully requests that this Court deny Ewell's Motion. This Response is supported by the attached Brief and by Michigan and federal state, statutory and common law and the Federal Rules of Civil Procedure.

Respectfully Submitted,

KAUFMAN, PAYTON & CHAPA

Date: October 28, 2009

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BERNARD EWELL, an individual

Third-Party Defendant

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**BRIEF IN SUPPORT OF GLOBAL FINE ART REGISTRY'S RESPONSE TO THIRD  
PARTY DEFENDANT BERNARD EWELL'S MOTION TO DISMISS UNDER RULE  
12(B)(6)**

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**STATEMENT OF ISSUES PRESENTED**

1. Whether Global Fine Art Registry (FAR) states a claim for defamation against Third-Party Defendant Bernard Ewell when the published statements of Mr. Ewell about FAR: (1) meet the test for defamation; and (2) are not protected statements of opinion.
2. Whether Third-Party Plaintiff FAR's claims for Tortious Interference, Interference with Business Advantage, and Conspiracy should be dismissed when: (1) they were properly pled; (2) Ewell has not provided justification for dismissing the claim for defamation; (3) these claims are not entirely based upon the enumerated defamatory statements made by Ewell; and (4) this Court has already determined that these causes of action are not dependant on sustaining a cause of action for defamation.

**CONTROLLING OR MOST APPROPRIATE AUTHORITY**

**Issue No. 1:**

Fed.R.Civ.P. 12(b)(6)

*Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995)

*Kefgen v Davidson*, 241 Mich. App. 611, 617 (2000)

*Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich. App. 317, 328 (1995)

*Ulrich v John Shilling*, unpublished per curiam, issued July 8, 2003 (Docket No. 23797)

*Milkovich v Lorain Journal Co*, 4797 U.S. 1, 17-20 (1990)

*Locricchio v Evening News Association*, 438 Mich 84 (1991)

**Issue No. 2:**

Judge Zatkoff's Opinion and Order, August 3, 2009; *Park West Galleries, Inc. v Global Fine Art Registry, et. al.*

## I. INTRODUCTION

Park West Galleries, Inc. (“Park West”) initiated this action alleging various claims against Defendant/Third-Party Plaintiff Global Fine Art Registry, L.L.C. (hereinafter “FAR” or “Fine Art Registry”). Park West has also named other parties in this, and the consolidated action, Case No. 2:08-cv-12474, *Park West Galleries, Inc. v David Charles Phillips*. The gist of both actions is that FAR and Phillips have defamed Park West and interfered with its economic advantage. This Complaint is one of many filed by Park West against its critics. Park West has sued FAR in a number of forums, in an attempt to burden and intimidate FAR with legal bills and silence FAR’s reporting on Park West questionable, and likely criminal business activities (explained below).<sup>1</sup> In addition to the lawsuits, Park West, and others, including Third-Party Defendant Bernard Ewell (who is on the Park West’s payroll and who has a financial interest in making sure Park West’s business practice remain unchallenged) have engaged in a smear campaign against FAR in the media and elsewhere.

In response to Park West’s Complaint and subsequent Amended Complaint in this case, FAR filed a counterclaim. By way of that Counterclaim, FAR alleges that Park West and its agents, including Bernard Ewell, have defamed FAR and interfered with FAR’s economic advantage. In addition to that Counterclaim, FAR filed a Third-Party Complaint naming Bernard Ewell as a Third-party Defendant (Docket No. 118, Amended Third-Party Complaint).<sup>2</sup>

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<sup>1</sup> Upon information and belief Park West is currently under investigation by at least two federal governmental agencies related to its questionable business activities.

<sup>2</sup> The Third-Party Complaint against Ewell arguably could have been characterized by FAR as a Counter-Claim under which Ewell is joined as Counter-Defendant under the Permissive Joinder Rule as set forth in Fed. R. Civ. P. 20(a).

The Third-Party Complaint filed against Ewell is sounding in (I) Defamation; (II) Tortious Interference; (III) Interference with prospective Business Advantage; and (IV) Conspiracy. Contrary to Third-Party Defendant Ewell's unsubstantiated claims in his recently filed Motion to Dismiss, the Third-Party Complaint was filed for an entirely proper purpose of holding Ewell responsible for his defamatory statements made about FAR, and to seek justice for Ewell's active and wrongful collusion and participation with Park West in the unjustified smear campaign waged against FAR.

