

ROLL 'EM PRODUCTIONS, INC. ET AL.

V.

ALFONSO DIAZ ET AL.

Civil Action No. 08-252

Supreme Court, Trial Division
Republic of Palau

Decided: May 15, 2015

Counsel for Roll 'em Productions, Inc. et al..... Kassi Berg
Counsel for Alfonso Diaz et al. William L. Ridpath

[1] **Torts:** Assault

As a general matter, words do not make an actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person. Consequently, it is commonly said that mere words do not constitute an assault, or that some overt act is required, and this remains true even if the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults.

[2] **Torts:** Assault

The defendant's threats only provoked fear of harm at an indeterminate time in the future, as opposed to the type of apprehension of "imminent contact" required to sustain an action for civil assault.

[3] **Torts:** Assault

That the defendant could be criminally convicted of assaulting the plaintiff but not be civilly liable based on the same misconduct is an entirely feasible consequence of the differences between the elements of civil assault, as set forth in the Restatement, and the elements of criminal assault, as set forth in the Palau National Code.

[4] **Torts:** Infliction of Emotional Harm, Intentional

Extreme and outrageous conduct is that which goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community. This determination depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged.

[5] **Torts:** Infliction of Emotional Harm, Intentional

Severe emotional harm is considered that which is so severe that no reasonable person could be expected to endure it.

[6] **Torts:** Infliction of Emotional Harm, Intentional

The degree of harm suffered may also be inextricably tied to the nature of the misconduct, as in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence bearing on whether the requisite degree of harm resulted.

[7] **Torts:** Damages

Damages: Consequential Damages

Implementing security measures reflect a reasonable, foreseeable, and even likely response to the type of threats made by the defendant, especially considering his apparent power to follow through on these threats. It is further evidenced in the record that these security measures were implemented entirely as a result of the defendant's misconduct. Accordingly, awarding consequential damages for the reasonable cost of these measures is warranted.

[8] **Torts:** Interference with Contract

To succeed on a claim for intentional interference with contract, a plaintiff must plead and prove the following seven elements:

- (1) that it had a valid, enforceable contract with a third party;
- (2) that the defendant had knowledge of that contract or knowledge of facts that should lead it to ask about the contract;
- (3) that the third party actually breached its contract with the plaintiff;
- (4) that the defendant's actions were the proximate cause of that breach;
- (5) that the defendant intended to induce the third party to breach its contract with the plaintiff;
- (6) that the defendant's actions were improper; and
- (7) that the plaintiff suffered pecuniary loss as a result of the breach.

[9] **Damages:** Standard of Proof

Without question, it is important that there be some concrete basis for any damage award, but absolute, beyond-all-reasonable-doubt certainty is neither necessary nor justifiable.

[10] **Damages:** Consequential Damages

A plaintiff entitled to general damages for reputational harm may also seek damages, to the extent that they can be shown, for any special harm or emotional distress caused by the defamation.

[11] **Civil Procedure:** Attorney’s Fees

Damages: Attorney’s Fees

Palau has adopted the general rule, sometimes referred to as “the American rule,” that each party is presumed to bear their own attorney’s fees unless there is a statutory or contractual provision to the contrary.

[12] **Torts:** Unlawful Business Practices

The unfair-or-deceptive-business-practices provision of 11 PNC § 203(h), which makes it unlawful to “disparag[e] the goods, services, or business of another by false or misleading representation of fact,” only creates a private cause of action for *consumers* that have been harmed by a violation of § 203.

[13] **Civil Procedure:** Injunctions

Injunctions: Permanent

Injunctions: Adequacy of Remedy at Law

Torts: Relief Available

In light of Plaintiffs’ success in this action, which includes an award of punitive damages for the express purpose of deterrence, injunctive relief is not reasonably necessary to prevent future harm. Furthermore, any future harm can better be addressed through subsequent actions, as opposed to a permanent and relatively far-reaching prior restraint.

DECISION

The Honorable ARTHUR NGIRAKLSONG, Chief Justice:

This matter is before the Court on the parties’ stipulated findings of undisputed fact and trial briefs on damages. For the reasons set forth below, the Court finds in favor of Plaintiffs on their claims for intentional infliction of emotional distress, intentional interference with contract, and defamation. Plaintiffs’ remaining causes of action are dismissed for failure to prosecute, for failure to state a claim upon which relief can be granted, and as redundant with the claims on which Plaintiffs have already prevailed. The Court further awards damages in the amounts delineated below.

I. Background¹

Plaintiffs Jeff Barabe, Kassi Berg, and Mike Fox are United States citizens and residents of the Republic of Palau. Plaintiffs Hilde “Jill” Senior and Michael Spis Gordon are Palauan citizens and residents of the Republic. Collectively, these

¹ A more comprehensive recitation of the facts is set forth in the parties’ stipulated findings of fact. Portions of this document are reproduced here without quotation designated.

individual plaintiffs are the owners, directors, and shareholders of Plaintiff Roll 'em Productions, Inc. ("Roll 'em"). Roll 'em is, and at all relevant times to this suit was, a lawfully chartered Palauan corporation operating under the Foreign Investment Act by virtue of Foreign Investment Approval Certificate No. 362-2002 ("FIAC"). Roll 'em's FIAC expires in 2035 and states that it may "train, produce, and broadcast multimedia productions." Plaintiffs are also the creators of the television production branded as OTV, which is delivered to PNCC for broadcast to its cable subscribers.

