

PUBLIC CITIZEN LITIGATION GROUP

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BY TELECOPIER: (303) 830-1033

October 19, 2007

Gregory H. Smith, Esquire
Fairfield and Woods, P.C.
Wells Fargo Center, Suite 2400
1700 Lincoln St.
Denver, Colorado 80203-4524

Re: *Video Professor v. Doe*

Dear Mr. Smith:

I write in response to your October 8 letter, your October 11 e-mail, and the affidavit and chart provided therewith. In sum, we appreciate the efforts that Video Professor has made both to narrow the list of anonymous posters that it seeks to identify, to reduce the burden that the subpoena is causing Leonard, and to provide evidence in support of its claimed right to pierce the right of the posters to speak anonymously. Because you have narrowed the list of speakers to eliminate all posters on infomercialratings.com and to seek to identify only 43 specified posters on infomercialscams.com, and have supplied the supporting evidentiary material in soft form to facilitate the process of notifying the persons whose identities you seek, Leonard has agreed to undertake the process of isolating the identifying material and issuing the notices to the Doe defendants without any charge to Video Professor.

The notices to the posters went out earlier this week. For your information, a copy of the form of notice is attached. Because courts generally hold that accused Internet speakers are entitled not just to notice but to enough time to obtain counsel and file a motion to quash if one is warranted, Leonard has informed the Doe defendants that it will refrain from releasing any information at least until October 31, pending the possible filing of a motion to quash by any of the posters.

Moreover, as we now explain, we do not believe that, at this time, Video Professor has provided sufficient evidence to support a prima facie case under any of the causes of action asserted in the complaint. We discuss at the end of this letter some of the evidence that would enable us to better evaluate your client's claims.

First, it is notable that Ms. Harrison's affidavit purports only to show a basis for finding the allegedly actionable posts to be defamatory. She does not claim to have a basis for proceeding on any of the other causes of action based on Colorado state law, all of which would depend on meeting

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the elements for a defamation claim. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Moreover, in the Tenth Circuit, there is no Lanham Act cause of action for “false advertising” unless the messages are “(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services [and] . . . (4) disseminated sufficiently to the relevant purchasing public to constitute ‘advertising’ or ‘promotion’ within that industry.” *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-1274 (2000). The posts themselves do not meet the *Haugen* test at the very least because they do not contain any explicit urging to buy the products of any competitor of Video Professor. *Id.* at 1275-1276. In addition, you provide no reason to believe that any of the posters is a competitor of Video Professor or that the motivation of the posters is anything other than dissatisfaction with your client’s sales practices, however misguided you consider that dissatisfaction to be. *Nevyas v. Morgan*, 309 F. Supp. 2d 673 (E.D. Pa. 2004). Nor is there any showing of the sort of coordinated campaign to disparage your client, which is required in light of the rule that “businesses harmed by isolated disparaging statements do not have redress under the Lanham Act; they must seek redress under state-law causes of action.” *Fashion Boutique v. Fendi USA*, 314 F.3d 48, 57 (2d Cir 2002). Even assuming that your client firmly believes that the posters may be competitors, we do not agree that you can overcome the right of anonymous speech simply by hypothesizing that the posters are competitors and then taking discovery to determine whether your hypothesis is correct.

Nor have you provided adequate evidence to support the falsity and damages components of your defamation cause of action. The Harrison affidavit explains that the underscored statements in the selected posts are “likely” false because they describe circumstances which, she avers, are “directly contrary” to a “company policy.” However, even assuming that the language is contrary to the stated policy, which is not always the case, Harrison does not provide the actual company policy or aver that the company always follows the policy and that departures from the policy never occur. Moreover, information that we have obtained from former Video Professor marketing staff suggests that the persons who handle these phone calls have a financial incentive to report that they have obtained authorization to charge a credit card, or that they have succeeded in avoiding the cancellation of a supposed previous authorization. Given the fact that, according to her affidavit, each and every telephone call is recorded, and archived along with electronic records of all Internet orders, Video Professor obviously has the evidence in its possession that would enable it to make such an absolute statement if it were true. We must assume that Video Professor is not making that assertion because it knows the assertion would be false. Nor, indeed, does Harrison tell us whether Video Professor uses independent audits of its employees’ telephone calls to ensure that the employees are adhering to company policies, and if so what those audits reveal.