The Ewell/Park West campaign to damage and drive FAR out of business results from FAR's reporting on various concerns that have been raised with Park West's business practices by a number of individuals. Through its reporting, FAR has conclusively shown that Park West has defrauded individuals, and the public at large by selling many thousands of Dali prints with forged Dali signatures to unsuspecting victims, thus raking in millions of dollars in profit.<sup>3</sup> Ewell was an active participant in this scheme, having been on the Park West payroll (making a large sum of money) in exchange for rendering favorable authentication opinions on the artwork.<sup>4</sup> Ewell wanted to keep getting paid by Park West, and keep the business flowing, so he conspired with Park West to damage FAR, leading to this Third-Party lawsuit.<sup>5</sup>

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<sup>3</sup> Park West Galleries, Inc. has also been accused of other "bad acts" by FAR related to other artwork and artists.

<sup>4</sup> Two world-recognized Dali authorities, a professor of art at Michigan State, and a well-respected forensic document examiner (and handwriting expert) have all determined that Park West has sold Dali prints with fraudulent Dali signatures, and that Ewell wrongfully had authenticated the art prior to Park West selling it to unsuspecting art-buying victims.

<sup>5</sup> Park West is also facing six recently filed class action lawsuits for the sale of fraudulent artwork. (4 filed in the United States District Court for the Eastern District of Michigan). Park West is also the subject of six class action lawsuits: *Alleman et al v. Park West Galleries, Inc. et*

While Ewell is listed as a Dali expert for Park West in this matter, the causes of action in the Third-Party Complaint against Ewell are in no way based upon any “expert” testimony he has rendered or any of his “expert opinions.” The complaint is based upon Ewell’s defamatory statements on a blog he publishes online for the world to see, Ewell’s statements to FAR customers and the general public (not just on his blog, but also in e-mails, telephone calls, and elsewhere), Ewell’s planning and collusion with Park West and others to damage FAR, and the resulting effects on FAR’s reputation, and business. Ewell’s defamation and other actionable conduct preceded the initial complaint, and continue to this day. Ewell’s defamatory writings were not “an opinion on the basis of, and in the context of, a pending court proceeding in which he is serving as an expert witness” as claimed in Ewell’s Motion to dismiss because: (1) Ewell’s defamatory statements are phrased as fact, and not opinion; (2) Ewell makes defamatory comments unrelated to the current litigation; and (3) Ewell is subject to a protective order related to his expert opinions based upon confidential information in this case and therefore there cannot be a claim by Ewell that Ewell has been writing on his blog in his capacity as an expert in this matter.

FAR has sufficiently pled causes of action against Ewell. There is no justification for dismissal of those claims, or for removing him from this case, as will be more fully explained

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*al* - filed July 22, 2009; *Mullen v. Park West Galleries, Inc., et al* - filed July 24, 2009; *Hatter v. Park West Galleries, Inc. et al* - filed July 29, 2009; *Bohm v. Park West Gallery, Inc. et al* - filed April 13, 2009; *Blackman v. Park West Galleries, Inc et al* - filed September 2, 2008 (Washington); *Bouverat v. Park West Gallery, Inc.* - filed June 20, 2008 (Florida). It is likely that Ewell will be added as a Defendant to all or some of these cases (100 John Doe Defendants are now named).

throughout this Brief in Support. Therefore, Third-Party Defendant Bernard Ewell's Motion to Dismiss should be denied.

## II. FACTUAL BACKGROUND

FAR operates a website that sells to artists and art owners a tagging system that allows them to protect their works against acts of fraud.<sup>6</sup> FAR also provides regular commentary and reporting on issues of interest to the art world. Approximately two years ago, FAR learned that some of the customers of Park West Gallery, Inc. ("Park West") who had bought artwork from Park West on cruise ships had made claims of fraudulent and unethical dealings by Park West, particularly with respect to purchases of artwork by Salvador Dali. FAR researched these issues and cases and published several articles and case studies discussing individual complainants and related controversies. FAR also learned and reported on the fact that Bernard Ewell, a self-described Salvador Dali expert appraiser who has never met the artist and whose services are not used by any reputable auction house, was falsely authenticating supposedly thousands of Dali prints sold by Park West that bore fraudulent Dali signatures in exchange for big payouts and being on their payroll.

