

DOUGLAS A. MILLER, CLERK
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APR 08 2016

Case No. _____ Inst. No. _____
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

MCCALL WEDDINGS, LLC, an Idaho
Limited Liability Company,

Plaintiff,

vs.

WED WEDDING EVENT DIRECTORIES,
LLC dba MCWED and dba IDOWED, an
Idaho Limited Liability Company; and
SHERRY SCHELNE, an Individual,

Defendants.

Case No. CV-2015-211-C

MEMORANDUM DECISION AND ORDER

Plaintiff McCall Weddings, LLC moves for partial summary judgment on one of its claims for breach of contract against Defendants Wed Wedding Event Directories, LLC and Sherry Scheline. Specifically, McCall Weddings seeks partial summary judgment on the liability aspect of that claim, leaving the damages aspect for trial. Wed Wedding and Scheline move to strike a declaration McCall Weddings filed in support of its motion for partial summary judgment. Those two motions were argued and taken under advisement on March 7, 2016.¹ For the reasons that follow, the motion to strike is denied and the motion for partial summary judgment is granted as to Wed Wedding but denied as to Scheline.

¹ Several other motions were argued at the same time. They were resolved by oral rulings and need not be listed, nor need the oral rulings be reiterated, here.

I.

BACKGROUND

In July 2015, McCall Weddings reached an agreement with Wed Wedding and Scheline to settle a federal trademark lawsuit. (Berry Decl. filed Feb. 8, 2016, ¶¶ 2-4.) The agreement ultimately took the form of a written agreement entitled “Settlement Agreement.” (Id. Ex. 1.)

The Settlement Agreement’s first recitals clause states that Wed Wedding represented itself to be “doing business as a magazine publisher with a mirroring on-line presence, for paid advertisers advertising their services related to the wedding industry serving the McCall, Idaho area.” (Id.) Its second recitals clause states that Scheline formed Wed Wedding. (Id.) Its third recitals clause states that McCall Weddings represented itself to be “doing business as a wedding and event planning and coordination company serving the McCall, Idaho area.” (Id.) Its fifth recitals clause states that the parties had a dispute about, among other things, the business “use of the phrase #mccallweddings” by Wed Wedding and Scheline. (Id.) That dispute was resolved in the Settlement Agreement. Key here is its section 4, which provides as follows:

Wed Wedding and Event Directory, LLC, dba McWED agrees not to originate the use of the phrases “#mccallweddings,” “#mccallwedding,” “#mccallweddingplanner,” and “#mccallweddingsplanner,” “#mccallweddingeventplanner,” and “#mccallweddingeventsp planner” in its publication or in any of its on-line marketing efforts, or colorable imitations thereto. The parties recognize that Ms. Scheline cannot monitor all content that may be placed by third parties using on-line media in their marketing efforts, and McCall Weddings . . . agree[s] that it shall not attempt to hold Wed [Wedding] and/or Sherry Scheline responsible or in breach of this Agreement if third parties use such phrases in their own separate marketing efforts.

(Id. § 4 (emphasis added).)

In the days and months following the Settlement Agreement’s execution, Wed Wedding (through Scheline) “reposted” to its own social media pages (on Facebook, Instagram, and Tumblr) social media posts by third parties that contained one or more of the phrases listed in the

Settlement Agreement's section 4. (Scheline Aff. ¶¶ 34-36; Suppl. Berry Aff. filed Mar. 7, 2016, ¶¶ 5-33 & Exs. 1-4; Berry Aff. filed Feb. 8, 2016, ¶¶ 7-9, 12-14, 16-26 & Exs. A-B, E-G, I-S; Gullick Decl. ¶ 12 & Ex. H.) For present purposes, the parties agree that Wed Wedding and Scheline did not insert any of those phrases into the reposted third-party posts. Instead, what they did was republish those phrases on Wed Wedding's social media pages, in a way that attributes the use of those phrases (along with the rest of the reposted content) to third parties.

McCall Weddings contends the defendants' reposting of the listed phrases violates the Settlement Agreement's section 4. On that basis, it claimed in the sole count of its original complaint (filed on August 27, 2015) that the defendants breached the Settlement Agreement. Trial on that claim was set to begin on July 19, 2016.

