IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

TUMEY LLP and TOD T. TUMEY, Plaintiffs, v. MYCROFT AI INC., JOSHUA MONTGOMERY, and MICHAEL LEWIS, Defendants.	)	No. 21-0113-CV-W-BP

ORDER DENYING PLAINTIFFS' MOTION FOR SANCTIONS

Pending before the Court is Plaintiffs' Motions for Sanctions. The Court has considered the parties' arguments (including the supplemental submissions filed by each side) and has also reviewed the transcript of the Status Conference held on January 19, 2022, (Doc. 135). Having done so, the Court denies Plaintiff's motion, (Doc. 118).

This case is related to two pending patent cases in which Voice Tech Corporation sued Mycroft AI, Inc. Plaintiffs in this case are the lawyer and law firm who represented Voice Tech, and they filed this suit against Mycroft and some of its principals in February 2021. Their Complaint asserts a variety of claims stemming from their allegation that "Defendants have undertaken and/or incited a vicious, relentless, and escalating campaign of . . . harassment by telephone and email, online hacking, phishing, identity theft, and other cyberattacks, and even threats of death and bodily harm . . . ." (Doc. 1, ¶ 3.)

After filing suit Plaintiffs sought a Temporary Restraining Order and Preliminary Injunction to prohibit Defendants from engaging in cyber-attacks, initiating phishing attempts, and making harassing calls to Plaintiffs, their employees, and their family members. On March 31,

2021, a Preliminary Injunction was entered that prohibited "Defendants and their officers, agents, servants, employees, and attorneys" and others acting in concert with Defendants from:

1. Engaging in, participating in, or recklessly or intentionally inciting any cyberattacks, hacking or other harassment directed at Plaintiffs, including Plaintiffs' officers, agents, servants, employees, attorneys, witnesses and potential witnesses (including Chilton Webb and Christina Butler), and the family members of any of the foregoing (the "Protected Parties"); and

2. Using or disclosing any documents, information, or other materials of any kind obtained from Plaintiffs or any other Protected Party through any unauthorized means.

(Doc. 34, p. 11.)[1] Defendants initiated an interlocutory appeal, and on March 4, 2022, the Court of Appeals held that the Preliminary Injunction should not have been granted and ordered that it be vacated. (Doc. 160-1.) Among the reasons for the Eighth Circuit's decision was that there was "a lack of evidence demonstrating [Defendants were] responsible for the conduct at issue." (Doc. 160-1, p. 12; *see also* Doc. 160-1, p. 13.)

While the matter was on appeal, Plaintiff filed a Motion for Contempt and Sanctions, which argues that Defendants should be held in contempt and sanctioned for violating the Preliminary Injunction and for tampering with witnesses. Plaintiffs also invoke the Court's inherent authority as a basis for imposing sanctions. The facts cited by Plaintiffs to support their request fall into the following categories:

1. Events that occurred before this lawsuit was filed, such as emails sent to Tod Tumey in February 2020 and June 2020. (Doc. 119, pp. 10-11; Doc. 119-2; Doc. 119-1, ¶ 5.) This category also includes what Plaintiffs refer to as "the honey pot" – a fake website Plaintiffs constructed as a trap to lure and identify high end hackers who might be responsible for

[1] All page numbers are those generated by the Court's CM/ECF system.

the cyberattacks – which Plaintiffs contended proved Defendants' involvement in cyberattacks. (Doc. 119, pp. 19-21.)

2. Interactions between Defendant Joshua Montgomery and his neighbor, Christina Butler, including the terms of a settlement between them. (Doc. 119, pp. 12-15.)
3. A lawsuit Montgomery filed against some of the Plaintiffs in Hawaii state court. (Doc. 119, pp. 15-17.)
4. A children's book authored by Montgomery that parodies the principals and attorneys in this case and in the related patent suits. (Doc. 119, pp. 17-19.)
5. Harassment and cyberattacks directed to Plaintiffs, their employees and families, and others after the preliminary injunction was entered. (Doc. 119, pp. 11-12, 21-24.)

For several reasons, some of which apply to more than one of these categories, these facts do not support any of the relief requested by Plaintiffs.

It goes without saying that events occurring before the suit was filed, much less before the Preliminary Injunction was entered, cannot independently justify sanctions under the Court's inherent authority or for violating the Preliminary Injunction. To the extent that Plaintiffs offer these facts as background information or as circumstantial proof of Defendants' actions, the Court notes that these facts were presented to the Court to support the Preliminary Injunction, and as stated above the lack of any proof connecting Defendants to the actions described (including the honey pot) are the very reasons the Court of Appeals vacated the Preliminary Injunction. Therefore, while the contents of these communications are abhorrent, (*e.g.*, Doc. 119-2), as background these allegations have little probative value in the absence of additional facts connecting them to Defendants.

Plaintiffs next point to Defendant Montgomery's interactions with Christina Butler; Montgomery and Butler live in Hawaii where they are neighbors. Plaintiffs contend that Montgomery has engaged in witness tampering, and witness tampering might justify sanctions under the Court's inherent authority. However, it appears Plaintiffs have identified Butler as a witness not because she has any knowledge about the facts alleged in the Complaint or about Defendants' conduct as it relates to Plaintiffs, but because she is Montgomery's neighbor and she "independently reached out and offered to assist Plaintiffs due to her own disturbing experiences living next door to Montgomery." (Doc. 32, p. 6; *see also* Doc. 39, pp. 137-47.) The Court is not persuaded that Butler is a witness simply because Plaintiffs arranged for her to testify about her interactions with Butler as a neighbor.

