

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION AT MEMPHIS

THE SERVICEMASTER COMPANY, THE)
TERMINIX INTERNATIONAL COMPANY,)
L.P., TRUGREEN LIMITED PARTNERSHIP,)
AMERICAN HOME SHIELD CORPORATION,)
AND AMERISPEC, INC.,)
)
Plaintiffs,) Civil Action No. 99-2866-TUV
)
v.)
)
CARLA VIRGA,)
)
Defendant.)

AFFIDAVIT OF CARLA VIRGA

1. My name is Carla Virga. I am the defendant in this case. This affidavit is made both in support of my opposition to plaintiffs' motion for a preliminary injunction, and in support of my motion to have the case dismissed.

Personal Information

2. I live and work in Yuba City, a small city about 45 miles north of Sacramento, California. I am fifty years old, married, and have four children. Apart from our home and its contents, our two cars, a checking account, a small amount of penny stock, and my husband's state retirement, we do not have other assets (for example, we have no savings account).

3. Since graduating from McClatchy High School in Sacramento, I have held various clerical jobs, and at one time I operated a small word-processing business. For many years I was a housewife, but after the events described on my web site drove my family into bankruptcy I needed to go back to work. Currently, I work as a secretary for a small manufacturing concern in Yuba City, which in no way competes with ServiceMaster or its affiliated companies.

4. I have never been to Tennessee. Indeed, since reaching adulthood, the only times I have been out of California have been occasional trips to Nevada, and once each to Idaho and Tijuana.

5. I do not conduct business in Tennessee. I own no property in Tennessee. So far as I am aware neither of our penny stock holdings is in a Tennessee company.

6. I have never worked for Terminix, for ServiceMaster or any of its subsidiaries, or for any of the competitors of Terminix, ServiceMaster, or any of its subsidiaries. So far as I am aware, none of my relatives do either; none of our stock is in such companies.

How I Came to Start My Web Site

7. My web site arose out of a bad experience my family had when we purchased our home. Terminix, which did the pest inspection on the home we bought in 1991, gave a "clear" report that proved to be inaccurate. We sued Terminix, the seller, and the real estate agents/brokers, and for various reasons, which are recounted on my web site but which I will not repeat in detail in this affidavit, we lost our case. The costs judgments against us that Terminix and the real estate agents/brokers obtained, combined with all the money we had to spend (and still owed) to pay our own lawyer and to repair the damage to our house, eventually forced us to declare bankruptcy. These experiences left me feeling disillusioned not only about Terminix, whose report we had accepted at face value because of our respect for its name, but also about the uselessness of contracts, about the state agencies that supposedly regulate pest control companies and real estate agencies, and about the system of justice in our country.

8. For example, in the course of our case against Terminix, one of the problems I encountered was that California's Structural Pest Control Board (which regulates pest control companies like Terminix) is dominated by the industry that it is supposed to be regulating. Several,

if not all, of the members of the Board are employees or officials of pest control companies. It seemed to me as if the foxes were guarding the henhouse.

9. Similarly, we lost our case, in the end, because the investigator for the Structural Pest Control Board (and a former Terminix employee), who was subpoenaed to testify as our expert witness, supposedly left town on vacation during our trial. The judge was unwilling to give us a delay or to issue a warrant in order to enforce our subpoena and force him to testify. I also felt that Terminix was putting false testimony in the record, and there just wasn't anything we could do about it. All of these experiences are recounted on my web site.

10. In February or March, 1997, an acquaintance told me about her plan to file a case against a company who had sold her a defective item but refused to fix it, despite a contractual guarantee. I told her not even to try, because she didn't have a chance in our legal system.

11. But after I said this, I got very upset, even though my experience with Terminix had been several years before. Now I was as much upset and angry at myself as at Terminix. After all, the main reasons why companies like Terminix get away with what happened to me are cynicism and fear -- cynicism, because people think they can't do anything about it, and fear, because people think a company will come after you if you try to protect your rights. As I saw it, I had turned into just another obstacle to people getting justice, warning a victim not to do anything about her victimization.

12. I decided that it was my duty as a citizen to fight back — not just against Terminix but the state agencies that don't protect citizens, but do protect the businesses and the people they are supposed to be regulating, and against the legal system that didn't work for us. Ordinary citizens can't always count on the laws, and the lawyers, and the judges; but we can say what we have seen

and warn each other not to be so trusting in a written contract containing some company's promises, even when the company has a famous name.

Basic Facts About My Web Site

13. My web site has a variety of useful information, not just for people that may do business with Terminix and associated companies, but also for people who have dealings with state agencies, such as California's Structural Pest Control Board (whose name also appears in my meta tags) and with the courts. I have provided information about complaints that other people have sent me about Terminix; about findings by state agencies; about lawsuits against Terminix; and about where consumers can go to get help in dealing with their problems. One set of web pages is a compilation of complaints against Terminix in each state, and how each state responds to citizen requests for information on that subject.

14. My site is completely non-commercial. The site has no advertisements. Nobody pays me anything to place information on my web site, all of which I do on my own time on my home computer; then I transfer the files to the server of my local Internet Service Provider, SYIX.COM, which is located in Yuba City, California. I do not have any links to the competitors of Terminix, ServiceMaster, or any of their affiliated companies (although, as noted below, I do link to ServiceMaster's web site so that my readers can make their own judgments about the company). I have started and maintained the site solely for the purpose of expressing my opinions and allowing other people who have written to me about their experiences with Terminix, with its affiliated companies, and with various public agencies, to have their say, so that consumers can learn from our experiences and better protect themselves in the future.

15. I have placed on my site various pieces of information that other people have sent me.

Some of this information and commentary appears on the face of the web site itself, and some appears in the "guestbook" feature of the web site. A guestbook is a common web site feature that allows people who visit a web site to leave their comments posted, not only so that the web site owner can see them, but so that future visitors to the web site can see them as well.

16. Both through the guestbook and through individual e-mail, a number of people have contacted me about my web site and sent accounts of their own experiences with Terminix and with ServiceMaster and its affiliated companies. From time to time, I place such accounts on my web site. I do not pick and choose among those stories, with the limited exceptions described in the next five paragraphs. Comments in the guestbook include both positive comments about Terminix and criticisms of my web site and of me. To the best of my knowledge, only two guestbook comments came from Tennessee -- both of them have been transferred to the web site's "complaint pages."

17. The only time that I edit or exclude information about Terminix is as follows. First, if a story contains spelling or grammatical errors, I try to correct those. If a story contains obscene words, I delete them. For example, one man posted a comment on the guestbook that contained a pornographic award to Terminix; I deleted that.

18. I do not put up anonymous accounts. For example, I do not allow postings in my guestbook from people who refuse to leave their e-mail addresses.

19. At one time, I tried to respond to each of the comments in my guestbook. One man began a dialogue with me on the guestbook and began to say things that seemed to me to be pretty extreme. I decided to delete everything he had said in the guestbook and instituted the policy of not posting anonymous accounts.

20. I do not post accounts from anyone who expresses a desire for confidentiality. Many

people do not want their accounts posted because they are in litigation (or contemplating litigation), and their lawyer has instructed them not to do so; because they have made confidentiality agreements that they do not want to violate; and because they are afraid Terminix will come after them (as it has repeatedly come after me) if they say anything bad about Terminix. From my experiences with Terminix and from what I've learned since putting my web site on the Internet, it is obvious to me that Terminix is a contentious and litigious company. Many people are intimidated by Terminix's approach in this regard.

21. Finally, although I received a message about another pest control company (Orkin), I decided not to post it on my site. I have only so much time and so much ability to post on the site, and I decided that I simply could not take on the job of reporting about all pest control companies. So I decided that I would concentrate on Terminix (and more recently its affiliated companies), and do the smaller job well rather than doing a bigger job not so well.