On February 3, 2016, McCall Weddings moved for permission to expand its claims in a proposed first amended complaint, Count I of which would be the original claim for breach of the Settlement Agreement's section 4 and Counts II through V of which would be new claims. Five days later, while its motion to amend was still pending, McCall Weddings moved for partial summary judgment on its claim for breach of the Settlement Agreement's section 4. McCall Weddings seeks summary judgment on the claim's liability aspect (*i.e.*, it seeks summary judgment that section 4 was breached), leaving the claim's damages aspect for trial.

McCall Weddings arranged for both motions to be argued on March 7, 2016. The motion to amend was granted in an oral ruling made that day. McCall Weddings filed its proposed first amended complaint on March 16, 2016. Although the motion for partial summary judgment was filed while the original complaint was the operative pleading, McCall Weddings' claim for breach of the Settlement Agreement's section 4 appears, as already noted, in both versions of the complaint, without material changes from one version of the complaint to the other. (Compare

Compl. ¶¶ 21-24 with First Am. Compl. ¶¶ 35-38.²) Consequently, now that the first amended complaint is on file and has supplanted the original complaint as the operative pleading, the Court considers the motion for partial summary judgment to be directed to Count I of the first amended complaint.

Wed Wedding and Scheline oppose the motion for partial summary judgment, and they move to strike the Declaration of Steve Berry, filed by McCall Weddings on February 8, 2016. They argue that the repost printouts attached to the Berry declaration are not properly authenticated. McCall Weddings attempts to neutralize that concern through two new declarations: a Supplemental Declaration of Steve Berry and a Declaration of Dicsie Gullick, both filed the day of the hearing (March 7).³ The supplemental Berry declaration did not draw a similar motion to strike, but the Court will consider the arguments for striking the original Berry declaration as having been made with respect to the supplemental Berry declaration too.

² Both versions of the complaint contain the same typographical error in their charging allegations, which mistakenly accuse the defendants of breaching the Settlement Agreement's section 14 rather than its section 4. (Compl. ¶ 22; First Am. Compl. ¶ 36.) Section 14 merely provides for awards of costs and attorney fees in litigation to enforce the Settlement Agreement. (Berry Decl. filed Feb. 8, 2016, Ex. 1 § 14.) Other portions of the original and first amended complaints make clear that the intended reference was to section 4. (Compl. ¶ 16; First Am. Compl. ¶ 16.) And the parties' briefing leaves no doubt that they regard the claim as alleging a breach of section 4, despite the typographical error. The Court construes the claim accordingly.

³ Both are "signed" with federal court-style electronic signatures, not manual signatures. This calls into question whether their content is admissible in evidence. *See* I.R.C.P. 1(d). That said, no objection was made to them on that ground. The Court has discretion to act on a concern about the admissibility of evidence even in the absence of an objection. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (2008) ("A trial court has the discretion to decide whether an affidavit offered in support of or opposition to a motion for summary judgment is admissible under Rule 56(e), even if that issue is not raised by one of the parties. However, we have not required the trial court to rule on the admissibility of the affidavit when there is no objection to it. If there is no timely objection, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56(e)."). But the Court chooses not to do so here. Regardless, even if the Court, on its own motion, disregarded these declarations entirely, the outcome on summary judgment would not change.

As already noted, the motion for partial summary judgment and the motion to strike were argued and taken under advisement on March 7. They are now ready for decision.

II.

MOTION TO STRIKE

On summary judgment, “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” I.R.C.P. 56(e). Although the defendants do not deny that the repost printouts attached to the Berry declarations accurately reflect content they placed on Wed Wedding’s social media pages, they ask the Court to strike the Berry declarations, contending the repost printouts are insufficiently authenticated.

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” I.R.E. 901(a). Whether the proponent of documentary evidence has provided enough foundation to authenticate it is a discretionary determination. *State v. Koch*, 157 Idaho 89, 96, 334 P.3d 280, 287 (2014). As the Idaho Supreme Court recently observed in the context of authentication of electronic evidence, “[c]ourts have not required proponents offering printouts of emails, internet chat room dialogues, and cellular phone text messages to authenticate them with direct evidence, such as an admission by the author or the testimony of a witness who saw the purported author typing the message. Rather, courts have held that circumstantial evidence establishing that the evidence was what the proponent claimed it to be was sufficient.” *Id.* (citations omitted).

Here, Steve Berry testifies in his original declaration that he had recently been involved in McCall Weddings’ settlement of its trademark litigation against Wed Wedding and Schline and is familiar with their social media pages on Facebook, Instagram, and Tumblr. (Berry Decl.

filed Feb. 8, 2016, ¶¶ 1-4 & Ex. 1.) He then testifies to having taken a number of screen shots from their social media pages and having attached printed copies of them to his declaration. (Id. ¶¶ 8-9, 12-14, 16-26 & Exs. A-B, E-G, I-S.) The screen shots, generally speaking, show the Internet addresses whose content is reflected in the screen shots and the date and time the screen shots were taken. (Id. Exs. AB, E-G, I-S.) And the screen shots, generally speaking, show Wed Wedding's trade name (IDoWED). (Id.) Moreover, though Scheline neither confirms nor denies in her own affidavit that the particular reposts depicted on Berry's screen shots are traceable to her and Wed Wedding, she does "affirm" that, after the Settlement Agreement was signed, she "did repost some of [her] vendors' social media posts" on her Facebook and other social media pages. (Scheline Aff. ¶¶ 31-37.)

Berry's testimony, in combination with Scheline's admissions, is sufficient to support the conclusion that Berry's screen shots are what he purports them to be: accurate printouts of reposts the defendants made to their own social media pages. This is so even if the supplemental Berry declaration and the Gullick declaration are disregarded. And, if they are considered, the case for deeming the screen shots to be adequately authenticated only strengthens. The defendants' motion to strike the Berry declarations is denied. The defendants' authenticity objection notwithstanding, the record contains admissible evidence that the reposts Berry attributes to the defendants in fact are attributable to them.

III.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The movant's burden, then, is to prove that there is no genuine factual dispute and that, in the absence of a

genuine factual dispute, it is entitled to judgment as a matter of law. *E.g., Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 103-04, 294 P.3d 1111, 1115-16 (2013).

If the movant carries its burden, the burden shifts to the nonmovant to prove that a genuine factual dispute must be resolved before judgment can be awarded to the movant. *Id.* at 104, 294 P.3d at 1116. To carry that ultimate burden, the nonmovant “may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Id.* (quotation marks omitted). In determining whether the nonmovant has carried its burden, the district court must construe the record in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant’s favor. *Id.* Nevertheless, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” for the nonmovant to avoid summary judgment. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 163, 307 P.3d 176, 180 (2013).

The question at hand is whether the defendants breached the Settlement Agreement’s section 4 by reposting on their own social media pages third-party social media posts that use the phrases listed in section 4. Although section 4 is quoted above, the Court will quote it again here for ease of reference:

Wed Wedding and Event Directory, LLC, dba McWED agrees not to originate the use of the phrases “#mccallweddings,” “#mccallwedding,” “#mccallweddingplanner,” and “#mccallweddingsplanner,” “#mccallweddingeventplanner,” and “#mccallweddingeventspalner” in its publication or in any of its on-line marketing efforts, or colorable imitations thereto. The parties recognize that Ms. Scheline cannot monitor all content that may be placed by third parties using on-line media in their marketing efforts, and McCall Weddings . . . agree[s] that it shall not attempt to hold Wed [Wedding] and/or Sherry Scheline responsible or in breach of this Agreement if third parties use such phrases in their own separate marketing efforts.

(Berry Aff. filed Feb. 8, 2016, Ex. 1 § 4 (emphasis added).)

Section 4's restriction on "originat[ing] the use" of certain phrases applies by its own terms only to Wed Wedding. In other words, Wed Wedding agreed not to originate the use of those phrases. Scheline herself did not also so agree. The Settlement Agreement's introductory paragraph collectively defines Wed Wedding and Scheline as "Defendants." The Settlement Agreement at times imposes obligations on "Defendants," meaning both Wed Wedding and Scheline. (Berry Aff. filed Feb. 8, 2016, Ex. 1 §§ 2, 5.) Section 4 is structured differently; it imposes the obligation not to "originate the use" of the listed phrases on Wed Wedding alone, not on Scheline too. The record does not reveal why. In any event, McCall Weddings has not shown as a matter of law that Scheline personally agreed in section 4 not to "originate the use" of the listed phrases. Consequently, McCall Weddings is not entitled to partial summary judgment on Count I, as asserted against Scheline.

Since Wed Wedding did agree not to "originate the use" of the listed phrases "in any of its on-line marketing efforts," the Court must determine whether McCall Weddings has shown as a matter of law that Wed Wedding in fact did so. Wed Wedding says it did not "originate the use" of the listed phrases in its reposts because it merely reposted on its own social media pages third-party uses of those phrases; in Wed Wedding's mind, it was the third parties that "originate[d] the use" of the listed phrases. McCall Weddings, however, says that, by reposting third-party uses of the listed phrases on its own social media pages, Wed Wedding "originate[d] the use" of the listed phrases "in any of its on-line marketing efforts," (Berry Aff. filed Feb. 8, 2016, Ex. 1 § 4), in violation of section 4. This is a dispute about what the Settlement Agreement's "originate the use" clause means.

A contract is ambiguous if it is subject to more than one reasonable interpretation. *E.g.*, *Huber v. Lightforce USA, Inc.*, 2016 WL 824853, at *15 (Idaho Mar. 2, 2016). In that event,

what the contract means is a question of fact. *E.g., id.* But when the contract's language is not subject to more than one reasonable interpretation, and therefore is unambiguous, what the contract means is a question of law. *E.g., id.* The threshold question of whether a contract is ambiguous—whether it is subject to more than one reasonable interpretation—is a question of law. *E.g., id.* Consequently, whether the Settlement Agreement's section 4 is or isn't subject to more than one reasonable interpretation is a question of law for the Court to decide.

“Ambiguities can be either patent or latent.” *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). “To determine whether a contract is patently ambiguous, a court looks at the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings.” *Id.* Put differently, “whether a contract is ambiguous on its face must be decided by giving the words or phrases used their ordinary meanings.” in the absence of a contractually agreed meaning. *Id.* The Settlement Agreement does not define the term “originate.” Consequently, the Court must use the term's ordinary meaning in determining whether the Settlement Agreement's section 4 is patently ambiguous.

Merriam-Webster's online dictionary defines “originate” in several ways. The definitions best matching the term's use in section 4 are “to cause (something) to exist,” “to give rise to,” or “to bring into being.” <http://www.merriam-webster.com/dictionary/originate> (last visited Apr. 6, 2016). So, giving the term “originate” its ordinary meaning, section 4 on its face prohibits Wed Wedding from causing to exist, from giving rise to, or from bringing into being the use of the phrases listed in section 4 in any of its online marketing efforts. It is true that third parties caused to exist, gave rise to, or brought into being the use of those phrases on their own social media pages. But, when the third-party posts were reposted by Wed Wedding to its social media pages, Wed Wedding caused to exist, gave rise to, or brought into being the use of those

phrases in new and different Internet locations. Nothing on the face of the Settlement Agreement renders section 4 inapplicable when Wed Wedding doesn't do the drafting itself, but instead brings a third party's words to Wed Wedding's own online fora in pursuit of its own business interests. To the contrary, by stating that Wed Wedding and Schline are not responsible "if third parties use [the listed] phrases in their own separate marketing efforts," (Berry Decl. filed Feb. 8, 2016, Ex. 1 § 4), section 4 makes even clearer that Wed Wedding may not repost third-party uses of those phrases on its own social media pages, in pursuit of its own business interests. There is no patent ambiguity here. According to the term's ordinary meaning, Wed Wedding did indeed "originate" the use of the listed phrases on its own social media pages, in violation of a contractual prohibition that is clear on its face.¹