Montgomery's and Butler's interactions eventually led to litigation, which has since been settled. Plaintiffs point to the terms of that settlement as an additional instance of witness tampering, in that it purportedly precludes her from being a witness in this case. The importance of this restriction is questionable because, as stated above, it does not appear that Butler can testify about any facts alleged in the Complaint. And, if a showing could be made that Butler had any relevant information to offer, the Court could be persuaded to exercise its inherent power to order that Butler testify notwithstanding her agreement, as an agreement that precludes a witness from providing relevant testimony is arguably contrary to the public interest. But sanctions are not appropriate.

Plaintiffs' third ground for sanctions relates to a lawsuit Montgomery filed against them in Hawaii state court. Plaintiffs' arguments hinge on their contention that the lawsuit is frivolous, (*e.g.*, Doc. 119, pp. 4, 25, 28; Doc. 125, p. 2), and that Montgomery is issuing improper discovery requests in that suit, (Doc. 119, pp 15-16; Doc. 125, pp. 6-8). For relief, Plaintiffs ask the Court

to order Montgomery "to dismiss the Hawaiian lawsuit and bring any related allegations in this case." (Doc. 119, p. 30.) However, the Court does not believe it has the power to explore whether the suit Montgomery filed against Plaintiffs in Hawaii state court is "frivolous" or whether the discovery requests in that case are improper, nor does the Court believe that the Hawaii state court requires the Court's assistance in either regard. Regardless, the Court lacks the power to order Montgomery to dismiss that suit. *See* 28 U.S.C. § 2283 (absent circumstances Plaintiffs do not allege are present, federal court "may not grant an injunction to stay proceedings in State court"); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970) (Section 2283 also precludes court from enjoining parties from continuing to prosecute suit in state court).

The fourth category involves the "children's book" published by Montgomery. Montgomery does not deny, and the Court would find, that the characters in the book are intended to correspond to parties, attorneys, and others involved in this litigation. But the book would be sanctionable, if at all, only under the Preliminary Injunction, which the Eighth Circuit held should not have been issued. The Court does not find that the book incites violence or any other action toward anyone and it is not independently sanctionable.

Finally, the Court considers the remaining actions Plaintiffs describe that occurred after the Preliminary Injunction was issued and while it was in effect. These actions include:

1. Harassing calls were made to Tumey's high-school aged son, on the son's phone,
2. Tumey's wife's phone was hacked and information was deleted,
3. Plaintiffs' counsel's law firm had its computers hacked and documents were deleted or re-written,
4. Malware has been sent to Plaintiffs' computer systems,

5. Threatening telephone calls, and

6. Denial of service attacks directed to the phones and computer systems of Plaintiffs and their attorneys.[2]

Many of these incidents were brought to the Court's attention in one of the related patent cases, Case No. 20-0111. In an Order dated September 22, 2021, the Court (the Honorable Rosanne Ketchmark, to whom the case was assigned at the time) ruled that there was insufficient evidence to establish that these acts were committed by Defendants. Plaintiff have offered nothing more to connect Defendants to these actions; they rely instead on a correlation between events in the parties' disputes and the activity they describe and ask the Court to find, by circumstantial evidence, that Defendants engaged in the improper actions they have described. But this analysis is inadequate to justify the relief that they seek.

The Court wishes to make clear, however, that there can be no doubt that the conduct described is improper, sanctionable, and in some instances likely criminal. There is no circumstance in which a party – or someone acting on a party's behalf or at their behest or encouragement – should be contacting a party's children or other family members, sending malware, initiating denial of service attacks, or otherwise interfering with their activities. It is also in Defendants' best interests that these activities stop, lest a connection between these activities and Defendants be established or, in the mind of the public, Defendants become guilty by association. (*See* Doc. 39, p. 21 (Defendants' counsel explaining that Defendants are "in the

[2] According to a website maintained by the United States Cybersecurity & Infrastructure Security Agency, "[a] denial-of-service (DoS) attack occurs when legitimate users are unable to access information systems, devices, or other network resources due to the actions of a malicious cyber threat actor. . . . A denial-of-service condition is accomplished by flooding the targeted host or network with traffic until the target cannot respond or simply crashes, preventing access for legitimate users." (https://www.cisa.gov/uscert/ncas/tips/ST04-015 (last visited Mar. 14, 2022).)

privacy business" and it would damage their reputation if it were thought they were involved in invading another's privacy).)[3]

And there should be no doubt: should it be established that Defendants have engaged in the misconduct Plaintiffs have described, the Court will respond quite harshly. But for the reasons stated above, Plaintiffs' motion, (Doc. 118), is **DENIED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: March 18, 2022

[3] The Court notes that Defendants have posted public statements on Mycroft AI's blog discouraging readers from engaging in threatening and harassing conduct, (*see, e.g.*, Doc. 134, p. 2), although it is not in the language proposed by Plaintiffs.