

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUPER FUTURE EQUITIES, INC.,	§	
	§	
Plaintiff,	§	
	§	
V.	§	
	§	
WELLS FARGO BANK MINNESOTA,	§	
N.A., <i>as Trustee of the Certificate Holders</i>	§	CIVIL ACTION NO. 3: 06-CV-0271-B
<i>of Merrill Lynch Mortgage Investors</i>	§	
<i>CMBS Pass Through Certificates Series</i>	§	
1999-C1, ORIX CAPITAL MARKETS,	§	
LLC, ORIX CAPITAL MARKETS	§	
PARTNERSHIP, JOHN DINAN,	§	
MICHAEL WURST, CLIFFORD	§	
WEINER, and JAMES R. THOMPSON,	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Super Future Equities, Inc. (individually referred to as “Super Future Equities”) filed this action against Wells Fargo Bank Minnesota, N.A. (“Wells Fargo”); ORIX Capital Markets, LLC (“Orix” or “Orix Capital”); ORIX USA Corporation (“Orix USA”); John Dinan; Michael F. Wurst; Clifford Weiner; James R. Thompson; and ORIX Capital Markets Partnership (“Orix Partnership”)¹, claiming breach of fiduciary duty, negligence, gross negligence, breach of contract, and civil violations of Racketeer Influenced and Corrupt Organizations Act (“RICO”). Orix Capital filed a counterclaim against Super Future Equities, Schumann Rafizadeh, Cyrus Rafizadeh, D.R.², Houman

¹On August 2, 2007, the Court dismissed Orix Capital Markets Partnership from the case pursuant to Federal Rule of Civil Procedure 4(m) (doc. 309).

²Counter-Defendant D.R. is a minor child. According to this Court’s Privacy Notice, available at

Thomas Arjmandi, and Keon Michael Arjmandi (collectively referred to as “SFE” or “Counter-Defendants” unless otherwise denoted) alleging libel *per se*, business disparagement, tortious interference with contractual relationships, common law conspiracy, and copyright infringement. On December 14, 2007, this Court granted the Defendants’ Motion for Summary Judgment on all of Super Future Equities’ claims (doc. 498). Presently before the Court is Counter-Defendants’ Motion for Summary Judgment (doc. 311) on Orix’s counterclaims and Orix Capital Markets, LLC’s Objections and Motion to Strike Counter-Defendant’s Summary Judgment Evidence (doc. 393). For the reasons that follow, the Court **GRANTS** the Counter-Defendants’ Motion for Summary Judgment (**doc. 311**) as to Orix’s counterclaims for business disparagement, tortious interference with contractual relationships, and copyright infringement. The Court **GRANTS** SFE’s Motion for Summary Judgment as to Orix’s counterclaims for libel *per se* and conspiracy against D.R. but **DENIES** the Motion as to libel *per se* and conspiracy with respect to all other Counter-Defendants. The Court **DENIES** as **Moot** Orix’s Motion to Strike Counter-Defendant’s Summary Judgment Evidence (**doc. 393**).

I. Background

As an initial matter, this lawsuit involves two Commercial Mortgage Backed Securities Trusts: (1) the Trust for the Certificate holders of the Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates, Series 1999-C1 (“MLMI Trust”) and (2) the Trust for the Certificate holders of the First Union-Lehman Brothers Bank of America Commercial Mortgage Pass-Through Certificate Series 1998-C2 (“FULBBA Trust”) (collectively “the Trusts”). Super

<http://www.txnd.uscourts.gov/pdf/TXNprivnot.pdf>, minors should be designated by their initials.