Defendant Alfonso Diaz is a Palauan citizen and the sole proprietor of Defendant Diaz Broadcasting Company, doing business as Medal Belau TV. Diaz's television production, MBTV, is delivered to PNCC for broadcast to its cable subscribers. Diaz was also a sitting Senator of the Republic of Palau at all times relevant to this case.

On September 2, 2008, Barabe filed a complaint against Defendants, alleging assault, defamation, and intentional infliction of emotional distress. Subsequently, the Court allowed the filing of an amended complaint, which added additional parties and causes of action. This First Amended Complaint requested compensatory and punitive damages as well as injunctive relief. The Court granted Plaintiffs' initial motion for a temporary restraining order and, on March 30, 2009, held a hearing on their motion for a preliminary injunction.

During this hearing, Plaintiffs presented evidence that, since Roll 'em began competing with Defendants, Diaz has engaged in a multitude of illegitimate tactics to drive Roll 'em out of business. These tactics included threats—sometimes direct and sometimes thinly veiled—against Barabe's personal safety, using his radio and television programs to continuously broadcast defamatory statements about Plaintiffs' competency, character, and legal status in Palau, and direct interference with Plaintiffs' business operations. Diaz's threatening statements ultimately resulted in a conviction for criminal assault. Diaz's interference with Plaintiffs' business included using his connections and position as a sitting senator to have Roll 'em audited by the Division of Revenue and Taxation and attempting to have Plaintiffs' business permit revoked by the Foreign Investment Board ("FIB").

In addition, Plaintiffs presented evidence that Diaz interfered with a grant Roll 'em had received from UNESCO to develop daily television news programs. On February 28, 2009, Plaintiffs learned that they had been awarded a grant from the UNESCO International Programme for the Development of Communication. Subsequently, Diaz wrote several e-mails to Abel Cain at UNESCO, all signed "Senator Diaz," complaining about UNESCO's grant award to Roll 'em. In particular, Diaz wrote that Roll 'em was unlawfully operating a business in Palau and breaking its FIB permit. He further stated that "at this time we are doing investigation on other grants they applied for from other donors throughout the world." Nine days later, Plaintiffs received an e-mail from UNESCO, informing them that UNESCO had received a complaint from Diaz regarding the legal status of OTV and that, as a direct result of the Senator's interference, the grant was suspended. Consequently, Roll 'em was forced to allocate

substantial time and resources to reassuring UNESCO of its lawful status in Palau. On April 7, 2009, the grant was restored. At this time, UNESCO's Adviser for Communication & Information for the Pacific States wrote to Diaz to assure him that UNESCO was confident of OTV's legal status in Palau.

Based on the evidence adduced at the preliminary injunction hearing, on April 7, 2009, the Court granted Plaintiffs' motion for a preliminary injunction. On February 24, 2010, the Court took judicial notice of the Information, Affidavit of Probable Cause, Stipulations and Waiver of Trial, and Agreement of the Parties filed in *ROP v. Diaz*, Criminal Case No. 09-067. In that case, Diaz stipulated to the truth of the following:

1. That he used his official position to influence an official action in order to limit the competition to the radio and television broadcast business in which he holds an interest by his introduction of Senate Bill 8-19.
2. That he has been given control of the Republic of Palau Senate audio and visual recordings and that Roll 'em's requests to the Senate asking for information were ignored but the same information was later seen playing on MBTV.
3. That he used his government position as a senator in an attempt to pressure the FIB to investigate, fine and revoke the operating license of his private business competition.
4. That he used his government position as a senator to influence UNESCO to suspend a grant given to his private business competition.

In addition, on July 16, 2013, in *ROP v. Diaz*, Criminal Case No. 12-010, Diaz was tried on four counts of broadcast violations for his failure to produce complete, unedited recordings of his radio broadcasts that were requested by Roll 'em through the Division of Communications. After a two-day trial, the Trial Division of the Supreme Court found Diaz guilty on all four counts. The Trial Division also imposed the maximum fine under the statute and the conviction was upheld on appeal.

Ultimately, the parties to this case stipulated, in accordance with ROP Rule of Civil Procedure 65(a)(2), for all evidence introduced at the preliminary injunction hearing to be admitted and incorporated into the trial record. The parties further agreed to file, in lieu of a full trial on the merits, stipulated findings of undisputed fact along with trial briefs on damages. These documents having been filed with the Court, this matter is now ripe for final resolution.

II. Discussion

Plaintiffs' First Amended Complaint asserts the following nine causes of action: (1) assault; (2) defamation; (3) intentional infliction of emotional distress; (4) unlawful communication with a foreign government; (5) harassment; (6) abuse of power; (7)

unfair business competition; (8) intentional interference with contract; and (9) intentional interference with prospective business relations. Each of these claims is addressed, in turn, as follows, though not necessarily in the same order as they are asserted in Plaintiffs' First Amended Complaint.

A. Assault and Intentional Infliction of Emotional Distress

Plaintiffs' First Amended Complaint asserts separate causes of action for assault and intentional infliction of emotional distress, though these two claims overlap in many respects. *See* Pls.' First Am. Compl. at 9-10. Palau has no statute concerning civil assault, such that this Court must seek guidance from the Restatements of the Law, *see* 1 PNC § 303, which provide, in pertinent part:

An actor is subject to liability to another for assault if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) the other is thereby put in such imminent apprehension

- [1] Restatement (Second) of Torts § 21 (1965). As a general matter, pursuant to the rules concerning civil assault embodied in the Restatement, “[w]ords do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.” *Id.* § 31. Consequently, “it is commonly said . . . that mere words do not constitute an assault, or that some overt act is required,” and this remains true even if “the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults.” *Id.* § 31 cmt. a. At the same time, however, this rule has been somewhat relaxed “to permit the finding of an assault on the basis of words in the light of past conduct and other attendant circumstances.” *Id.* § 31 Reporter’s Note.

