

PUBLIC CITIZEN LITIGATION GROUP

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BY TELECOPIER: (866) 449-4897

February 15, 2011

Richard D. Newman, Esquire
Hinch Newman LLP
Suite 2330
401 West "A" Street
San Diego, California 92101

Dear Mr. Newman:

I write in response to your February 10, 2011 demand letter to Melnet Media LLC and Shmuel Melamed ("Melnet"). You contend that criticisms of your client, which your letter identifies as "JAVELIN MARKETING," that have been posted on Melnet's Insurance Forums are defamatory. You demand that all criticisms of Javelin at <http://www.insurance-forums.net/forum/prospect-match-thread27268.html> and <http://www.insurance-forums.net/forum/prospect-match-thread27268.html>, and indeed every other criticism of your client, be removed from Insurance Forums and that no future criticisms of Javelin be permitted there in the future. The draft complaint supplied with your demand letter specifies two postings, one on December 17, 2010, and the other on January 6, 2011, that you claim are false in some unspecified ways, asserts that other unidentified postings are false, and then alleges that your client has suffered hundreds of thousands of dollars in damages because of the criticisms.

Melnet has responded to past communications sent on behalf of your client by removing certain criticisms, but your escalation of threats and demands makes clear that these courtesies have only encouraged bullying. Melnet will no longer accommodate Javelin's sensitivities and it is not going to comply with your demands. Your threatened lawsuit against Melnet is completely frivolous. Because your firm's web site indicates that you specialize in Internet law, you must be aware of this fact.

As you apparently recognize, the criticisms of your client are posted on www.insurance-forums.com by anonymous third parties, without any intermediation by Melnet. Melnet generally does not censor the comments of the posters, and neither endorses nor rejects the criticisms that the posters may choose to place there. Melnet itself has not posted anything about your client. In fact, Melnet is a provider of an interactive computer service and is absolutely protected against both liability and suit by section 230 of the Telecommunications Act of 1996, 47 U.S.C. § 230. This

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immunity has been well-recognized both in the Ninth Circuit, where you and your client are located, e.g., *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), and in the Fourth Circuit, where Melnet is located and where your draft complaint shows that you intend to file suit. *Nemet Chevrolet v. Consumeraffairs.com*, 591 F.3d 250 (4th Cir. 2009); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997). Your complaint contains only vague pleading that does not clearly distinguish between posting by the Doe defendants and Melnet's role as site operator. Under *Nemet Chevrolet*, such conclusory pleading is not sufficient to overcome Melnet's statutory immunity.

Your draft complaint apparently seeks to evade Melnet's section 230 immunity by re-labeling your defamation claims as false advertising and "trade libel" under section 43(a) of the Lanham Act. However, these are not intellectual property claims and hence they will not survive dismissal under section 230. Moreover, even assuming that some of the criticisms of your client were posted by your client's competitors, there is no basis for your attempt to hold Melnet secondarily liable for allowing such criticisms to be posted. Nor, indeed, does Melnet have the actual malice that you would need to establish to hold it liable for allowing the criticisms. Melnet knows only that you claim that the facts and opinions to which you object are false.

Not only is your threatened lawsuit against Melnet patently frivolous, but if your state-law claims were filed against Melnet in a state or federal court in California, they would be subject to a special motion to strike under California's anti-SLAPP statute, section 425.16 of the California Code of Civil Procedure. Your client cannot evade the anti-SLAPP statute by bringing its tort claims in Maryland. Under Maryland's choice of law rules, it is the law of the plaintiff's domicile that governs the substantive issues in a multistate intentional tort case such as your client's libel claim. *Wells v. Liddy*, 186 F.3d 505, 528, 530 (4th Cir. 1999); *Neuralstem, Inc. v. StemCells, Inc.*, 2009 WL 2412126, at *3 (D. Md. Aug. 4, 2009). Moreover, California's anti-SLAPP statute has been held to be substantive rather than procedural. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-973 (9th Cir. 1999). Accordingly, if you file the amended complaint that you have sent to Melnet, we will file a special motion to strike and seek an award of attorney fees under the anti-SLAPP statute. You should also expect that, once your Lanham Act claims are dismissed, we will seek an award of attorney fees under 15 U.S.C. § 1117(a).

That is not to say that your client has no remedy for the allegedly defamatory statements that the Does have placed on the Insurance Forums. You can sue the Does in an appropriate forum, such as the state courts of Maryland, and if you follow the procedures set forth by the Maryland Court of Appeals in *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009), you will be able to enforce subpoenas to identify the authors of those posts that you can show are false. We have some question about the extent to which you will succeed in such discovery, because in some respects it is apparent that at least some of what your demand letter complains about is true, and because a number of the criticisms are express opinions rather than facts. However, under the law, your sole complaint must be made against the anonymous posters; you cannot sue Melnet or hold it liable.

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Finally, your letter threatens suit if Melnet publicizes your demand letter. Both Melnet and, indeed, Public Citizen plan to criticize you for sending this threat of frivolous litigation and to criticize your client for having the letter sent on its behalf. Even assuming that your letter is sufficiently original to be copyrightable and that you register the copyright, the posting of your letter will be fair use and hence not actionable.

Sincerely yours,



Paul Alan Levy