In response to this reportage, and a threat to their fraudulent activities, Park West, Ewell and others who have a financial interest in continuing their activities unabated have orchestrated a campaign to sue and oppress FAR and anyone associated with it, including David Charles Phillips, who has authored articles on the Fine Art Registry website. One prong of this campaign

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<sup>6</sup> Unless otherwise ascribed, the facts set forth in this Brief are supported by the Counterclaim and Third-Party Complaint.

is to file lawsuits against FAR in multiple states - one of which initiated the current lawsuit.<sup>7</sup> In addition, Park West and Ewell have engaged in a smear campaign by against FAR by making derogatory comments to FAR customers, publishing defamatory comments on the internet, and taking other actions to conspire against and hurt FAR with the goal of silencing it and running FAR out of business.

On June 18, 2009, Park West filed a Motion to Amend its Complaint in this case. (Docket No. 75). Park West's Motion asked for three new parties to be added to the case: (1) Global Fine Art Registry, L. L. C. (and for the previous party, Fine Art Registry, to be removed from the case); (2) Theresa Franks, the CEO of FAR; and (3) The Salvador Dali Gallery. Defendants filed a Response to that Motion asking that the proposed amendment be denied, but, in the alternative, asking for an extension of the scheduling order so that additional discovery could be conducted, counter-claims could be made and third-party claims could be asserted. (Docket No. 80). On August 3, 2009, this Court granted Park West's Motion to Amend, and extended the scheduling Order. (Docket No. 105).

On August 7, 2009, Park West filed its Amended Complaint. (Docket No. 108). In response, Global Fine Art Registry filed a Counter-Complaint against Park West, and a Third-Party Complaint against Bernard Ewell. (Docket No. 117; also see Docket No. 118, Amended Third-Party Complaint). The cases against Park West and Ewell are very similar, both consisting

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<sup>7</sup> A lawsuit brought by Park West against FAR was dismissed in the U.S. District Court for the Southern District of Florida. A Third-Party lawsuit filed by Park West against FAR is currently pending in Michigan's Oakland County Circuit Court.

of the same causes of action<sup>8</sup>, and both stemming from their conspiracy and participation in the smear campaign against FAR. The Counter-Complaint against Park West and the Third-Party Complaint against Ewell involve nearly identical issues of law and fact. FAR, therefore, brought them both in this case.

In response to the Third-Party Complaint (and Amended Complaint), Third-Party Defendant Ewell filed a Motion to Dismiss on October 8, 2009, asking this Court to dismiss the Third-Party Complaint against him. Ewell's rationale for dismissal can be summarized as follows: (1) Ewell claims his derogatory statements about FAR on his blog were not defamatory; and (2) Ewell asserts that all other causes of action in the Amended Complaint should be dismissed if the defamation claim is dismissed. Neither rationale is valid, as evidenced by the case law and arguments below, in addition to this Court's rulings on identical issues. For these reasons, more specifically explained throughout this Brief in Support, Ewell's Motion to Dismiss should be denied.

### **III. STANDARD OF REVIEW**

Third-Party Defendant Ewell filed his Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), for an alleged "failure to state a claim upon which relief can be granted." When considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "the district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and

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<sup>8</sup> The counter-complaint against Park West by FAR has one additional cause of action sounding in the Lanham Act for Park West's violation of FAR's federally protected trademarks.

determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.” *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). In order to defeat a motion to dismiss, the opposing party must allege sufficient facts in the complaint, as to each material element, so that a decision in his favor is conceivable under the legal theory he advances. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988).

**IV. GLOBAL FINE ART REGISTRY HAS STATED A CLAIM AGAINST EWELL FOR DEFAMATION, AND THEREFORE EWELL’S MOTION SHOULD BE DISMISSED**

*A. Law*

The statements made by Ewell on his blog, as enumerated above, are clearly defamation of a business. Defamation requires proof of four elements: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm . . . or the existence of special harm caused by publication . . ." *Kefgen v Davidson*, 241 Mich. App. 611, 617 (2000).<sup>9</sup> Furthermore, a corporation that operates for profit may assert a defamation action if "the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it." *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich. App. 317, 328 (1995), quoting *Heritage Optical Center, Inc v Levine*, 137 Mich. App. 793, 797 (1984).

FAR has sufficiently alleged a cause of action against Ewell sounding in Defamation. In the Amended Third-Party Complaint, FAR sufficiently lays out the statements published by

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<sup>9</sup> FAR and Ewell both agree that Michigan law applicable to defamation is controlling.

Ewell which FAR believes are defamatory. FAR also indicates that these statements were made available by Ewell to a world-wide audience on his blog, that the statements were untrue, and not privileged, and that Ewell made them with actual knowledge of the falsity of the statements as well as with malice. Further, FAR asserted that the defamatory statements caused damage to the company. Thus, FAR has sufficiently pled a cause of action sounding in defamation.

