

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

HOULIHAN SMITH & COMPANY, INC., *et al.*)
)
 Plaintiffs)
)
 v.) Case No. 1:10-cv-2412
)
 JULIA FORTE, *et al.*,)
)
 Defendants.)

REPLY MEMORANDUM IN SUPPORT OF ATTORNEY FEES

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It's an old story. A local financial institution, represented by a large national law firm, rushes into state court with a verified complaint and smooth-looking papers. The financial institution claims an emergency, pointing to one recent event without admitting that it has known for several years about most of what it is suing over. The verified complaint has a few key allegations pleaded only on information and belief, but others are pleaded—and hence sworn—on personal knowledge, even though the verifying officials couldn't possibly have personal knowledge about those facts. The memorandum of law overlooks the key facts and key precedents, and the defendant is an individual or small-potatoes operation in a distant state. Taking plaintiff and its law firm at their word, but not looking closely, the state court judge grants a broad TRO without giving the defendant any notice or opportunity to be heard. And then the case is over, because an injunction is all that was wanted, and the small defendant cannot afford to come to the jurisdiction.

Here, the big local company was Houlihan Smith and Company and Houlihan Smith Advisors LLC (“Houlihan”), and the national firm was Duane Morris. But in this case, the out-of-state defendant secured representation, and the TRO motion was promptly exposed for what it was—entirely baseless both factually and legally.

The central issue on this motion is whether this action, and in particular Houlihan's motions for emergency relief, were filed in bad faith. Houlihan repeatedly acknowledges in its brief and in the affidavit of its counsel that, from its perspective, the case was only worth doing if it could get a preliminary injunction. Opposition Memorandum (“Opp. Mem.”) at 27 (once preliminary injunction was denied, “the litigation was effectively over”); Darke Affidavit ¶ 48 (plaintiff did not authorize counsel to proceed because preliminary injunction was denied and defamation case is too expensive to litigate on merits). Houlihan's “business reasons,” Darke Aff. ¶ 54 and Exh. B, attached affidavit ¶ 12, called for dismissal if it failed to secure a preliminary injunction.

Plaintiffs and their lawyer ask the Court to be lenient about their verified complaint because some allegations were on information and belief, because scattered information online suggested a possibility of prevailing, and because, plaintiffs' lawyer avers, he really did have a good faith belief that, after discovery, he could have presented tenable claims. But those arguments do not help Houlihan defend the good faith basis for the motions for a TRO and preliminary injunction. For that reason, although there were many indicia of bad faith after the preliminary injunction proceeding was over, as described in Forte's opening brief, this memorandum addresses primarily the issue of bad faith in seeking emergency relief. Whatever may be true of the complaint for damages, the one thing that stands out from defendant's memorandum and the long affidavit of Richard Darke is that the plaintiffs had **no legal or evidentiary basis** for seeking a TRO or a preliminary injunction. We also rebut plaintiff's argument that the fee application was filed too late.¹

I. THE APPLICATIONS FOR A TRO AND A PRELIMINARY INJUNCTION WERE FILED IN BAD FAITH.

In their opposition to fees, plaintiffs and their counsel have a great deal to say about what they believed and what they hoped to accomplish by filing and pursuing their complaint and then their motions for a TRO and then for a preliminary injunction. Although those facts can be relevant

¹ Richard Darke's 38-page affidavit, often relying on hearsay rather than personal knowledge, ranges widely across the entire case, discussing a number of issues that are ignored in Houlihan's memorandum of law. Having omitted the additional arguments from its brief, Houlihan has waived them; this reply brief does not respond to them. It is apparent from Mr. Darke's affidavit that he has some very different recollections of events than does Mr. Levy; Mr. Darke relies on a number of supposed telephone conversations to support his version of events, while Mr. Levy's affidavit recounts that after the preliminary injunction proceeding ended, it was frequently impossible to get Mr. Darke on the telephone because he was always said to be "in court" or "in a meeting." Fourth Levy Affidavit ¶¶ 18, 21, 23. Because discovery has never opened in this case, and because in any event the attorney fee tail should not wag the merits dog by requiring a trial to settle the differing factual accounts of what happened between counsel, we rest on the analysis presented in this brief.

to the issue of subjective bad faith, plaintiffs Houlihan does not respond to the controlling Seventh Circuit authority cited in our opening brief holding that the test for bad faith need not rest on a party's or attorney's subjective opinions, although those can be additional ground for awarding fees. Ultimately bad faith turns on whether the litigation was colorable, and "subjective bad faith is important only when the suit is objectively colorable." *See In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985); DN 39-1 at 9-10 (citing cases).