My Use of Meta Tags

22. In putting together a web page for my web site, I include several elements. For example, in addition to the text and graphics that appear on the body of the web page itself, a web page has a "title" which appears at the top of the web site viewer's browser (for example, Netscape or Internet Explorer, which are the leading browsers). Web page designers also have the option of including one or more "meta tags," which are elements that are ordinarily not viewed on the web page but are noticed by some kinds of "search engines" which people use when they are trying to find sites containing information of interest to them. Not all search engines use the meta tags, however. The meta tags can be viewed by any visitor simply by using the "page source" feature on the more current browser versions.

23. From the very beginning of my web site in September 1997, I have used meta tags that included not only the general topics of pest control and the like, but also Terminix's name. I do this because I believe my site is of potential interest to people who are trying to find information about the specific entities I am criticizing, as well as the pest control industry generally. Thus, if they are doing an Internet search for such information, I want my site to come to their attention. I am attaching as Exhibit A a copy of the beginning of my web page as it first appeared, along with the "page source" print out showing my use of Terminix's name at that time.

24. I do not agree at all with the assumption in the plaintiffs' affidavits and briefs that the only reason people might enter "Terminix" into a search engine is because they are trying to locate the company's web site in order to buy its services. Quite to the contrary, people may be trying to form objective conclusions about the company, because they are trying to make decisions about the company, or to write something about the company. To that end, they may want to find objective reports on the company, such as by newspapers or magazines or consumer rating services. Or they may want both favorable and unfavorable comments, on the assumption that they can look at both sides and then draw their own conclusions. Or they may be looking for criticisms more than anything else, because they have had a bad experience and may want to know if they are the only ones, or to figure out what they can do about their problem and see what others have done.

25. To me, it seems as if meta tags are like the index of a book, or the index in the card catalog at the local library. You might look in the card catalog if you are trying to find the local Terminix company or if you want a laudatory "authorized" history of the company, but you might also want to find out about the company for a variety of other reasons. Surely, Terminix can't prevent librarians from putting the word "Terminix" on a card in the card catalog; for the same

reasons, it shouldn't be able to prevent me from putting "Terminix" in the Internet's equivalent of a card catalog.

26. Although I have placed the word "Terminix" in the meta tags for a number of my pages from the very beginnings of the site, I have never placed it on every page on the site -- it depended on whether the page was actually about Terminix. Examples of this include my "Need Help?" page, which discusses the reasons why others are harmed by situations like mine, and offers suggestions about how consumers can protect themselves against similar problems, and my "Submit Complaint" page, which encourages viewers to send me their own accounts of problems with Terminix; both include Terminix in the page titles, but not in any meta tag.

27. The plaintiffs also seem to assume that my use of their names in my meta tags may be confusing to someone who comes across my page when using a search engine, but that is simply not likely to happen. When you enter a term in a search engine, you get a list of results that are identified not by the search term that you used, but by the title of the page, which is followed by the beginning of a description of the page (which may also be included in the meta tags). These titles are linked to the underlying web page that the search engine has identified. You then choose among the sites that are thus identified by clicking on whatever link you have chosen; or if you do not see any pages that interest you, you can move on to the next group of search results. Given the way individual pages are described by the results of a search engine's search, it is hard to imagine an Internet user seeing my entry in the results of a search and assuming that my site is an official Terminix site.

28. So far as I can recall, there is only one occasion when I received any communication from an unnamed individual who claimed to have stumbled on my site "inadvertently" -- and that

was an e-mail that was sent after this lawsuit was filed against me. Even that individual did not say that he or she was trying to find the official sites for Terminix or ServiceMaster. I attach a copy of this e-mail as Exhibit B.