In the present case, the undisputed facts show that Diaz repeatedly threatened the physical safety of Barabe, both over the phone and via e-mail. In particular, while on the phone with Barabe, Diaz was heard repeatedly stating, “I will kill you,” for which he was later cited for criminal assault. Ultimately, Diaz did not contest this citation, accepted his resulting conviction, and paid a fine. Only three days after threatening Barabe over the telephone, in an e-mail addressed to Plaintiffs’ generic business e-mail address, Diaz wrote:

Jeff [Barabe] my friend, those Palauan working for your are my people, and do you think they’re going to stand there and watch you attacking their senator and not doing anything about it? Why I ask you that question, because I am

very concern about your safety . . . I don't have control over some of my supporters, and they might do something stupid without my knowledge. It has happened many times before here in Palau

There does not, however, appear to be any evidence in the record indicating that Diaz specifically threatened any of the individual plaintiffs other than Barabe.

[2][3] In any event, it is clear from Barabe's testimony that Diaz's threats only provoked fear of harm at an indeterminate time in the future, as opposed to the type of apprehension of "imminent contact" required to sustain an action for civil assault. Restatement (Second) of Torts § 29 cmt. b ("The apprehension created must be one of *imminent* contact, as distinguished from any contact in the future. . . . [Imminent] means [] that there will be no significant delay." (emphasis added)). Furthermore, there is little if any evidence of past conduct or attendant circumstances that might permit a finding of liability based on words alone. Admittedly, it may, on its face, appear odd that Diaz could be criminally convicted of assaulting Barabe but not be civilly liable based on the same misconduct. Such a result, however, is an entirely feasible consequence of the differences between the elements of civil assault, as set forth in the Restatement, and the elements of criminal assault, as set forth in the Palau National Code. *Compare id.* §§ 21, 29(1), *with* 17 PNCA § 501.

Although the record thus fails to establish an actionable claim for civil assault, this finding, in light of the egregious and malicious nature of the misconduct at issue, supports a finding of liability under the overlapping and alternative theory of intentional infliction of emotional distress. As the Restatement aptly provides, in discussing the general rule that words alone cannot constitute assault, "Any remedy for words which are abusive or insulting, or which create emotional distress by threats for the future, is to be found under §§ 46 and 47," which are the sections that govern intentional infliction of emotional distress. Restatement (Second) of Torts § 31 cmt. a. This cause of action "originated as a catchall to permit recovery in the narrow instance when an actor's conduct exceeded all permissible bounds of a civilized society but an existing tort claim was unavailable." Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. a (2012). The cause of action for intentional infliction of emotional distress is thus uniquely and appropriately suited to the present case, which involves threats of future harm as part of a broader pattern of intimidation and abuse.

With respect to the intentional or reckless infliction of emotional distress, the Restatement provides, "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm . . ." *Id.* § 46; *accord Nebre v. Uludong*, 15 ROP 15, 30 (2008) ("To establish liability for intentional infliction of emotional distress, a plaintiff must have endured conduct so extreme as to be an outrage to human decency and dignity." (quotation omitted)). As this suggests, the critical elements are that the defendant's conduct be "extreme and outrageous" and that the emotional harm suffered by the plaintiff be "severe." Together, these requirements serve "to provide

some assurance about the genuineness of the claim and to screen out modest or trivial harms that are endemic to modern society and therefore inappropriate for the legal system to address.” Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. j. At the same time, however, the Restatement expressly rejects the notion that a plaintiff must suffer some bodily harm or exhibit “some ‘physical manifestation’” of her emotional injuries in order to recover damages for the infliction of emotional harm. *Id.* §§ 4 cmt. d, 46 cmt. b.

[4][5][6] Extreme and outrageous conduct is that which “goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community.” *Id.* § 46 cmt. d. This determination “depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged.” *Id.* Severe emotional harm is considered that which “is so severe that no reasonable [person] could be expected to endure it.” *Id.* § 46 cmt. j (quotation omitted). The degree of harm suffered may also be inextricably tied to the nature of the misconduct, as “in many cases the extreme and outrageous character of the defendant’s conduct is itself important evidence bearing on whether the requisite degree of harm resulted.” *Id.*

In light of the testimony presented at the preliminary injunction hearing and the parties’ stipulated findings of fact, the Court finds that, with respect to Barabe, Diaz’s conduct was sufficiently extreme and outrageous, and the resulting emotional harm sufficiently severe, to support a finding of liability for intentional infliction of emotional distress. It is clear that Diaz used and abused his positions as the sole proprietor of a media production company, an on-air personality, and a sitting senator to orchestrate a relentless scheme of intimidation, threats, and harassment designed to demean and ostracize Barabe and make him fear for the safety of his person, family, and business. Considering Diaz’s position relative to Barabe, the nature of his offensive and fraudulent tactics, the obvious malice that pervaded all of his actions, the prolonged period of abuse—over the course of which his attacks continually escalated until Barabe was compelled to file this suit, and the demonstrable distress suffered by Barabe, the Court concludes that Diaz is liable for this harm.