In the section that follows, Forte shows that Houlihan's opposition presents no evidentiary basis that would allow the Court to conclude that there was any colorable claim for relief in this case. And for a party that moved for a TRO and a preliminary injunction, it is particularly striking that Houlihan's showing consists of an attorney affidavit reciting what others told him—the contention that there was a sufficient basis for making verified allegations "on information and belief," an alleged oral conversation in which an expert told him that several allegations in his complaint sounded correct, an oral conversation with a representative of Google who allegedly "insinuated" that some suggested alternative searches on a list of search results could be the result of certain advertising, and the like. The response to the application for attorney fees does not contain a single piece of admissible evidence supporting the key allegations against Forte on which the motions for a TRO and preliminary injunction had to be based. Consequently, even if the Court concludes that Houlihan did not file its complaint in subjective bad faith, it should conclude that the motions for emergency relief, as well as the complaint itself, lacked any **objective** colorable basis.

A. The Applications for Emergency Relief Lacked Even a Colorable Basis.

Because plaintiffs recognized from the outset both that Forte's two message boards in this case are interactive computer services and that, consequently, 47 U.S.C. § 230 protected Forte

against being sued for their operation, success on the merits of Houlihan's motion for emergency relief rested on its ability to persuade the courts that the case fell within an exception to that statute.

1. Contentions Based on Forte's Alleged Use of Hidden Code Were in Bad Faith.

Houlihan's main ground for evading section 230 was the contention, in paragraphs 31 to 38 of the complaint, that Forte had manipulated Google through the use of hidden code on her web site and other tricks to return search results when search engine users used Houlihan's name, or Houlihan's name together with certain negative words, as a search string. As argued in Forte's opening brief, as well as on the merits in opposition to Houlihan's motion for a preliminary injunction and in support of summary judgment, there was never any basis, colorable or otherwise, for alleging these facts or for relying on supposed evidence of those facts as a basis for injunctive relief. The code that Houlihan submitted in support of its state court discovery petition, the code attached to Forte's affidavit in opposition to the motion for a preliminary injunction, and the code that appeared on Forte's web site before the TRO was entered (when it was fully accessible to Houlihan before the TRO was granted), and that is still there now that the TRO has expired, all demonstrate that the allegations were completely false.

In fact, the "hidden code," Forte's meta tags and title tag, contains only telephone numbers, because the focus of Forte's web sites is not companies but phone numbers from which abusive telemarketers operate. Forte Affidavit ¶ 13. She uses the numbers in the code because consumers use the sites by entering a phone number that appears on their caller ID to find out what others have said about the calls, and to add their own experiences to the conversation. *Id.* If names appear on her web sites, it is only because the site's users discuss them in the course of saying what happened during and as a result of marketing calls.

Houlihan's opposition to fees, and the affidavit of its counsel Richard Darke, put forward a number of considerations to try to persuade the Court that there was a colorable basis for their motion for preliminary relief based on the hidden code, but at the most they show that, if Mr. Darke's affidavit is fully credited, he believed that he might succeed in proving his allegations about the hidden code. Although Mr. Darke explains the reasons for his belief, his reasons rest largely on hearsay, and he produces no admissible evidence that affords the Court any basis for concluding that there was, in fact, even a colorable basis for proceeding on those claims.

First, Mr. Darke avers that he consulted with an unidentified chief of technology at his law firm, and that it had been his understanding that his client consulted with unidentified technical experts in their operation. Aff. ¶¶ 17-18, 20. Conspicuous for their absence, however, are any assertions about what those experts told him or told his client, or any affidavits from those experts. The only evidence submitted on these points in support of the motion for a TRO and preliminary injunction was the verification of the complaint by two investment bankers who gave no reason to believe that they had any expertise in the matter. Moreover, as Houlihan acknowledges, many of the key allegations were verified only on information and belief. Thus, neither Mr. Darke's affidavit on fees nor the evidence submitted on the merits gives the Court any basis for concluding that there was a colorable basis for the injunctive motions in this respect.

Next, Mr. Darke avers that he consulted with an outside expert, Racich, and that Racich told him that his complaint's "allegations concerning metatags, metadata, source code and the like appeared accurate." Darke Affidavit ¶ 19. But nothing is produced from Racich to this effect. Mr. Darke attaches a chain of emails between himself and Racich, Exhibit C, but those emails do not contain any conclusions; they conclude with an email from Racich on the morning of April 15 (the

day the TRO papers were filed) asking when Mr. