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Pro Se Defendant

Honorable Marco A. Hernandez

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MAX ZWEIZIG, Plaintiff, vs. TIMOTHY C. ROTE, *et al.*, Defendants.	Case No.: 3:15-CV-02401-HZ DEFENDANT ROTE'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MEMORANDUM IN SUPPORT THEREOF

CERTIFICATION PURSUANT TO *LOCAL RULE 7.1(a) (1) (A)*

Pursuant to *Local Rule 7.1 (a),* Timothy C. Rote ("Rote) "Defendant", certifies that he has attempted to confer with Plaintiff's attorney on this Motion by email, in good faith, and Plaintiff will oppose this Motion.

DEFENDANT'S MOTION TO DISMISS

FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Rote hereby moves the Court to dismiss all claims in this case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and 12(h)(3). In support of their motion, Defendant respectfully submits the following memorandum of points and authorities.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

POINTS AND AUTHORITIES

I. INTRODUCTION

Conceptually this case is about whether anyone can say or publish anything that identifies a plaintiff who currently or formerly brought an action against an employer under ORS 659A and/or for Wrongful Termination. Plaintiff essentially argues that he has a right of anonymity forever.

More specifically, the plaintiff asserts that any publication by Rote, the plaintiff's former employer Northwest Direct Teleservices, Inc. (NDT), the owner of NDT (Northwest Direct Marketing, Inc.) or any member of the affiliated group of companies of which NDT is a part, and the Owner of Northwest Direct Marketing, Inc. (Rote Enterprises, LLL), about the arbitration hearing (and supporting documentation) between NDT and Zweizig is an adverse employment action per se and retaliation per se. NDT has not been active since 2014. Rote has not been employed by NDT since 2009.

Plaintiff alleges the following claims against Rote in his Complaint:

A. Against Rote:

1. Aiding and Abetting ORS 659A.030 (1) (g), "for any person, whether an **employer or an employee**, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or attempt to do so;

2. Retaliation for Opposing Unlawful **Employment Practice**-ORS 659A.030 (1)

(f), "for any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice , or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so;

3. Whistleblower Discrimination and Retaliation-ORS 659A.230 defining unlawful practices of an **Employer**; &

4. Prohibited Conduct of **Employer**-ORS 659A.199 .

B. Overview of Complaint

Plaintiff asserts retaliation against entities that were never Zweizig's employer. Only NDT was the employer and NDT has not been active in any way other than for litigation defense.

Plaintiff previously pursued these exact claims in 2006 and was bound by an employment contract to arbitrate his dispute. The plaintiff's employment contract between himself and Northwest Direct Teleservices, Inc. is provided herein. Plaintiff is bound by an arbitration and mediation clause in the employment agreement, which not only mandates the forum but also mandates the time period within which a claim may be brought. **See Exhibit A**.

Plaintiff previously challenged the arbitration and mediation requirements of his employment agreement in New Jersey State court and that court upheld the agreement. **See Exhibit B.**

Plaintiff asserts that the fear of future discovery of the content of the blog and forensic reports has caused emotional distress. And that this emotional distress is actionable. Plaintiff is in essence claiming that he has a right to complete anonymity with respect to the underlying arbitration action, where he was the Respondent. While defendant disagrees, it's an unnecessary

analysis for this motion to dismiss.

Plaintiff asserts that conclusions reached in the blog were defamatory. Plaintiff had recourse by filing a defamation action but has in the alternative alleged retaliation, a claim that requires a relationship between an employer and employee. Plaintiff has not identified with specificity which items are defamatory nor demanded retraction. The statute of limitations on an Oregon defamation claim has now passed.

Plaintiff asserts that the release of forensic reports is a violation of the ASP Protective Agreement. Plaintiff may seek an injunction stopping the release of forensic information but has not done so.. The ASP Protection Agreement, Exhibit C, provides an injunction opportunity to enforce the agreement.

II. LEGAL STANDARD

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Rasul v. Bush, 542 U.S. 466, 489 (2004) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511U.S. 375, 377 (1994)). The court is presumed to lack jurisdiction unless the contrary appears affirmatively from the record. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006). Consistent with these basic jurisdictional precepts, the Ninth Circuit has articulated the standard for surviving a motion to dismiss for lack of jurisdiction as follows: "When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by

amendment." Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir.2001) (citations and internal quotations omitted).

A Rule 12(b)(1) challenge to subject matter jurisdiction can be "facial," in which case the Court assumes the plaintiff's factual allegations to be true and draws all reasonable inferences in its favor. Doe v. See, 557 F.3d 1066, 1073 (9th Cir. 2009); Castaneda v. United States, 546 F.3d 682, 684 n. 1 (9th Cir. 2008). Or, the motion may be a "factual" or "speaking" motion, where the movant may submit materials outside the pleadings to support its motion. In that case, "'[i]t then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.'" Colwell v. Dep't of Health and Human Servs., 558 F.3d 1112, 1121 (9th Cir. 2009) (quoting St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.1989)). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed.R.Civ.P 12(h)(3). The instant motions presents both a facial and factual challenge..