A review of publicly available data suggests that there are indeed occasions when Video Professor fails to live up to its alleged policies. For example, the *Denver Post*’s business columnist, Al Lewis, said that, on reviewing the posts on infomercialscams.com and other sites that have been subpoenaed, “Mostly what I found on the sites were the same variety of complaints about the Video Professor that I’ve heard for years.” I trust that it is not Video Professor’s position that those who

have talked to Lewis were either defaming customers or concealed competitors. Lewis reported that the Denver Better Business Bureau has also heard the same sort of complaint – according to its web site, there have been more than 600 complaints about Video Professor in the past three years, and although the web site does not include the text of the complaints, the categories listed appear to resemble many of the posts that have been alleged as defamatory. The Better Business Bureau web site indicates that Video Professor responded to all of these complaints, resolving many of them to the apparent satisfaction of the consumer. A review of this selection of complaints, and of Video Professor’s investigation of and response to the complaints, could speak volumes about whether its assertion that the complaints cited in the Harrison chart are “likely false.”

Other information that we have obtained strongly suggests that many customers find their experience with Video Professor on the telephone or the Internet confusing, and do not understand that they are agreeing to have their credit cards charged for additional lessons unless they follow a certain return ritual. In fact, not only do most of the comments included in Harrison’s chart reflect such a misunderstanding, but many of the comments say no more than that the posters did not understand, or expect, to have certain charges posted to their credit card accounts. The existence of a “policy” against unauthorized charges and other such policies cannot show the falsity of statements about what the posters understood or expected.

Additionally, information that we have received from former Video Professor staff suggests that the scripts are confusing, and indeed that Video Professor deliberately plays on such confusion, and takes advantage of such confusion to sell its product to unsophisticated or inattentive consumers. The fact that the lessons are apparently very basic, and aimed at consumers who do not understand even the basics of computer and basic computer programming, lends credence to such concerns. Information we have received from former Video Professor staff also suggests that the company is aware that requests for cancellation of service are not processed promptly.

In order to further assess whether Video Professor can produce evidence showing that the statements about which it is suing are false, while we are waiting to see whether any of the individual posters will file their own motions to quash, we request that Video Professor produce the following documents:

- (1) All documents since January 2004 concerning customer complaints about Video Professor received by the Better Business Bureau or government agencies, Video Professor’s response to those complaints, and the resolution of those case. The names of the complainants, and their personal identifying information, should be redacted from these documents.
- (2) All written policies, including those referenced in the Harrison affidavit, concerning Video Professor’s sales, billing and customer service practices;

- (3) All telephone scripts and policies concerning telephone scripts that Video Professor telephone operators have used at any time since January 2004 to (1) take orders, including the explanation given to customers of the circumstances under which their credit cards will be charged, and (2) process cancellation requests, including the explanation given to customers who call to request cancellation of their service;
- (4) All written policies concerning (a) the circumstances under which Video Professor will charge a customer's credit card in any amount between \$60.00 and \$99.00; (b) the circumstances under which and the manner in which Video Professor informs customers that they will continue to receive and be charged for products or services unless they cancel, and (c) the circumstances under which customers may request cancellation of service and the manner and length of time in which Video Professor responds to telephoned, emailed, or faxed requests for cancellation of service.
- (5) All written policies concerning the monitoring of telephone calls;
- (6) All written policies specifying how long recordings of telephone calls and/or records of online orders are archived;
- (7) All policies or rules concerning the compensation of persons who take telephone orders or telephone conversations with customers after orders have been made, including any provision for financial incentives for selling more than the minimum or "free" order, or for ending conversations without a cancellation having been made;
- (8) All communications with Paul Suggett, including but not limited to communications after his employment ended;
- (9) All documents concerning Video Professor's procedures for conducting internal or independent audits of (a) its customer-service telephone calls and internet transactions, particularly with respect to how Video Professor's billing and cancellation policies are communicated to customers and how customers understand those policies, (b) the tracking of the time between the intake of cancellation requests and the cancellation of service, and (c) customer reports of dissatisfaction with Video Professor's billing and cancellation policies.; and
- (10) The results of any such audits within the past two years.

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- (11) All subpoenas issued and lists of documents sought during the litigation of this case.

Finally, although Harrison's affidavit avers vaguely that the posts "tend to harm" Video Professor's reputation, there is no showing that any of the identified posts has caused actual damage to Video Professor. Indeed, in light of assertions on your client's web site that it has sold eight million copies of its educational programs, we find it highly dubious that any of the forty-three posts identified in Harrison's chart has caused any discernible injury to Video Professor. However, we would welcome the production of any financial data and supporting documents, or any other evidence, that would support such a claim.

Sincerely yours,


Paul Alan Levy