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BY TELECOPIER: (561) 272-6831

April 2, 2009

Lee Levenson, Esquire
Michael Weiner & Associates, P.A.
Suite C
10 S.E. 1st Avenue
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Dear Mr. Levenson:

It has come to our attention that early last month, you filed a complaint against Julia Forte in the United States District Court for the Southern District of Florida. *Vision Media TV Group, LLC v. Julia Forte*, No. 09-80396-civ-Marra/Johnson. In the event you serve the complaint, we will appear for Forte. However, I am writing to urge you not to seek to effect service and, in fact, to dismiss the case voluntarily without requiring Forte and her counsel to run up expenses and fees which will ultimately be assessed against your client and possibly yourself.

As you know, Forte operates a web site at www.800notes.com, where members of the public may post comments – either negative or positive – about their experiences with individuals and companies that call them to market goods and services. When a consumer receives a sales call, she can, before answering the call or deciding whether to return it, consult the 800notes web site to find out what others have been saying about the person making calls from that number. Or, if she has taken the call, she may choose to contribute her own experiences to the discussion. No search can be conducted within the site by company name, but only by telephone number.

Forte does not select the telephone numbers or the companies about which postings are made, but relies entirely on users to identify the subjects of their commentary. If a user conducts a search and finds no reports on that number (for example, 202-588-1000), she sees a web page with the following URL (http://800notes.com/Phone.aspx/202-588-1000) and the text, "Did you get an unwanted call from 202-588-1000? There are no comments for this number yet. Be the first to report the call to help identify who is using this phone number." There follow a series of boxes to enter information, followed by the warning: "Thank you for your contribution! Oh, and please watch your language and post only truthful information." Once the information is submitted, the content will appear on the web site without any personal involvement by Forte. The post will have a Report Abuse button, which allows readers to report posts they think are abusive. Such reports go into a pool of postings that Forte can then review.

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Apparently, users received calls from a telephone number that your client uses to solicit new business and posted information about their experiences with your client. Forte did not create any of those postings, and she did not in any way edit the information that they presented. The page was posted pursuant to the automated process described above, without any involvement by Forte. She has **never** posted anything on her web site about your client. She did no research about your company and had no knowledge about what it did until this controversy arose. Among other things that she did not know about your company was the fact that it is located in Florida. In that regard, although your complaint alleges in very conclusory fashion that some aspects of her web site are aimed at Internet users in Florida, that allegation is false except in the sense that her web site is aimed generally at users throughout the world, which happens to include users located in Florida. Specifically, Forte has not aimed anything about your client at Florida or at users in Florida. Although we will argue that she cannot be sued in Florida in any event, these facts distinguish her case from others that involved defendants who knowingly posted statements about plaintiffs whom they knew to be located in Florida.

Under several provisions of the Communications Decency Act, 47 U.S.C. § 230, Forte enjoys absolute immunity from suit based on information posted to her web site by others. First, Section 230(c)(1) states as follows:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Section 230(e)(3) provides:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

And section 230(c)(2) provides:

> No provider or user of an interactive computer service shall be held liable on account of—
>
> > (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; . . ..

The courts have consistently held that these provisions create an immunity from suit on each of the causes of action pleaded in your complaint. *E.g.*, *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119,

1125 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983 (10th Cir. 2000). *See also Whitney Information Network v. Xcentric Ventures,* 2008 WL 450095 (M.D. Fla. 2008); *Almeida v. Amazon.Com, Inc.*, 2004 WL 4910036 (S.D. Fla. 2004), *aff'd on other grounds*, 456 F.3d 1316 (11th Cir. 2006).

Your correspondence with Forte in February of this year makes clear that you are aware of this immunity, although you described them as "arguably limited immunities," warned her that you are developing "new legal procedures" to address what you regard as online wrongdoing, and referred ominously to "the vagaries and expenses of litigation." Apparently, you attempted to draft your complaint to get around Forte's Section 230 immunity, thus trying to intimidate her into a settlement that would entail the removal of statements that you claim are defamatory and the identification of the alleged defamers. However, your complaint does not succeed in pleading around Section 230, and even if it did, it is based on numerous statements that not only are false, but that you and your client know or should know are either false, legally frivolous, or both.