Development of the ServiceMaster Page on My Web Site

29. When I first developed my web site, the fact that ServiceMaster was the parent corporation of Terminix did not interest me, and I gave it little thought. Over the course of time, however, the importance of ServiceMaster came to my attention through a complaint I received about ServiceMaster. I also received a message from somebody who commented that the "fish rots from the head down." Moreover, the repeated references on ServiceMaster's own web site to its Christian credo of service to God and devotion to customer satisfaction seemed particularly hypocritical in light of what had been done to me. I eventually decided that it would make sense to expand the scope of my site to include ServiceMaster and all of Terminix's corporate siblings as well.

30. The first time I posted a page on my web site concerning ServiceMaster was in June 1998. This page listed ServiceMaster's various affiliates (the plaintiffs in this case), and contrasted the laudatory comments on their web site with several actions against ServiceMaster, which were mentioned on web pages to which I provided links. I listed ServiceMaster and each of its affiliates -- the same affiliates who are now seeking a preliminary injunction compelling their removal from the web site -- in the meta tags at that time. I am attaching as Exhibit C a copy of the ServiceMaster page as it appeared in June 1998, and a print-out of the first page of the "page source" showing that all of these meta tags appeared on the page at that time.

31. As it now appears, my "ServiceMaster" page contrasts the self-laudatory press releases

that ServiceMaster routinely issues with the more critical releases that have been posted elsewhere and a number of complaints that I have received from individual consumers or others. I link to ServiceMaster's own web site so that viewers of my page can visit their page and judge for themselves. The references in the middle of the page to an SEC investigation, to ServiceMaster's stock hitting a 52-week low, and to other similar matters, were added to the page in September 1999, just before this suit was filed against me. I added references to ServiceMaster's having sued me after this suit was filed. I attach a copy of the current page as Exhibit D.

32. The plaintiffs claim in their papers (for example, in their complaint at paragraph 29) that their company names -- Terminix, ServiceMaster, Merry Maids, Furniture Medic, TruGreen, ChemLawn, American Home Shield, AmeriSpec, and Rescue Rooter -- are used in meta tags, but do not appear on my web page. This claim is completely false; these company names appear right below the banner headline.

33. The plaintiffs also pretend to be concerned that people who visit my web site might assume, on looking at the banner including the ServiceMaster name and the links to its website, that they were looking at a page sponsored by ServiceMaster. The blatant falsity of this claim should be obvious to anyone who looks at the page (copy attached as Exhibit D). Viewers who come to the page see at the top of their browsers the page title, "ServiceMaster -- Consumer and Investor Alert!" Then, right below the banner with the ServiceMaster name (in plain block letters similar to the banners for the other pages on the web site, but very different from the distinctive combination of fonts that the company uses for its trademark and logo), appears the statement, "I couldn't very well do this web site justice without including information, lawsuits, and complaints about the parent company." As if that weren't enough to bring to the viewer's immediate attention that this is a critical

site and not an official ServiceMaster site, there is a series of "buttons" down the left-hand side of the page bearing such labels as "Consumer Complaints 1" and "Employee Complaints." Next to some of the names of ServiceMaster's subsidiaries are links to other sites critical of those companies, bearing such labels as "Complaints" and "pending Class Action Suit." Nobody who comes to this page could possibly believe that its source was Terminix or ServiceMaster.

Terminix' Last Suit Against Me

34. I want to be able to continue maintaining this web site so that I continue to spread the truth that Terminix and ServiceMaster don't want the public to hear, but I am concerned that these companies are going to sue me every time I say something that they don't like. In fact, this is not the first time that Terminix has sued me over my web page. Before I first prepared my web site for posting, I sent ServiceMaster (whose CEO was also the CEO of Terminix) a notice that I intended to create a web site which would include my experiences with Terminix, and I described what would be included. I also mentioned that Terminix would be among the "keywords to access the page." A copy of the first and last pages of this letter are attached as Exhibit E (the other pages simply recite the text of the proposed web page). I received a response from W.B. Mallory, Terminix's general counsel, warning me that if I proceeded to post the material on the web I would be sued for defamation and other wrongs, including the following: "You should be informed that your unauthorized use of the Terminix business name, registered trademark and business records infringes upon Terminix's legal rights." A copy of the Mallory letter is posted on my website, and is attached as Exhibit F.