It bears emphasis that this is not merely a case of idle threats and a handful of hateful, though perhaps constitutionally protected, statements. The troubling aspect of this case, the aggravating circumstance that makes it shock the conscience, so to speak, is Diaz’s unmitigated and unapologetic abuse of his positions as a senator and owner of—and on-air personality for—a broadcasting company. Diaz abused these positions of trust and respect to threaten, intimidate, and publicly and baselessly shame his business competitor. If such behavior does not exceed that which is tolerable in a civilized community, the Court would be hard-pressed to identify any misconduct that might.

While this supports a finding of liability with respect to Barabe, the evidence of record does not support such a finding as to the remaining plaintiffs.² As noted above, only Barabe was ever specifically threatened by Diaz. In fact, it is quite evident from the record that Barabe bore the brunt of Diaz's extreme and outrageous conduct in this case. The evidence thus does not support a finding that Diaz had the requisite intent to emotionally harm the other plaintiffs, as it does with respect to Barabe. Similarly, as to the other plaintiffs, the record does not permit a finding that Diaz's actions were sufficiently extreme and outrageous, or that the harm inflicted was sufficiently severe, to sustain this cause of action.

1. *Damages for Intentional Infliction of Emotional Distress*

The cause of action for intentional infliction of emotional distress provides recovery for the emotional harm caused by the defendant's extreme and outrageous conduct. See Restatement (Third) of Torts: Phys. & Emot. Harm § 46. Emotional harm is defined as an "impairment or injury to a person's emotional tranquility." *Id.* § 45. This broad definition "encompasses a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression (and other mental illnesses), and a host of other detrimental—from mildly unpleasant to disabling—mental conditions." *Id.* § 45 cmt. a; see also *Robert v. Ikesakes*, 6 ROP Intrm. 234, 241 (1997) ("One who has a cause of action for a tort may be entitled to recover as an element of damages for that form of mental distress known as humiliation, that is, a feeling of degradation . . ." (quotation omitted)). Once a party's liability for emotional harm is established, the amount of damages to award is entirely within the Court's discretion, "the only standard being such an amount as a reasonable person would estimate as fair compensation," Restatement (Second) of Torts § 912 cmt. b; see also *Johnson v. Gibbons*, 11 ROP 271, 276 (Tr. Div. 2004) ("[P]ain and suffering are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured." (quotation omitted)).

In this case, Barabe has requested \$10,000 in compensatory damages for emotional harm. See, e.g., Pls.' Trial Br. on Damages at 15. In addition, Barabe has averred that he incurred the following expenses as a direct consequence of the fear for the safety of himself, his family, his colleagues, and his business engendered by Diaz's threats and intimidation:

- a) Installed security camera system at my house at a cost of \$3,850.
- b) Installed security camera system at my office at a cost of \$3,850.
- c) Installed security bars at the office at a cost of \$1,200.

² Plaintiffs Gordon and Senior are the only plaintiffs other than Barabe who have actually requested compensatory damages for emotional distress, or in fact any damages that could be said to be the result of intentional infliction of emotional distress or assault. Accordingly, it appears that the other plaintiffs have abandoned these causes of action.

- d) Upgraded the locks on doors and windows at my house at a cost of \$300.
- e) Installed motion detector security lighting at the house and office at a cost of \$300.
- f) Repaired the fence around our house at a cost of \$450.
- g) Obtained a dog for security.

In sum, Barabe seeks \$9,950 in consequential damages resulting from the security measures he implemented in response to Diaz's threats.

As to the amount of damages to award for the emotional harm suffered by the individual plaintiffs, Defendants suggests that the Court should be guided by damage awards made in other cases. The Court is persuaded, however, by a prior decision of the Trial Division, which held that "it is improper for the Court to consider damage awards in other cases when setting damages in this case," because "[e]ach case stands on its own unique facts and circumstances, and damages should be determined based upon those facts and circumstances, not ones present in other cases." *Sakaziro v. ROP*, 7 ROP Intrm. 279, 281 n.1 (Tr. Div. 1999) (citing, for example, *Wilson v. Beebe*, 743 F.2d 342, 348 (6th Cir. 1984)). Accordingly, the Court declines to predicate the damage award in this case on the type of improper comparison urged by Defendants.

Having considered the totality of the circumstances in this case, the Court finds that \$10,000 represents a fair and reasonable amount of compensation for the actual harm inflicted. This amount reflects the fear, anxiety, and humiliation engendered by Diaz's malicious conduct, and is premised on both the extreme and outrageous nature of this behavior as well as the credible harm suffered by Barabe, in light of his testimony as well as what a reasonable person in like circumstances might be expected to endure.

Finally, Defendants have not contested the propriety of an award of consequential damages for security expenses, with the exception of a single and conclusory statement that, "No supporting evidence as to the security system allegation is in the record," Defs.' Trial Br. on Damages at 2. However, this perfunctory argument overlooks the sworn statement that Barabe submitted, under penalty of perjury, in which he attests to the specific security measures implemented and their respective costs. Defendants have submitted no evidence suggesting that these were unreasonable expenses. Defendants did not, for example, submit any estimates or other documentary or testimonial evidence indicating that these security apparatuses could have been obtained at lesser expense. Nor have Defendants made any argument or offered any evidence that tends to undermine the credibility of Barabe's affidavit.

[7] Ultimately, implementing security measures of the sort described in Barabe's affidavit reflect a reasonable, foreseeable, and even likely response to the type of threats made by Diaz, especially considering his apparent power to follow through on these threats. It is further evidenced in the record that these security measures were implemented entirely as a result of Diaz's misconduct. Accordingly, the Court awards consequential damages in the amount of \$9,950 to Barabe. *See* Restatement (Second) of Torts § 917

(“One who tortiously harms the person . . . of another is subject to liability for damages for the consequences of the harm in accordance with the rules on whether the conduct is a legal cause of the consequences.”).