***B. Third-Party Defendant Bernard Ewell's Statements Identified in Paragraphs 27, 28, 31a, 34a, 35c of the Amended Complaint are actionable defamation***

*i. Specific Case Law*

In *Lyn Ulrich v John Shilling*, unpublished per curiam, issued July 8, 2003 (Docket No. 23797) (Exhibit A), the Michigan Court of Appeals dealt with issues of whether a statement was defamatory, or whether it was merely inflammatory, but protected "opinions." In *Ulrich*, the defendant was recalled as township supervisor; a process set in motion by an unflattering petition. Subsequently, plaintiff and defendant ran for township supervisor in a primary election, which plaintiff won. Before the general election, defendant placed an advertisement in a free local publication which aimed to discourage citizens from voting for plaintiff in the general election. The advertisement included the statement, "I [defendant] already know he [plaintiff] is a liar. All the things he said about me to get me out of office were not true, just to get me out so he could get in, POWER."

The trial court determined that defendant was guilty of defaming plaintiff. On appeal, defendant argued that the trial court incorrectly concluded that defendant had made a defamatory comment about plaintiff. Defendant argued that his characterization of plaintiff as a "liar" was a protected opinion or just a "rhetoric hyperbole" that was not actionable. On appeal, the Court

affirmed the ruling of the trial court, and rejected defendant's argument that calling plaintiff a liar was not defamatory.

In its analysis, the Court of Appeals noted that "The United States Supreme Court has rejected the idea that all statements of opinion are protected..."<sup>10</sup> The *Ulrich* Court notes that in *Milkovich v Lorain Journal Co*, 4797 U.S. 1, 17-20 (1990), the U.S. Supreme Court "distinguished the actionable statement, 'In my opinion Mayor Jones is a liar,' from the nonactionable statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin.'" The Lyn Court opined that the distinction was between "an objectively verifiable event in the former case and a subjective assertion in the latter."

The Court of Appeals concluded its analysis by writing that:

Read in context, the defendant's "liar" statement asserts that plaintiff told untruths about defendant in the 1997 petition. We find that this statement is capable of defamatory meaning because plaintiff could prove that he did not speak untruths about defendant. [...] In addition, we believe a reasonable person would understand defendant's "liar" statement as describing actual facts, rather than being mere rhetoric, as defendant suggests. Thus, the trial court did not err in concluding that the statement was actionable.

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<sup>10</sup> In Ewell's Motion to Dismiss, he falsely attempts to claim that: (1) his statements are his opinion; and (2) that no opinion can be defamatory. In reality, Ewell couches his blog writings as statements of fact, and according to the Supreme Court, and the case law cited below Ewell's statements that FAR "lies" and similar statements imputing untruthfulness to FAR are not protected even if allegedly only an opinion.

Many of the statements made by Bernard Ewell, as stated in the Third-Party Complaint are similar to the statements made by the defendant in *Ulrich*, supra. For the same reasons given by the *Ulrich* Court, those statements in which Ewell calls FAR a “liar” or a similar adjective are thus actionable defamation.

*ii. Ewell Statements Using the Terms Liar, or Stating that FAR tells lies are actionable defamation*

Third-Party Defendant Ewell, in his attempt to smear FAR, and bring it into disrepute, has explicitly published that FAR lies, or is a liar. For example, the following statements made by Ewell, and identified in the Amended Complaint make this false and insulting claim:

<u>Paragraph of Amended Complaint</u>	<u>Defamatory Statement by Ewell</u>
27	“This blog will share a great deal of information about...the <b>fallacious charges</b> posted on Fine Art Registry...” <sup>11</sup>
28	“...the <b>lies</b> posted on Fine Art Registry...”
30	“...Park West is being relentlessly attacked by you [ed: referring to Bruce Hochman] and your pseudo-independent stooge Fine Art Registry and you do so with <b>lies</b> and innuendo.”
31a	“Unfortunately for them [ed: meaning Park West Galleries, Inc.]...they have become infamous of late. This is due in large part of scurrilous postings relying heavily on <b>lies</b> by a dangerous blog hosted by the bogus Fine Art Registry. [...]”
32a	“[...] The source of the attacks is California “dealster” Bruce Hochman who uses Fine Art Registry (FAR) as his mouthpiece for <b>posting false and defamatory</b> charges on the Internet.” <sup>12</sup>

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<sup>11</sup> “Fallacious” is defined by Merriam-Webster’s Online Dictionary as: “tending to deceive or mislead.” <http://www.merriam-webster.com/dictionary/fallacious>

34a “It’s beginning to look as if I’ll be forced to file lawsuits against...Fine Art Registry and it’s president, Theresa Franks...as well as their hired gun, writer David Phillips. They just keep posting outright lies, smears and nasty suggestions about me on the Web.”

