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BY EMAIL: clydevanel@vanellaw.com

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K. Clyde Vanel, Esquire
The Vanel Law Firm, P.C.
219-16 Linden Blvd., 2nd Floor
Cambria Heights, New York 11411

Dear Mr. Vanel:

I write on behalf of CafePress.com to respond to the cease-and-desist letter that you emailed to Lindsay Moore, claiming that the various designs that are available on the CafePress web site at http://www.cafepress.com/+ben-carson+gifts impinge on the intellectual property rights of presidential candidate Ben Carson and his campaign organization. Specifically, you make four different claims: "trademark infringement, copyright infringement, misappropriation of name and likeness, privacy rights infringement." To borrow from a slogan that is much used in this campaign, it doesn't take a brain surgeon to understand how baseless these claims are.

CafePress is a platform for passionate people to express themselves freely, and the content and merchandise that they create are forms of creative self-expression. Whether it is a buyer who uses an expressive medium, such as a T-shirt or a poster, to communicate his views or opinions, or a seller who chooses to disseminate his ideas and opinions on merchandise, the users of CafePress.com convey their political and social messages through quintessentially expressive mediums. The notion that expressing views about Carson's candidacy violates any of his rights is simply absurd. It is shocking that a lawyer whose web site touts his expertise in intellectual property law would sign his name to such a communication.

Starting with the related issues of trademark infringement and misappropriation of name and likeness, we acknowledge there is a campaign organization called Ben Carson for President 2016, and you, acting on behalf of the campaign, have applied for a trademark registration for a logo that includes those words, shown in a specific color pattern. But so far as I have been able to discern, none of the items linked at the web page you have identified uses that logo as it appears in the registration application and on each page of your client's campaign web site.

At most, the items display the phrase "Ben Carson for President 2016," often appearing in the patriotic colors of red, white and blue. Many of them simply use Carson's name, or just his given name or his profession. You cannot use trademark theories to ride roughshod over members of the American public who either share your clients' views and favor Carson's candidacy, or for that matter disagree with their views and oppose Carson's candidacy. They can hardly express their

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views in that respect without identifying the candidacy about which they wish to speak. Moreover, it is very common for people to express their views about presidential candidacies, completely independent of the campaign; this is so common that it defies belief that a reasonably careful consumer would believe that a shirt or bumper sticker advocating your client's election necessarily came from the campaign itself. Indeed, the Super PAC "2016 Committee" carries various wares that display the phrase "Ben Carson for President 2016." *E.g.*, http://store2016committee.org/pins-stickers- and-magnets/. Super PACs have to be independent committees, and cannot coordinate with the official campaign. I assume you are not going to argue that 2016 Committee's use might confuse consumers into believing that Carson or his campaign committee is the sponsor of the PAC. So I doubt that you have any realistic chance of arguing that the items carried by CafePress are likely to cause confusion, a key element of a trademark infringement claim. And because your state law claims regarding misappropriation of name or likeness also require a showing that the use implies that the plaintiff endorsed or authorized the product in question, your inability to show lack of likely confusion condemns those claims as well.

More important are the issues of fair use and the First Amendment, which apply equally to your purported misappropriation of name and likeness claims as well as to your trademark claims. Speech about a candidate for president is squarely protected by the First Amendment, hence any effort to use trademark law to quash such uses is highly suspect. Although CafePress users' products are sold, their contents are noncommercial speech, which qualifies for full First Amendment protection. *Ayres v. Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997); *see also Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 812 (9th Cir. 2003); *Smith v. Wal-Mart Stores*, 537 F. Supp.2d 1302, 1340-1341 (N.D. Ga. 2008). The First Amendment protection for non-commercial speech extends to bar trademark claims. *Entertainment 2000 v. Rock Star Videos*, 547 F.3d 1095, 1099-1101 (9th Cir. 2008); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-976 (10th Cir. 2003); *CPC Intern. v. Skippy Inc.*, 214 F.3d 456, 462-463 (4th Cir. 2000); *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987).

Your reference to a purported invasion of Carson's privacy is particularly foolish. Given the intense scrutiny that presidential candidates receive in this day and age, it is a matter of some doubt whether any statement about a presidential candidate, especially one who now stands second in the polls of the Republican nomination, could constitute an invasion of privacy, no matter how personal. But there is nothing "private" in the expression contained on the products that CafePress carries—they are all specifically about the Carson candidacy. That candidacy is certainly not private.

Finally, you make a claim of copyright infringement and claim that the DMCA has been violated. But the DMCA imposes an obligation on the hosts of interactive web sites like CafePress.com only once the purported copyright holder has scrupulously followed the formalities required by 17 U.S.C. § 512(c)(3)(A); your email does not meet those requirements. One important flaw in the copyright claim is that you do not identify the specific works that infringe your clients' copyrights, and looking through the various items displayed at

http://www.cafepress.com/+ben-carson+gifts, I do not see any materials that are likely to infringe copyrights that your clients own. Most of the items contain some variation of the phrase "Ben Carson for President 2016." That expression lacks sufficient originality for copyright protection. Indeed, if the phrase were copyrightable, your clients might not be the owners of the copyright, because they might not have been the first to fix it in a tangible medium of expression. It is quite possible that some supporter hoping to encourage Carson to run may have written it down before Carson did. That person would own the copyright, if the phrase were copyrightable, and your clients would be among the infringers.

CafePress takes its copyright obligations very seriously. Therefore, I invite you to specify, in detail, the specific works in which your clients claim copyright, so that we can assess whether the inclusion of any copyrighted content in its users' designs might be fair use. Certainly, if you identify any material that genuinely infringes a valid copyright that your clients own, CafePress will take it down.

During the 2008 election, the Republican National Committee ("RNC") sent CafePress a series of threats to sue for trademark infringement because CafePress users were having shirts and other items printed with designs expressing views about the Republican Party or various candidates, using the acronym GOP or images of elephants. CafePress eventually had to sue the RNC for a declaratory judgment of non-infringement, and the result was a great deal of embarrassment for the Republican Party; the RNC then retracted its threat, subject to a request that CafePress direct users who, without any other expressive design elements, displayed a particular image of an elephant that the RNC had trademarked, to ask the RNC for permission (the RNC indicated that consent would readily be given).

I trust that Carson will want to save a similar embarrassment for his political campaign. I hope you will issue a prompt retraction of your demand.

Sincerely yours,

Paul Alan Levy