B. Intentional Interference with Contract

[8] Plaintiffs’ claim for intentional interference with contract overlaps significantly with their claim for defamation, which is addressed in more detail below. However, Plaintiffs have requested that the Court consider their intentional interference with contract cause of action as an alternative means for recovering, at least some of, the damages sought in connection with their claim for defamation. *See, e.g.*, Pls.’ Trial Br. on Damages at 7-8, 13 n.11. To succeed on a claim for intentional interference with contract, a plaintiff must plead and prove the following seven elements:

(1) that it had a valid, enforceable contract with [a third party]; (2) that [the defendant] had knowledge of that contract or knowledge of facts that should lead it to ask about the contract; (3) that [the third party] actually breached its contract with [the plaintiff]; (4) that [the defendant’s] actions were the proximate cause of that breach; (5) that [the defendant] intended to induce [the third party] to breach its contract with [the plaintiff]; (6) that [the defendant’s] actions were improper; and (7) that [the plaintiff] suffered pecuniary loss as a result of [the] breach.

Hanpa Indus. Corp. v. Black Micro Corp., 12 ROP 29, 34 (2004).

Diaz’s interference with the UNESCO grant plainly satisfies each of these elements. Specifically, the undisputed facts show that Diaz knew that UNESCO had agreed to provide Roll 'em with the grant at issue and deliberately made libelous statements about Roll 'em to UNESCO in order to cause UNESCO to withdraw the grant award. The record further reveals that Diaz succeeded in this effort. In particular, it is undisputed that the grant was suspended as a direct consequence of Diaz’s unilateral and improper intervention, which caused Roll 'em to suffer pecuniary harm.

1. Damages for Intentional Interference with Contract

The pecuniary harm resulting from this tortious conduct consists of the time and resources that Roll 'em had to reallocate to recovering the grant as a result of Diaz’s interference. Barabe estimates this loss as totaling \$4,200, which reflects the man-hours that had to be diverted to recovering the grant at the various hourly billing rates of the Roll 'em employees that accomplished this task. *See* Jeffrey Barabe Decl. in Support of Pls.’ Trial Br. on Damages at 5.

[9] Defendants argue that this amount has not been proven with sufficient particularity to permit such an award. However, the detailed, reasonable and, it must be said, decidedly conservative estimates provided by Barabe in his sworn declaration provide all the certainty that might reasonably be expected given the nature of the tort and the

circumstances of the case. *See* Restatement (Second) of Torts § 912 (“One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation *with as much certainty as the nature of the tort and the circumstances permit.*” (emphasis added)). Without question, it is important that there be some concrete basis for any damage award, but absolute, beyond all reasonable doubt certainty is neither necessary nor justifiable. *See id.* § 912 cmt. a (“It is desirable, [] that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.”). Accordingly, the Court awards Roll 'em \$4,200 in damages resulting from Diaz’s interference with the UNESCO grant.

C. Defamation

Plaintiffs’ First Amended Complaint also asserts a claim for defamation. The sole reference to defamation in the Palau National Code addresses only the burden of proof in such actions. Specifically, 14 PNC § 4201, entitled “Burden of Proof in Defamation Actions,” states: “The plaintiff in a defamation action shall be required to allege that the offending publication is false. Once this allegation is raised, the burden of proof shall shift to the defendant to show that the publication is true.” Accordingly, with respect to the precise elements of the tort of defamation and related defenses, our case law has been guided by the relevant provisions of the Restatements of Law. *See, e.g., Ngiraingas v. Nakamura*, 18 ROP 225, 234 (2011) (“Palau has no civil statute regarding tortious defamation. In the absence of a local defamation statute, the Court seeks guidance from the Restatements of Law.” (citing 1 PNC § 303)).

Pursuant to the Restatement (Second) of Torts § 558, the essential elements of a claim for defamation are:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Accord Ngiraingas, 18 ROP at 234. There is at least one further caveat, however, that may be relevant to the present case. Namely, in cases where the allegedly defamatory remarks concern “a public official or public figure in regard to his conduct, fitness or role in that capacity,” the defendant “is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.” *Id.* at 234-35 (quotation omitted).

In this case, Plaintiffs plainly alleged that Diaz knowingly published false statements about their business to third-parties, including UNESCO. *See* Pls.' First Am. Compl. at 9-10. Furthermore, in ruling on Plaintiffs' motion for a preliminary injunction, this Court found credible testimony that Diaz "harassed [Plaintiffs] on numerous occasions by making defamatory statements on his radio program," and "unreasonably attacked, on radio and television, the quality of Plaintiffs['] work, the legality of their operations, and their personal characters." Prelim. Inj. Order at 3. In light of these allegations and the evidence adduced at the preliminary injunction hearing, there can be no question that Plaintiffs presented a prima facie case of defamation and that the burden shifted to Defendants to prove that the statements at issue were true.

Having reviewed the stipulated findings of facts submitted by the parties, the Court finds that Defendants have failed to show that the defamatory statements about Plaintiffs and their business were, more likely than not, true. Quite to the contrary, the Court finds that Diaz knew that the statements were false or, at the very least, acted with reckless disregard to their veracity.³ To take but one example, it is evident from the evidence adduced during the preliminary injunction hearing and the stipulated findings of undisputed fact that Diaz knowingly, or in any event recklessly, made false allegations to UNESCO about Roll 'em and its legal status in Palau. Furthermore, this was only one instance in a much larger pattern of regular and persistent defamation intended to tarnish Roll 'em's reputation in the community and discourage, under false pretenses, anyone from doing business or associating with this company. These defamatory remarks included, but were not limited to, baseless assaults on the character and competency of those affiliated with Roll 'em, as well as the legality of Roll 'em's operations in Palau. *See, e.g.*, Johnson Iechad Decl. in Supp. of Pls.' Trial Br. on Damages at 2-3.

Thus, the first three elements of a claim for defamation are plainly satisfied here. The fourth and final element requires the plaintiff to prove that the defendant's statement(s) constituted: (1) libel, (2) slander per se, or (3) slander that resulted in some special harm to the plaintiff. Restatement (Second) of Torts §§ 558(d), 569-70, 575. Libel is defined as "the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words," *id.* § 568(1), which expressly includes the "[b]roadcasting of defamatory matter by means of radio or television," *id.* § 568A. Slander per se includes, *inter alia*, "a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession." *Id.* § 573.

³ This finding, amply supported by the evidence in the record, makes it unnecessary to consider whether Plaintiffs, as the creators and operators of a television production, are "public figures," since their claim for defamation succeeds even assuming that they are.

Under either and in fact both of these theories, Diaz's defamatory statements are actionable irrespective of any proof of special harm. Without question, Diaz's e-mails to UNESCO, which falsely claimed that Roll 'em was operating illegally in Palau and violating its FIB permit, constitute libel, as do Diaz's defamatory on-air television and radio remarks. In addition, it is undisputed that Diaz's defamatory statements frequently attacked the competency, ethics, and legal status of Plaintiffs and their business, in a manner that constitutes slander per se.

Furthermore, Plaintiffs have proven that they suffered special harm as a result of these defamatory statements. Within the context of a defamation action, "special harm" means "the loss of something having economic or pecuniary value." *Id.* § 575 cmt. b. As discussed above, it is undisputed that UNESCO suspended a grant that had previously been awarded to Roll 'em as a direct consequence of Diaz's libelous e-mails. As a result, Roll 'em had to devote significant amounts of time and resources to recovering the grant. These otherwise unnecessary expenses suffice to establish the existence of some special harm resulting from the defamation. Moreover, in addition to the loss of the UNESCO grant, Plaintiffs have presented credible evidence that their business suffered financially as a result of Diaz's defamation in other ways as well, including the loss of clients. *See, e.g.*, Jeffrey Barabe Decl. in Supp. of Pls.' Trial Br. on Damages at 3.

For all of the reasons set forth above, the evidence of record and stipulated statement of undisputed facts suffice to prove Defendants' liability for defamation.

1. *Damages for Defamation*

The prevailing party in a defamation suit is generally entitled to compensatory damages for any harm that the defamatory statements inflicted on their reputation. Restatement (Second) of Torts § 621. Under the common law, such damages are immediately recoverable—that is, without further proof of any actual harm to the plaintiff's reputation—where the defendant's defamatory statements constitute either (1) libel, or (2) slander per se. *Id.* § 621 cmt. a. In other words, the common law permits recovery "not only for harm to reputation that is proved to have occurred, but also, in the absence of this proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved." *Id.* These are commonly referred to as "presumed damages," and permit a highly discretionary award—effectively any amount the trier of fact determines to be fair and reasonable compensation for the likely or presumptive reputational harm resulting from the statements at issue. *Id.*; *see also id.* at § 904 cmt. a ("In many cases in which there can be recovery for general damages, there need be no proof of the extent of the harm, since the existence of the harm may be assumed and its extent is inferred as a matter of common knowledge from the existence of the injury as described.").

At least with respect to negligent defamation, however, the U.S. Supreme Court has held "that the common law rule of presumed damages is incompatible with the First

Amendment freedoms and therefore unconstitutional.” *Id.* § 621 cmt. b (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Rather, in this context, “a plaintiff’s recovery is confined to compensation for ‘actual injury.’” *Id.* Although the U.S. Supreme Court has not expressly defined “actual injury,” the Restatement provides the following guidance on the meaning of this term:

[Actual injury] includes ‘impairment of reputation and standing in the community,’ but this must be supported by competent evidence and cannot be presumed in the absence of proof. Unless the harm is pecuniary in nature, the evidence need not ‘assign an actual dollar value’ to it. ‘Actual injury’ is also held to include ‘personal humiliation, and mental anguish and suffering,’ provided they are proved to have been sustained. The Constitution does not require proof of impairment of reputation before damages for emotional distress can be recovered.

Id. Furthermore, because the U.S. Supreme Court’s decision was limited to negligent defamation, the Restatement has taken “no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.” *Id.* § 621 caveat; *see also id.* § 621 cmt. c.

Ultimately, the Court need not decide whether this exception to the common law is equally necessitated by the freedom of expression enshrined in the Palau Constitution or, assuming that it is,⁴ whether it should be extended to cases, such as the present one, where the defendant acted with knowledge of or reckless disregard to the falsity of his statements. This is because there is ample evidence in the record that shows Roll 'em suffered an “actual injury” as a result of Diaz’s defamatory statements. While Defendants argue that any reputational harm stemming from the communications with UNESCO were “narrow and short-lived,” this argument ignores the pervasive impact of the defamatory broadcasts. *See, e.g.*, Johnson Iechad Decl. in Supp. of Pls.’ Trial Br. on Damages. Moreover, as discussed above, there is evidence that Plaintiffs’ business suffered fiscal harm, including the expenses attendant to recovering the UNESCO grant and the loss of clients who feared that any association with Roll 'em might subject them to Diaz’s malice.