35c “Theresa Franks...who heads Fine Art Registry, called me for an interview after a number of slanderous postings...”<sup>13</sup>

All of the above statements accuse Global Fine Art Registry of lying, or of being a liar. These statements are verifiably false, because FAR has only published factual information, relevant to the public controversy involving Mr. Ewell and Park West’s collusion in the sale of fraudulent Salvador Dali prints to thousands of unsuspecting victims. Ewell has not only published these false statements on his blog, but it is clear that these were actionable statements.

As in *Ulrich*, wherein the Court of Appeals determined that defendant’s statements calling defendant a “liar” were actionable defamation, Paragraphs 27, 28, 31a, 34a, and 35a of the Amended Complaint all cite examples from Ewell’s blog wherein he explicitly states that FAR is a “liar” by writing that FAR posts lies on its website, or by indicating that FAR posts “slanderous” or “fallacious” things on the internet, which are synonymous for liar. Ewell would be hard pressed to make the argument that he isn’t calling FAR a liar when he says FAR is telling lies. These statements are nearly identical to the actionable defamatory statements enumerated by the Supreme Court of the United States in *Milkovich*, supra.

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<sup>12</sup> Again, Ewell is falsely claiming that FAR posts lies on the internet. This time, he is using the term “false” and the term “defamatory” as synonyms, but the meaning is the same, and the terms are no less actionable than if the term “liar” was used.

<sup>13</sup> The definition of “slanderous” is: A false and malicious statement or report about someone. <http://www.thefreedictionary.com/slanderous>.

For these reasons, FAR can properly maintain a claim for defamation against Third-Party Defendant Ewell for Ewell's published statements, indicated in the Complaint in paragraphs 27, 28, 31a, 34a, and 35a.

***C. Third-Party Defendant Bernard Ewell's Statements Identified in Paragraphs 30, 32a, 34b, 35a, 35b, of the Amended Complaint are actionable defamation***

Global Fine Art Registry is an independent company, which is trusted by its members and the public at large to report on events in the art world. Unfortunately, Mr. Ewell has made numerous statements on his blog claiming that FAR is in some way controlled, or funded by California based Dali art dealer Bruce Hochman.<sup>14</sup> This could not be further from the truth, and there is no evidence supporting such statements as Ewell himself conceded at his deposition.

By claiming that FAR is controlled or funded by a Salvador Dali art dealer, Ewell is attempting to make FAR look biased in its reporting on Park West and Ewell's Dali sales fraud. Ewell's false and unsubstantiated claim of a FAR and Hochman conspiracy or business relationship, unjustly bring FAR's reputation for independence and impartiality into question, and harm the company and its ability to report on issues of public concern in the art market. Whether or not FAR suffered damaged as a result of Ewell's statements is for the jury to decide and is not an issue properly before the Court on Ewell's Motion to Dismiss.

The following statements, as alleged in the Amended Complaint, contain statements by Mr. Ewell wherein he falsely states as fact (certainly not as opinion) that Mr. Hochman controls Fine Art Registry or is funding it.

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<sup>14</sup> Mr. Hochman was interviewed for one article on the FAR website, in his capacity as someone knowledgeable about Salvador Dali. Hochman has never provided any funds, and in no way control or contributes to the FAR website or its postings.

**Paragraph of  
Amended Complaint**

**Defamatory Statement by Ewell**

- 30 “...Park West is being relentlessly attacked by you [ed: referring to Bruce Hochman] and your pseudo-independent stooge Fine Art Registry and you do so with lies and innuendo.”
- 32a “[...] The source of the attacks is California “dealster” Bruce Hochman who uses Fine Art Registry (FAR) as his mouthpiece for posting false and defamatory charges on the Internet.”
- 34b “So who are Fine Art Registry, Theresa Franks and David Phillips and where do they fit in?...It is clear, however, that they are doing Bruce’s [ed: Hochman] dirty work and are evidently well funded by him.”
- 35b “Hochman’s voice is clear in many of the FAR postings...”