Subject matter jurisdiction is an essential element to every lawsuit and must be demonstrated "at the successive stages of the litigation." Chapman v. Pier 1 Imports (U.S.), Inc., 631 F.3d 939, 954 (9th Cir. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). The existence of subject matter jurisdiction is an ongoing inquiry that a court must conduct sua sponte in order to continue the case. Chapman, 631 F.3d at 954; Bernhardt v County of Los Angeles, 279 F.3d 862, 868 (9th Cir. 2002). Where subject matter jurisdiction is absent, a court has no discretion and must dismiss the case. Chapman, 631 F.3d at 954.

A central component to subject matter jurisdiction is the question of standing, which requires that the party experience actual or imminent harm. Lujan, 504 U.S. at 561 (citing Whitmore v. Ark., 495 U.S. 149, 155 (1990)). A party's standing to bring a case is not subject to

waiver, and can be used to dismiss the instant action at any time. Fed. R. Civ. P. 12(h)(3); U.S. v. Hays, 515 U.S. 737, 742 (1995); Chapman, 631 F.3d at 954.

III. UNDISPUTED FACTS

Zweizig was employed by NDT from September 2001 through November 16, 2003. The employment agreement between NDT and Zweizig has a mandatory mediation and arbitration provision. **Exhibit A, Section V.**

Zweizig 's 2004 actions alleged Retaliation and Wrongful Discharge, which eventually became an arbitration action as the employment agreement required. Zweizig did challenge the enforceability of the arbitration clause of the employment agreement in New Jersey state court. The New Jersey State court ruled in NDT's favor and compelled arbitration. A copy of the final order has been provided and includes a denial for a motion to amend for defamation. Exhibit B.

Northwest Direct Teleservices, Inc. (NDT) **was the sole employer of Zweizig** and is a wholly owned inactive subsidiary of Northwest Direct Marketing, Inc. (NDM).

Northwest Direct Marketing, Inc., the parent of NDT licensed the use of the litigation property to Rote for use in his blog. The License agreement is attached herein as Exhibit D.

At all material times, Rote was and is the Chief Executive Officer of NDM. Rote was also the acting Chief Executive Officer of NDI, NDT and NDMO.

Rote owns 100% of NDM. NDM owns 100% of NDT.

The arbitration was completed more than 7 years after Zweizig's employment. And it has now been more than thirteen years since Zweizig was terminated from NDT. Since that time Zweizig has created an extensive trail of litigation, discoverable on the internet.

Plaintiff's Employment agreement (Exhibit A, Section V) provides in part that the Plaintiff must deliver to the other party written notice of its intent to submit the Dispute to Mediation within 90 calendar days of the date when the Dispute first arose and requiring arbitration in the event mediation is unsuccessful.

The Dispute first arose presumably on the date of discovery of the blog and certainly no later than September 30, 2015. Plaintiff did not provide timely notice to mediate or arbitrate. Plaintiff has plead his claims as adverse employment actions requiring the parties to follow the terms of the employment agreement, an issue addressed in the argument section. Plaintiff has not followed the terms of the agreement. Plaintiff no doubt plead the claims as adverse employment actions being fully aware that a defamation claim would have been dismissed with a Anti-Slapp Motion to Strike. Counsel for the corporate entities and defendant failed to file the motion to strike before answering the complaint, although it appears to be within the courts authority to allow the motion to strike even now.

Without the request of the Plaintiff, Zweizig's name has been redacted from the blog and the linked material. Plaintiff's attorneys' names (Marshall, Christiansen and Ware) have not been redacted. Most of the critiques in the blog are focused on the behavior of the arbitrator and legal counsel during the arbitration (Marshall). The frequency of the abuse by counsel is a hot topic of the blog.

IV. ARGUMENT

A. THE EMPLOYMENT AGREEMENT PRECLUDES FEDERAL JURISDICTION

The employment Agreement between the Plaintiff & NDT (by Aiding and Abetting also

Rote) requires Plaintiff to give notice to NDT to Mediate the Dispute. See Exhibit A, Section V. Zweizig agreed to a two-step resolution process. First, he agreed to mediation under section 5.1.1. And in the event mediation did not resolve the dispute, he agreed to the second step to the dispute resolution process, which is arbitration under section 5.1.2.

Section 5.1.1 of the agreement describe the claims that must be resolved through this process and in so far as they are the same claims previously arbitrated it is well resolved that the plaintiff's claims fall within this definition of claims to be resolved by mediation and arbitration. Those claims or disputes defined by the agreement are:

> "any alleged violations of federal, state or local statutes including any claims of discrimination based on race, color, religion, sex, national origin, age, disability, marital status, veteran or other status protected under federal or state law, harassment claims, employment benefit claims, claims for unpaid commissions…, claims based on any purported breach of duty, arising in contract or tort, including breach of contract, breach of covenant of good faith and fair dealing, violations of public policy or any other alleged violation of statutory, contractual or common law rights of either party, arising out of relating to the dispute as defined above…"

Section 5.1.1 (i) of the agreement also requires the plaintiff to give not ice of his intent to mediate with 90 days of when the dispute first arose. He failed to do so. Filing a lawsuit is not Notice of Mediation. It is not notice of intent to arbitrate. The date of discovery by Plaintiff was no later than September 30, 2015, as indicated by Exhibit C. Plaintiff's lawsuit was filed on Christmas Eve, 2015.