"A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist." *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). If section 4 is applied as written, Wed Wedding is prohibited from posting on its own social media pages, for its own business purposes, phrases it agreed, in settlement of a trademark lawsuit, not to "originate the use of . . . in any of its on-line marketing efforts." (Berry Aff. filed Feb. 8, 2016, Ex. 1 § 4.) This, seemingly, is as it should be. By contrast, if Wed Wedding's atextual reading section 4 prevailed, Wed Wedding could capitalize on third-party uses of the very phrases it agreed not to "originate the use of . . . in any of its on-line marketing

¹ The Settlement Agreement's effective date was July 8, 2015. (Berry Decl. filed Feb. 8, 2016, Ex. 1, p. 6.) The defendants argue, however, that section 4's restrictions did not take effect until the end of 2015, after most of the reposts occurred. That argument is based on other sections of the Settlement Agreement, which impose distinct obligations that expressly do not take effect until the end of 2015. (Id. Ex. 1 §§ 2, 5.) The parties' agreement that those distinct obligations would not take effect until the end of 2015 does not somehow suggest section 4 should not take effect until then either. To the contrary, the Settlement Agreement, viewed as a whole, demonstrates that the parties knew how to specify later effective dates for particular obligations when later effective dates were intended.

efforts,” simply by parroting the third-party uses on its own social media pages. It is unclear why the parties would have intended to distinguish between draft-it-yourself origination and copycat origination of the listed phrases, when both forms of origination would tend to invade McCall Weddings’ claimed trademark rights.

Wed Wedding argues that a reason for distinguishing draft-it-yourself origination from copycat origination is reflected by the Settlement Agreement’s first recitals clause. In that clause, Wed Wedding represented itself to be “doing business as a magazine publisher with a mirroring on-line presence, for paid advertisers advertising their services related to the wedding industry serving the McCall, Idaho area.” (Berry Aff. filed Feb. 8, 2016, Ex. 1.) Wed Wedding reads this verbiage to mean it represented that its business was generating advertising revenue by (i) publishing a wedding magazine, and (ii) “mirroring” online the content third parties that advertise in the magazine post to their own social media pages, supposedly making clear to McCall Weddings its intention to repost third-party posts exactly as did, even if they contained the listed phrases. (Defs.’ Opp’n Pl.’s Mot. Partial Summ. J. 10.) But that, too, is an atextual reading of the Settlement Agreement’s language. The chosen language, as written, indicates that Wed Wedding represented that its business was generating advertising revenue by (i) publishing a wedding magazine, and (ii) mirroring online the contents of its magazine. That language is not pregnant with any suggestion that Wed Wedding’s business involved reposting third-party uses of the listed phrases and that it would continue doing so after executing the Settlement Agreement. Section 4 suffers from no latent ambiguity; its clarity is not lost when applied to the facts of the case.

Because section 4 is neither patently nor latently ambiguous, its meaning is a question of law. The Court determines as a matter of law that section 4 prohibits Wed Wedding from

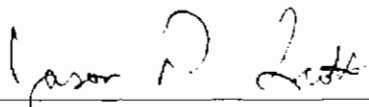
reposting on its own social media pages third-party uses of the phrases listed in section 4. There is no genuine factual dispute that Wed Wedding did exactly that after the Settlement Agreement was executed and took effect. Consequently, McCall Weddings has proved as a matter of law that Wed Wedding breached section 4. McCall Weddings' motion for partial summary judgment is granted to that extent.

Accordingly.

IT IS ORDERED that the defendants' motion to strike the Declaration of Steve Berry (filed on February 8, 2016) and the Supplemental Declaration of Steve Berry (filed on March 7, 2016) is denied.

IT IS FURTHER ORDERED that McCall Weddings' motion for partial summary judgment is granted as to Wed Wedding but denied as to Scheline. Specifically, summary judgment is granted to McCall Weddings on the liability aspect, but not the damages aspect, of Count I of its first amended complaint, as asserted against Wed Wedding.

Dated this 7th day of April, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on April 11th, 2016, I served a copy of this document as follows:

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Clerk of the District Court

By: 
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