All of Ewell’s statements meet the elements of defamation. Ewell’s statements were false because there is no financial relationship between FAR and Hochman, and Hochman is in no way in control or a contributor to FAR. Ewell’s statements are also not privileged in any way because there are made as statements of verified fact, and in no way could be read as an opinion. In fact, Ewell explicitly states that “it is clear” that Hochman is funding FAR when that is an absolute falsehood.

Further, it was at the very least negligent, and more likely reckless or intentionally false for Ewell to claim that FAR was being funded and controlled by Hochman, or that Hochman was writing articles for FAR. Ewell himself could provide no information that Hochman was paying FAR any money when asked about that issue at his deposition. Further, as stated above, FAR has been hurt financially, as well as monetarily by Ewell’s lies relating to a relationship between FAR and Hochman. FAR’s integrity, and impartiality has been impugned by Ewell’s publication

of false statements connecting FAR to a dealer of Salvador Dali artwork such as Ewell, given that FAR has been reporting heavily on the rampant fraud in the Dali market.

Further, on his blog, Ewell has accused Mr. Hochman of selling fake Dali artwork. For example, on September 29, 2009, Ewell writes on his blog that: "...Bruce Hochman sells both good and bad Dali artworks at what one would assume from his Annual Price Guide must be greatly inflated prices."<sup>15</sup> (Exhibit B). This is only one example of Ewell's allegations against Hochman as contained on Ewell's blog.

By claiming that FAR is funded by or is controlled by someone who Ewell claims is or has sold fraudulent Dali artwork, Ewell is committing defamation by implication against FAR as well as straightforward defamation as explained above. In *Locricchio v Evening News Association*, 438 Mich 84 (1991), plaintiff developers sued a defendant newspaper for defamation for alleging that the plaintiff developers were associated with organized crime and/or the mafia. While the Court did determine that the plaintiffs could not prevail because they couldn't convincingly prove the falsity of the statements, the case did set a precedent, followed by other cases, that a plaintiff may maintain a cause of action in defamation (by implication), based on allegations of association with an alleged criminal or criminal conspiracy. See *Hawkins v Mercy Health Servs.*, 230 Mich. App. 315 (1998).

While Ewell attempts to mislead the Court by saying that the statements about alleged FAR connections with Hochman are harmless, that clearly is not the case. For these reasons, FAR can maintain a case for defamation against Ewell for his published statements enumerated

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<sup>15</sup> By "bad" Ewell means fake or forged. Other postings on Ewell's blog have made more explicit statement about Hochman, alleging that he has been a fugitive of the law.

in paragraphs 30, 32a, 34b, and 35b of the Amended Third-Party Complaint that falsely assert a financial or other relationship between FAR and Hochman.

***D. Third-Party Defendant Bernard Ewell's Statements Identified in Paragraph 29 and 31b of the Amended Complaint are actionable defamation***

Bernard Ewell's statement, as indicated in Paragraph 29 of the Amended Third-Party Complaint, is also clearly defamatory. Ewell writes that FAR contributor, David Phillips, is "Fine Art Registry's hatchet man..." A hatchet man is defined as: "(1) A man hired to commit murder; or (2) One assigned to carry out a ruthless task or a vicious or unscrupulous order."<sup>16</sup> Clearly, if Mr. Ewell was claiming that FAR has a man hired to commit murders for it, that would be defamation per se. Most likely, Mr. Ewell was referring to the second definition, which is also offensive toward FAR and causes damage to FAR's reputation.

Again, FAR's mission, in part, is to report on issues of public concern. By impugning the credibility of Phillips, it reflects negatively on FAR. More relevant to this matter, is that Ewell calls Mr. Phillips FAR's "hatchet man", indicating that FAR assigns Phillips to do dishonorable or unethical tasks. Again, Ewell is attempting to impugn the character of FAR with his statements.

In reality, Mr. Phillips is an accomplished and very well respected writer. In the excerpt from Ewell's blog quoted in paragraph 29, Ewell was attempting to praise an article written by a representative of his co-conspirator Park West, which was written in an attempt to respond to a previous article Phillips authored in The Artist Magazine which exposed the sale of fraudulent Dali works by Park West, the use of fraudulent and/or misleading provenance documents by

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<sup>16</sup> <http://www.answers.com/topic/hatchet-man>

Park West, and the participation (either explicitly or implicitly mentioned) of Ewell in Park West's fraudulent activities.<sup>17</sup> Unfortunately, in attempting to praise the responding article from Park West (which contained numerous outright lies which were exposed by Phillips in a reply article), Ewell felt that it was necessary to defame both Phillips, and FAR in one fell swoop. Ewell's statement in paragraph 29 is actionable defamation, and also should not be dismissed.<sup>18</sup>