Future Equities is a certificate holder of the Trusts; Orix is the Master and Special Servicer of the Trusts; and Wells Fargo is the Trustee for the Trusts.³

By way of background, the parties' dispute began in 2001 when Cyrus II Partnership - an entity in which Schumann ("Schumann") and his wife Mondona Rafizadeh have an ownership interest -executed a promissory note on a property called "Arlington Apartments." (Orix Capital Markets, LLC's Am. Countercl. ("Am. Countercl.") at 3). Orix, the master and special servicer of the MLMI Trust that held the loan, brought suit in Louisiana to foreclose on the Arlington Apartments. (*Id.* at 3-4). In December 2004, Orix obtained a fraud judgment in excess of \$10 million against Cyrus II, Mondona Rafizadeh, and Bahar Development, Inc. (*Id.* at 4; Orix's Br. in Supp. of its Mot. for Summ. J. ("Orix's Br.") 5). On December 1, 2004, Schumann created Super Future Equities, naming himself as President and sole member of the Board of Directors. (Orix's Br. 6). Eventually, Schumann's nephew, Thomas Arjmandi ("Thomas"), became Super Future Equities' President, and Schumann's son, Cyrus Rafizadeh ("Cyrus") became the Secretary and Treasurer. (*Id.*). Thomas and Cyrus as well as Schumann's son, D.R., and Schumann's nephew, Keon Arjmandi ("Keon"), were the four shareholders of Super Future Equities. (*Id.* at 7).⁴ Super Future Equities acquired funds from Schumann and other entities he controlled. (*Id.*). Super Future Equities obtained certificates in the FULBBA Trust in April 2005 and in the MLMI Trust in July 2005. (*Id.* at 9).

³For more detailed background information on Commercial Mortgage Backed Securities and Super Future Equities' claims, see the Court's Order of December 14, 2007 (doc. 498).

⁴Schumann's sons were minors at the time, and his nephews were both younger than twenty. (Orix's Br. 6-7).

On February 13, 2006, Super Future Equities filed this lawsuit as a purported class action⁵ against Orix, Wells Fargo, Orix USA, John Dinan, Michael F. Wurst, Clifford Weiner, James R. Thompson, and Orix Partnership relating to their duties as Servicer, Special Servicer, and Trustee of the Trusts⁶. In its most recent complaint, filed September 11, 2006, Super Future Equities asserted causes of action against the Defendants for breach of fiduciary duty, breach of contract, RICO violations, negligence, and gross negligence.

On February 13, 2006, the same day that Super Future Equities filed this lawsuit, Cyrus created the website at www.predatorix.com ("Predatorix"). (Orix's Br. 9). On April 24, 2006, Orix counterclaimed against Super Future Equities, Schumann Rafizadeh, Cyrus Rafizadeh, D.R., Houman Thomas Arjmandi, and Keon Michael Arjmandi asserting claims of libel *per se*, business disparagement, tortious interference with contractual relationships, and common law conspiracy. Thereafter, Orix filed an amended counterclaim asserting claims for libel *per se*, business disparagement, tortious interference with contractual relationships, common law conspiracy, and copyright infringement. Orix alleges that SFE conspired to create Super Future Equities and to create Predatorix. (Am. Countercl. at 42, 122). Orix claims that Predatorix is used to bolster Super Future Equities' claims, make defamatory and disparaging statements, interfere with Orix's contracts, and infringe on Orix's copyright. (*Id.*).

On December 14, 2007, this Court granted the Defendants' Motions for Summary Judgment on all of Super Future Equities' claims (doc. 498). SFE filed a Motion for Summary Judgment on

⁵The Court has since struck Super Future Equities' class allegations.

⁶Orix claims that SFE filed this lawsuit against Orix and Wells Fargo in retaliation for the Louisiana fraud judgment against Mondona Rafizadeh. (Orix's Br. 5).

Orix's counterclaims on August 3, 2007 (doc. 311). Orix responded on August 23, 2007 (doc. 389) and also filed Objections and Motion to Strike SFE's Summary Judgment Evidence (doc. 393). SFE replied on September 7, 2007 (doc. 441). SFE's motion, being fully briefed, is now ripe for adjudication.

II. Analysis

A. Summary Judgment Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.*

The burden is on the summary judgment movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant has met its burden, the non-movant must show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party

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