Your complaint contains so many false statements that we cannot possibly cover them all in this letter, but one example is the repeated allegation in various paragraphs that Forte posts her own statements on the web site. You never quite allege that Forte has posted anything on the web site about your client, and to the extent that it is your intent to imply that she has, such statements would be false. Yet, unless she has posted defamatory statements **about your client**, under section 230 she cannot be sued for libeling your client. In this regard, Florida law requires that a claim for defamation based on written communications must set forth the allegedly defamatory words verbatim. *Edward L. Nezelek v. Sunbeam Television Corp.*, 413 So.2d 51, 55 (Fla. 3d DCA 1982). Your complaint fails to allege which words about your client Forte has herself posted. The defamation claims against her based on any theory of postings by Forte are legally and factually frivolous.

Because your complaint is so vague and conclusory, I cannot form a judgment about whether you might have any valid claims about any of the postings, for defamation or for posting in violation of some court order or settlement agreement. But if you do have valid claims, they would need to be brought against the Doe posters, not against Forte. You complain that Forte should identify the anonymous posters, but the First Amendment protects the right to speak anonymously. *E.g., Doe I and Doe II v. Individuals whose true names are unknown*, 561 F.Supp.2d 249 (D. Conn. 2008); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005). Forte explains on her web site that she does not give up identifying information without a valid subpoena that complies with the standards set in these cases – and she would have told you the same had you focused on seeking information such as IP addresses that might be used to identify anonymous posters, instead of asking that the postings be removed . Forte does not intend to give in to blackmail in the event you hope that she will just give up any identifying information to avoid having to defend a frivolous lawsuit.

Similarly, you lard your complaint with references to Forte's removal of positive statements about your client, which, supposedly, create a false context about your client by leaving only negative posts. Wholly apart from the fact that this theory of your complaint runs afoul of section 230(c)(2), this allegation is false, and you know that it is false. In fact, in response to an abuse report from one of the users of her web site, Forte reviewed a series of posts about your client, which purported to be a conversation among different posters. Her review of the Internet Protocol addresses from which they had been posted revealed that the same person was posting multiple statements that purported to respond to each other. When you inquired, she explained that she had removed the phony conversation as spam, but she encouraged you to have your client post openly, under its own name, and explain its side of the controversy. She said, "Please introduce yourself, address the concerns of the public and your responses will stay there." Your client took this advice, and those comments have been left on the web site to this very day. For example, there are lengthy postings from "Should I Be Reasonable" on March 1, from "Media Rep." on March 3, and from "Media Co. Rep." on February 4, each of which defends your company and cites much of the same information whose removal is bemoaned in your complaint. "Nonprofit" posted about its positive experiences with your client on February 17, and those comments similarly remain online. You yourself posted a comment on February 13 – the day after the exchange of emails in which Forte suggested that you just identify yourself and say your piece on the message board – and that post similarly remains online. Moreover, your complaint admits that Forte was right to conclude that the removed posts all came from the same source, because you refer in paragraph 38 to Forte's "removing Plaintiff's postings aimed at answering the offensive comments." However, this sequence shows that other allegations in the complaint are a bald-faced lie. For example, you allege several times that Forte "refused to engage in meaningful discussion with regard to alternate ways to resolve these matters," *e.g.*, ¶ 34, and that Forte "allow[ed] only the unlawful content complained of above." *E.g.*, ¶¶ 36, 38. In fact she told you how your client could respond without spamming, your client followed this advice, and your client's posts remain on the web site for all to see.

In addition to alleging defamation claims, your complaint alleges "false light" and "tortious interference with business relationship." However, the cases make clear both that section 230 immunity extends to state law claims other than defamation, *Parker v. Google, Inc.*, 242 Fed.Appx. 833, 838 (3d Cir. 2007), and that a plaintiff cannot evade the legal limitations imposed on defamation claims by placing other labels on the torts. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In this regard, although your complaint makes clear that your client is a public figure, you never allege that Forte (or anybody else) posted comments about your client with actual malice – that is, with knowledge of falsity or reckless disregard of probable falsity. In addition, although you allege generally that Forte was aware of the fact that your client is in business, you make no allegation that Forte was aware of negotiations with particular clients or that Forte had any intent to interfere with negotiations with any client. Even if it were true that your client lost business as a result of postings on her web site, that would not be sufficient to constitute the tort of intentional interference with business relationship. Indeed, as Forte explained to you in the course of

encouraging your client to post its side, "We are not taking anyone's side and our goal is to be informative . . .."

I also note that, just as your correspondence with Forte referred to claims of trademark infringement and dilution and to the fact that intellectual property claims are outside section 230 immunity, your complaint makes fleeting references to trademark concerns, such as "infringing Plaintiff's famous trademarks," ¶ 3, claiming that your client's mark is "famous," ¶ 8, and alleging that Plaintiff's trademark and trade name have been diluted. ¶¶ 3, 21. However, you have not set forth any count expressly alleging either infringement or dilution. Nor do you allege a likelihood of confusion about source or affiliation, which is a key element of an infringement claim. *Jellibeans, Inc. v. Skating Clubs of Georgia*, 716 F.2d 833, 839 (11th Cir. 1983). Moreover, nobody visiting Forte's web site would experience the slightest confusion about whether her site is sponsored by or affiliated with your client. A poster could not effectively speak about your client, whether positively or negatively, without using its trademarked name; but trademark law does not transform such commentary into actionable speech. To the contrary, it is well-established that use of a mark for criticism not only is not dilution, but is fair use. Finally, since the 2006 amendments to the Lanham Act, dilution claims have been confined to marks that are "widely recognized by the general consuming public of the United States," such as the Kleenex or American Express marks. The notion that your client's mark is comparable to such famous marks is ludicrous, and if you move forward with any complaint for trademark infringement or dilution we will seek not only Rule 11 sanctions, but an award of attorney fees for bringing an "exceptional" trademark claim. *Ross Bicycles v. Cycles USA*, 765 F.2d 1502, 1509 (11th Cir. 1985).

Although you evidently hope that you will be able to tie down Forte with the "vagaries and expenses of litigation" by dragging her through discovery, we do not intend to permit such a travesty. Because section 230 provides an immunity from suit and not just from liability, we will to bring to bear in this case both the heightened pleading requirements and the expedited summary judgment procedures that apply in qualified immunity cases in the Eleventh Circuit. *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998); *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834, 838 (11th Cir. 2004).

Moreover, as a practical matter, our preliminary investigation of your client reveals that a variety of respected sources, such as the New York Times, Consumers Union's "Consumerist" blog, and Inside Higher Ed, have published adverse information about your client's marketing activities and warned potential clients to be careful about your client's claims. Some of the exhibits attached to your complaint reveal that **those** and similar publications are the real reason why some businesses are not hiring your client. In this regard, I recognize that this is not the first time that you have filed a defamation action on behalf of this particular client claiming that the loss of a client could be attributed to criticism on an individual blog. Your complaint the last time did not reveal the impact of the New York Times article and other public criticisms. In this case, however, those articles will

be discussed prominently. I trust that you and your client will consider carefully whether, if you persist in this litigation, that information will be published even more prominently, and whether other consumer advocacy groups like Public Citizen will be impelled to investigate your client more thoroughly and then report what they learn publicly. Often, indeed, companies that bring marginal or frivolous cases seeking to suppress criticism find that, as a result of what some call the "Streisand effect," the result is simply to bring greater attention to the criticism. *See* Pecau, *Gripe Sites: Sue or Stew*, Internet Law & Strategy, Vol. 15, No. 5 (Feb. 2009).

If you are determined to move forward despite the many flaws in your complaint, we invite you to send us a request for waiver of service under Rule 4(d) of the Federal Rules of Civil Procedure. We will return an executed waiver form along with a draft motion for sanctions, thus beginning the running of the safe harbor period of Rule 11. We reserve the right to seek fees under other appropriate authority to which no safe harbor period applies, but we hope you will dismiss the case immediately to limit the amount of fees. Indeed, in light of the fact that you hold yourself out as an expert both in intellectual property and Internet-related litigation, we will ask the Court to infer that you have proceeded deliberately and to impose sanctions accordingly.

Sincerely yours,

Paul Alan Levy