⁴ On this point, the Court recognizes that existing precedent concerning defamation potentially requires, or at least strongly supports, adopting this exception. *See Ngiraingas v. Nakamura*, 18 ROP 225, 233 (2011) (“Defamation cases in the United States implicate the First Amendment of the Constitution of the United States, . . . Palau has a similar constitutional provision to that of the First Amendment. . . . As we have yet to interpret this constitutional provision in the context of a defamation action, we adopt the law and reasoning of the United States to guide our decision-making.”).

It is equally clear, however, that Diaz's defamatory statements were primarily or even exclusively directed at Roll 'em. Even to the extent that Diaz's remarks did reference the individual plaintiffs, they attacked them solely in their capacity as persons affiliated with Roll 'em. In other words, to the extent Diaz's defamation harmed the reputations of the individual plaintiffs, it did so only in their capacities as the stakeholders, managers, and on-air personalities of Roll 'em. Accordingly, these assaults on the individuals who owned and operated Roll 'em, based solely on their affiliation with Roll 'em, most accurately reflect additional defamatory statements about Roll 'em, as opposed to attacks against the individual plaintiffs in their personal capacities.

Furthermore, although Roll 'em is, for the reasons set forth above, entitled as a matter of law to general damages for reputational harm, these damages are limited to "compensating [Roll 'em] for the harm that the publication has caused to [its] reputation," Restatement (Second) Torts § 621 cmt. a. Here, Plaintiffs request \$50,000 in general damages. Defendants concede that some award of general damages is likely appropriate, but ask that any such award be limited to "a modest sum for the purposes of vindication." Defs.' Trial Br. on Damages at 5. Having reviewed the testimony from the preliminary injunction hearing as well as the stipulated findings of undisputed facts, the Court finds that Plaintiffs' request overstates the extent of the proven, or even likely or presumptive, harm to Roll 'em's reputation inflicted by the defamatory statements at issue. Having reviewed the totality of the circumstances, including the fact that Diaz's defamatory statements were not likely to be perceived as credible by the general public, the Court finds that an award of \$1,000 is sufficient to compensate Roll 'em for the reputational harm it suffered in this case.

[10] Plaintiffs have also requested actual or special damages in the amount of \$27,850, which reflects the cost of installing and operating a recording system to monitor Defendants' television and radio broadcasts (\$7,450) as well as lost productivity (\$20,400).⁵ A plaintiff entitled to general damages for reputational harm may also seek damages, to the extent that they can be shown, for any special harm or emotional distress caused by the defamation. Restatement (Second) of Torts §§ 621 cmt. a, 622-23.⁶

⁵ Plaintiffs' total stated request for actual damages is \$41,700. This appears to be the result of a clerical error, however, as the addition of each line-item that comprises this aggregate sum produces a total of \$42,000. In addition, \$14,150 worth of this total amount has already been awarded as damages stemming from Defendants' intentional infliction of emotional distress (\$9,950) and tortious interference with contract (\$4,200), as set forth above.

⁶ Likewise, albeit in a somewhat circular manner, a defendant who is found liable for slander that caused some special harm to the plaintiff is also liable for any reputational harm or emotional distress caused by the defamatory statement. *Id.* § 575 cmt. a

The Court finds that \$27,850 reflects a reasonable, and in fact decidedly conservative, approximation of the actual harm Roll 'em suffered as a result of Defendants' defamation. Although Defendants once again contest the certainty with which Plaintiffs have proven these damages, this argument is unpersuasive for the same reasons discussed with respect to the damages resulting from Diaz's tortious interference with contract, as set forth in more detail above.

D. Punitive Damages and Attorney's Fees and Costs

Plaintiffs also seek awards for punitive damages as well as their attorney's fees and costs. As to the former, an "award of punitive damages rests entirely in the discretion of the trier of fact[,] who must determine whether the defendant was motivated by malice, whether the defendant's conduct was sufficiently willful or wanton to justify the imposition of punitive damages, or whether there was such a reckless disregard of the rights of others as to warrant an award." *Nebre v. Uludong*, 15 ROP 15, 31 (2008). Factors relevant to this inquiry "include the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant." *W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 129 (2008) (quotation omitted). Such an award is designed primarily to deter and punish particularly outrageous conduct. *See id.*; *Nebre*, 15 ROP at 31.

As the preceding discussion makes clear, there is ample evidence in the record to justify an award of punitive damages in the present case, and in fact Defendants concede as much, *see* Defs.' Trial Br. on Damages at 9 ("Defendants do, however, concede that some award of punitive damages may be appropriate under the circumstances of this matter."). Furthermore, Defendants' suggestion that their compliance with the Court's duly ordered preliminary injunction in this case, backed by the threat of contempt and all of the punishments attendant thereto, a claim Plaintiffs in fact contest, *see* Stipulation of Undisputed Facts at 16, somehow justifies reducing any punitive damages award is singularly unpersuasive.

Plaintiffs request \$50,000 in punitive damages. Having reviewed the evidence of record and considered the totality of the circumstances of the present case, the Court finds that \$40,000 is an appropriate amount to both punish Defendants for their actions, so plainly motivated by malice, and deter similar misconduct in the future.

With respect to attorney's fees and costs, Plaintiffs argue that such an award is within the inherent discretion of the Court. This is accurate, however, only with respect to Plaintiffs' costs, specifically those "fees and expenses paid or incurred . . . for the service of process, witness fees, or filing fees on appeal," which, pursuant to statute, "shall be taxed as part of the costs against the losing party or parties unless the court shall otherwise order," 14 PNC § 703. *Accord Kulas v. Becheserrak*, 7 ROP Intrm. 106, 106 (1998). Costs, however, "are a limited subset of a party's total expenses[.]" and do not include attorney's fees or all of the expenses associated with litigating the case. *Id.* at 106-07.