Section 5.1.2 of the agreement provides that to initiate the arbitration process the

aggrieved party must deliver to the other party written notice of its intent to submit the dispute to arbitration, if no mediation occurs, not later than seventy (70) calendar days after delivery of its notice of intent to submit the dispute to mediation.

The Employment agreement also provides that in the event no notice to Mediation & Arbitration is made timely that it shall constitute an irrevocable waiver of that party's right to raise any claims in any forum arising out the Dispute herein. See Section 5.1.2 (i) of the employment agreement.

The Plaintiff pled that the entities named are affiliates having an economic interest in the monetizing of the blog. While only NDM has a monetizing right to the blog, it is academic for purposes of this analysis.

The Retaliation claims asserted by Plaintiff against an employer would fall under the Employment agreement, are untimely, brought in an improper venue and must be dismissed. ORS 659A.199 and 230 implicate specifically conduct between employer and employee and therefore those ORS sections are governed by section 5 of the employment agreement. ORS 659A.030 deals specifically with discrimination in the context of employment practices. It too is therefore governed by section 5 of the employment agreement.

If plaintiff Zweizig is going to allege employment based claims he must do so under the employment agreement.

B. TO THE EXTENT THAT PLAINTIFF'S CLAIMS ARE BASED ON POTENTIAL FUTURE CONDUCT, SUCH CLAIMS ARE NOT RIPE

The ripeness doctrine is closely related to standing because it "originate[s] from the same Article III limitation." *Susan B. Anthony List v. Driehaus*, 1 34 S.Ct. 2334, 2341 n.5

(2014) (internal quotation marks omitted); *Mont. Envtl. Info. Ctr. v. Stone- Manning*, 766 F.3d 1184, 1188 n.3 (9th Cir. 2014). But whereas "standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when that litigation may occur." *See v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997) (emphasis in original omitted). The basic rationale of the ripeness requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" *Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).*

The "Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional case or controversy, that the issues presented are definite and concrete, not hypothetical or abstract." *Thomas v. Anchorage Equal Rights Comm 'n,*220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (citation omitted). A dispute is ripe in the constitutional sense if it "present[s] concrete legal issues, presented in actual cases, not abstractions." *Co/we// v. HHS*, 558 F.3d 1112, 1123 (9th Cir. 2009) (internal quotation marks and citation omitted). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all."' *Texas v. United States,* 523 U.S. 296, 300 (1998) (citations and quotation marks omitted); *Alcoa, Inc. v. Bonneville Power Admin.,* 698 F.3d 774, 739 (9th Cir. 2012). This is because, "if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing." *Bova v. City of Medford,* 564 F.3d 1093, 1096 (9th C ir. 2009) (citation omitted).

Any claims that Plaintiffs may have with respect to the Defendant's Rote's blog are based entirely on speculation about the potential for an adverse employment action in the future. They are not ripe for review and fall outside the Court's subject matter jurisdiction. Accordingly, Plaintiffs' Complaint should be dismissed.

C. PLAINTIFFS' CLAIMS MUST BE DISMISSED AS MOOT

Under Article III of the Constitution, "the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). A federal court does not have jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citations and quotation marks omitted); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) ("Mootness is a jurisdictional issue."). A "live controversy must persist throughout all stages of the litigation." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005) (en banc) (citation omitted). In cases like this, the central question is "whether changes in the circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Id.* (quoting *West v. Sec 'y of the Dep 'I of Transp.*, 206 F.3d 920, 925 n.4 (9th Cir. 2000)).

A plaintiff bears the burden of demonstrating that a case or controversy exists at all stages of the litigation. If an actual, or threatened injury from a challenged action no longer exists, or a change in circumstances deprives a court of the ability to provide any meaningful or effective relief for the alleged violation, the matter is moot and must be dismissed for lack of subject jurisdiction. *See Mills v. Green, 1* 59 U.S. 651, 653 (1895); *Feldman v. Bomar*, 518 F. 3d 637, 642-43 (9th Cir. 2008).

Although plaintiff accurately classified the blog as having a public searchable presence for Max Zweizig, Rote has removed and redacted Max Zweizig from indexable material

interpreting the complaint to represent the Plaintiff's real request. Defendant cannot eliminate Zweizig's internet presence on his own legal action and to the extent that leads to the blog that is not attributable to Rote. Nonetheless Plaintiff's allegations are moot and the case should be dismissed.

V. CONCLUSION

Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction. Given that plaintiff and plaintiff counsel is well aware of the contractual mandates associated with Zweizig's employment, should the court dismiss this case defendant requests leave to file a motion for sanctions.

Dated: October 18, 2016.

s/ TIMOTHY C. ROTE
TIMOTHY C. ROTE
Phone: (503) 702-7225
Pro se Defendant

Certificate of Service

I hereby certify that on October 18, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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