35. After I put up my web site, Terminix filed suit in California state court against me and 100 "John Doe defendants" to make me take down every page on my web site and to obtain damages

from us. The "Doe" defendants were each of the persons whose negative comments about Terminix were posted on my web site. As in this case, Terminix moved for an emergency injunction to try to force me to take down the page immediately.

36. Although Terminix did not use the word "trademark" in its papers, both its complaint (¶ 6; attached as Exhibit G), and the affidavit in support of the motion for a temporary restraining order (¶ 4; attached as Exhibit H), referred to the use of the name "Terminix" in the "key words" of my site, as a reason to grant the injunction against me. (Key words are one part of the meta tags on a web page.) Terminix complained to the court in that case that the key words were being used to take Internet viewers to my web site, giving this as a reason necessitating immediate relief.

37. Because Terminix sued me in California, my lawyer in that case was able to file a motion to dismiss the case against me under the California anti-SLAPP statute ("SLAPP" stands for Strategic Lawsuits Against Public Participation). The judge in the case (Hon. Perry Parker) dismissed the case because there was no reason to believe that Terminix could win its case against me. Judge Parker specifically considered each of the statements that Terminix had identified as false or defamatory and ruled in my favor on each one. In addition, he ordered Terminix to pay me attorney fees of \$4,768.40 (this was not as much as the litigation costs I was assessed against Terminix in my suit against them). A copy of the judge's order is attached as Exhibit I.

38. After this case was over, I added the sentence "Terminix sued to have this web site removed and lost in court" to the meta tags for the home page. I am attaching as Exhibit J a copy of the print-out of the "page source" of the home page as it appeared in June 1998, showing that "ServiceMaster" was listed in the meta tags for the home page as of that time. More recently, I added a legend to the top of the home page referring to this lawsuit as well. A copy of the home page as

it is now posted is attached as Exhibit K.

39. Given what happened to Terminix when it sued me in California, and since it must know my financial circumstances from its prior litigation against me, it is not surprising that Terminix and its affiliated companies have decided to sue me in their own back yard in Memphis, Tennessee, rather than at a location where it is convenient for an individual like me to mount a defense. I hope the Court will dismiss this action against me as I am requesting

40. During the afternoon of October 5, 1999, I received a letter on Terminix letterhead (but with no address or telephone number) demanding that I remove all references to ServiceMaster or any of its affiliated companies from any part of my web site, and agree to a consent judgment not to mention them again, no later than 3 PM Central time the following day. A copy of this letter is attached as Exhibit L.

41. This conduct is eerily similar to what Terminix did when it sued me the first time. Even though I had first published my web site in September 1997, they waited until March 1998 to file suit, and when they did so they rushed into court, filing an ex parte application on March 16 and setting a March 20 hearing on a show cause order and a temporary restraining order ("TRO") directing me to take down the web site until the merits of the case could be determined. Because the suit was filed in Yuba City, I was able to secure a lawyer for the hearing. Judge Parker signed a show cause order but denied the TRO. Copies of this order, showing the deleted TRO provisions that plaintiff had requested, of the motion for a TRO, and of an e-mail notice to me on March 17, 1998, are attached as Exhibit M.

41. I feel extremely fortunate that my current lawyers have stepped forward to represent me, but I worry that the next time Terminix comes after me, I may not be so lucky. Similarly, I believe

that other people like me who have expressed their unhappiness with Terminix will be more reluctant to do so lest they, too, be faced with the same kind of litigation far from their homes. That is why I am asking the Court to award me attorney fees and grant me an injunction to prevent Terminix from bringing this kind of intimidating litigation against me in the future.

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on November 30, 1999.

Carla Virga