[11] Although Plaintiffs style their request as one for “costs of suit and reasonable attorney’s fees,” Pls.’ Trial Br. on Damages at 7, they have in fact only requested, and submitted proof of, their attorney’s fees, *see* Kassi Berg Decl. in Support of Pls.’ Trial Br. on Damages. However, Palau has adopted the general rule, sometimes referred to as “the American rule,” that each party is presumed to bear their own attorney’s fees unless there is a statutory or contractual provision to the contrary. *See, e.g., Haruo v. Ridep*, 17 ROP 1, 8 (2009) (“Palau follows the American rule in which each party typically bears their own attorney fees.”); *W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 128-29 (2008) (“Absent a statute or contract to the contrary, each party is responsible for his own attorney fees.”); *Rdialul v. Kirk & Shadel*, 12 ROP 89, 94 (2005) (“[E]ach party pays for its own attorney’s fees absent a statute or contract to the contrary.”); *Francisco v. Chin*, 10 ROP 44, 54-55 (2003) (“[T]he attorney-fee issue should have been decided according to the common law of the United States, *see* 1 PNC § 303, under which each party pays for its own counsel absent a contrary statute or contract.”). Plaintiffs have failed to identify any statutory or contractual provision entitling them to an award of attorney’s fees in this case. While Plaintiffs are, consequently, not entitled to a separate award of attorney’s fees, the Court has considered these fees in determining the appropriate amount of punitive damages to award. *See Robert v. Ikesakes*, 6 ROP Intrm. 234, 242-43 (1997).

E. Unfair Business Competition, Unlawful Communication with a Foreign Government, Harassment, Abuse of Power, and Intentional Interference with Prospective Business Relations

[12] Plaintiffs’ First Amended Complaint also claims that Defendants employed unfair or deceptive business practices in violation of 11 PNC § 203(h), which makes it unlawful to “disparag[e] the goods, services, or business of another by false or misleading representation of fact.” This provision, however, is part of 11 PNC Chapter 2, which is entitled “Consumer Protection,” and, as this suggests, subsequent provisions only create a private cause of action for *consumers* that have been harmed by a violation of § 203. *See* § 206 (“Any person *who purchases or leases goods or services primarily for personal, family or household purposes* and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 203 of this chapter, may bring an action under the Courts of Republic of Palau Rules of Civil Procedure in an appropriate court of the Republic,” (emphasis added)). As Plaintiffs are not within the class of persons authorized to sue under this Chapter, this claim necessarily fails.

The remaining counts in Plaintiffs’ First Amended Complaint assert claims for: (1) unlawful communication with foreign governments, (2) harassment, (3) abuse of power, and (4) intentional interference with prospective business relations. Plaintiffs’ trial brief on damages, however, makes no request for damages based on any of these theories of liability. Accordingly, Plaintiffs have effectively, through their silence,

abandoned these claims. In addition, as a result of Plaintiffs' failure to prosecute these claims, Plaintiffs have presented no authority or argument suggesting that any of these claims presents a cognizable cause of action, and the Court's own research has failed to reveal any such authority. Furthermore, the factual bases for, as well as the injuries that Plaintiffs seek to recover under, these causes of action overlap entirely with the misconduct and harms for which the Court has already found liability and awarded damages under Plaintiffs' alternative theories, as set forth at length above.

Consequently, these remaining claims are dismissed for the following three, independent and alternative reasons: (1) failure to prosecute; (2) failure to state a claim upon which relief can be granted, *see* ROP R. Civ. P. 12(b)(6); and/or (3) as wholly redundant with Plaintiffs' other causes of action, *see* ROP R. Civ. P. 12(f).

F. Injunctive Relief

[13] Plaintiffs also seek a permanent injunction that would enjoin a wide array of speech and expressive conduct. *See* Pls' First Am. Compl. at 13-14. However, in light of Plaintiffs' success in this action, which includes an award of punitive damages for the express purpose of deterrence, the Court finds that this relief is not reasonably necessary to prevent future harm. Furthermore, any future harm can better be addressed through subsequent actions, as opposed to a permanent and relatively far-reaching prior restraint.

III. Conclusion

For the reasons set forth above, the Court hereby **FINDS, ADJUDGES and ORDERS** as follows:

1. Defendants are jointly and severally liable to Plaintiff Jeffrey Barabe for intentional infliction of emotional distress, in the amounts of: (1) Ten-Thousand Dollars (\$10,000.00) in compensatory damages; and (2) Nine Thousand Nine Hundred and Fifty Dollars (\$9,950.00) in consequential damages.
2. Defendant Diaz is liable to Plaintiff Roll 'em Productions for intentional interference with contract, in the amount of Four Thousand Two Hundred Dollars (\$4,200.00).
3. Defendants are jointly and severally liable to Plaintiff Roll 'em Productions for defamation, in the amounts of: (1) One Thousand Dollars (\$1,000.00) in general damages; and (2) Twenty Seven Thousand Eight Hundred and Fifty Dollars (\$27,850.00) in actual damages.
4. Defendants are further jointly and severally liable to Plaintiffs Barabe and Roll 'em Productions for Forty Thousand Dollars (\$40,000.00) in punitive damages.

5. Plaintiffs' remaining claims are **DISMISSED**.