Further, paragraph 31b the Amended Third-Party Complaint cites the following defamatory statement from Ewell, which casts aspersions against FAR's CEO. Ewell writes that: "Park West is pursuing lawsuits naming as defendants Bruce Hochman, Frank Hunter<sup>19</sup>, Fine Art Registry and its CEO Theresa Franks (who has absolutely no credible art background)." Theresa Franks is FAR's CEO, and by stating as fact that she has "no credible art background" which is untrue, Ewell is attempting to cast FAR in a negative light. Ewell unbelievably claims in his Motion to Dismiss that "Whether FAR's CEO has a strong or weak art background does not imply anything negative about FAR. Indeed, as an alleged art appraisal company FAR's customers would certainly rely on the credential's of FAR's active agents, not its corporate officers, to judge FAR's reputation." (P. 21, Motion).

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<sup>17</sup> Ewell is Park West's only Dali authenticator who screens all Park West's Dali work and provenance documents prior to sale to unsuspecting victims.

<sup>18</sup> FAR is voluntarily dismissing defamation claims related to one statement in the Amended Third-Party Complaint. Paragraph 33 of the Amended Complaint identifies a statement where Ewell presumptuously and hypocritically claims in his Motion to Dismiss that "It's only a matter of time before a judge orders the FAR site taken off the Internet."

<sup>19</sup> Park West has sued FAR's expert Frank Hunt in a pending case in Oakland County Circuit Court as a result of Mr. Hunter's serving as an expert for victims of Park West/Ewell Dali fraud. It is interesting that Ewell supports that action by Park West, but contests that he is being sued for legitimate reasons in this matter.

This statement made in Ewell's Motion is disingenuous at best – why would Ewell throw in that insult about Franks if it wasn't meant to cast Franks and the company she founded and runs in a negative light? Further, FAR is not an “art appraisal company”, as counsel for Ewell alleges, revealing a clear misunderstanding of FAR and this case. FAR reports on news in the art world, assists victims of fraud, and sells a patented tagging technology meant to stop art theft and allegations that Theresa Franks (FAR's CEO, its only agent, and the person who runs the day-to-day operations of the company) has no “credible art background” hurt the image of the company, which is exactly what Ewell intended. Ewell's statement is false, intended to hurt FAR, and has hurt the image and reputation of FAR.

Mr. Ewell's undignified and defamatory attacks on FAR employees on his blog is meant to and does reflect negatively on the company.<sup>20</sup> Someone reading his blog is left thinking that Ewell is telling the truth, and not that he is giving his “opinion.” For these reasons, paragraphs 29 and 31b of the Amended Complaint cite actionable defamatory statements, and Ewell's Motion to Dismiss them should also be denied.

***E. Ewell's Grounds for Dismissing FAR's Defamation Claim Is Without merit***

As shown above, the statements Ewell published on his blog, which were identified in the Amended Third-Party Complaint are defamatory, and legally actionable. Nonetheless, Ewell attempts to claim that “Applied to the context of statements made on the internet, court have held that where a statement is made on one website, which references statements on other websites as the source of facts supporting the statement, there can be no claim for defamation.” (p. 8.,

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<sup>20</sup> Ewell has gone further by calling Mrs. Franks, a grandmother and small business owner, a “junk yard dog”. This demeaning and sexist comment was repeated more than once on Ewell's blog.

Motion). Unfortunately, as discussed below, these three non-binding cases in no way support the actions of Mr. Ewell, or justify dismissal of the defamation causes of action.

Ewell's defamatory statements about FAR were not based on any facts whatsoever – Ewell created facts himself which were false and presented in a defamatory manner. To claim that his statements were based off of anything other than his own imagination is without merit. Notably, Ewell does not refer to any other websites or sources which he based his defamatory statements on other than the FAR website itself. (P. 9, Motion). Certainly, nothing on the FAR website makes defamatory statements about FAR, so Ewell's argument is puzzling. He appears to be saying that he took issue with things on the FAR website, and then made statements of his own, which were defamatory in nature.

The cases cited by Ewell – *Nicosia v DeRooy, Inc.*, 72 F. Supp.2d 1093, 1102-03 (N.D. Cal 1999); *Franklin v Dynamic Details, Inc.*, 10 Cal. Rptr. 3d 429, 438-39 (Cal. Ct. App. 2004); *Agora, Inc. v Axxess, Inc.*, 90 F. Supp.2d 687, 704 (D. Md. 2004) – are not in any way analogous to what Ewell did in this case. In these cases, a defendant made a statement of opinion by essentially relying on or commenting about proof of the underlying accusation by someone else. These cases do not stand for the proposition that a defendant such as Mr. Ewell can take issue with something written on the web, and then publish his own defamatory and maliciously false statements based on his own malice and without any supporting facts. Even if Ewell was relying on other websites – which doesn't seem to be the case – he rarely, if ever, cites to or references them while making his defamatory statements about FAR. Essentially Ewell's concocted argument does not justify dismissal.

For the reasons stated above, Ewell's comments are defamatory, and FAR has sufficiently stated a cause of action for which relief can be granted. Therefore, dismissal is not justified, and Ewell's Motion should be denied.

V. **Causes of Action Against Ewell Sounding in Tortious Interference, Interference with FAR's Prospective Business Advantage, and Conspiracy Should Not Be Dismissed**

In his Motion, Third-Party Defendant Ewell claims that if the defamation actions are dismissed, then the other causes of action against Ewell should also be dismissed, because they are premised on the defamation claim. This argument is faulty on a number of points.

First, as explained above, FAR can maintain a defamation against Ewell because all (or at least some) of the specifically enumerated statements published by Ewell are defamatory. If this Court finds that even one statement made by Ewell was defamatory, then Ewell's entire argument for the dismissal of other enumerated causes of action sounding in Tortious Interference, Interference with prospective Business Advantage, and Conspiracy fail.

Further, this Court has already dealt with almost the exact same issue in a Motion to Dismiss filed by the Dali Gallery. The Dali Gallery argued that Park West could not prove it made defamatory statements, and therefore, the causes of action sounding in Tortious Interference, Interference with prospective Business Advantage, and Civil Conspiracy should be dismissed. This Court disagreed with that argument, by writing in its Opinion and Order, dated August 3, 2009, that:

[...] after a review of elements of each of these three claims, the Court concludes: (1) none of them require a determination that the

Dali Gallery defamed Plaintiff, and (2) such non-defamation claims are pled sufficiently so as not to be futile.” (Exhibit C).

Similarly, in this situation, even if FAR’s cause of action sounding defamation was dismissed in its entirety, FAR could still maintain a cause of action sounding in Tortious Interference, Interference with prospective Business Advantage, and Conspiracy. FAR has plead those causes of action properly, and Ewell cannot reasonably contest that.

Finally, FAR rejects Ewell’s contention that “No further factual allegations” are made besides the defamatory statements to support the remaining causes of action. In addition to the defamatory statements, FAR believes that Ewell has conspired with others, including Park West, to damage FAR, and interfere with its business by other means and in other ways than those specifically enumerated in the defamation section of the Amended Complaint. As alleged in the Amended Complaint (in sections following the defamation section):

49. EWELL initiated contacts with FAR members, customers, business partners and readers by blog postings, and by telephone and maliciously and intentionally told FAR members, customers, business partners and readers negative falsehoods about FAR, FAR’s principals, and FAR’s activities.

55. BERNARD EWELL has intentionally interfered with FAR’s relationships with prospective customers, members, and business partners and has maliciously smeared FAR and tried to destroy its reputation worldwide.

59. Third-Party Defendant EWELL maliciously conspired with PARK WEST, PARK WEST’S principals and employees, and others to tarnish the reputation of FAR.

60. To accomplish this goal, EWELL made and published false and defamatory statements about FAR, and maliciously interfered with existing and potential business activities of FAR.

These allegations of actions by Ewell include more than the defamatory statements enumerated in the defamation section of the Amended Complaint. Therefore, Ewell's claim that the causes of action sounding in Tortious Interference, Interference with prospective Business Advantage, and Conspiracy are solely based on the defamatory statements, and should be dismissed should the defamation claim be dismissed is also without merit.

For these reasons, Ewell has not justified dismissal of the Amended Third-Party Complaint, and his Motion should be denied.

**VI. CONCLUSION**

For the reasons stated above, Park West's Motion to Sever Third-Party Complaint Against Bernard Ewell should be denied.

Respectfully Submitted,

KAUFMAN, PAYTON & CHAPA

Date: October 28, 2009

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I hereby certify that on October 28, 2009 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Rodger D. Young, Ian C. Simpson, and Stephen T. McKenney.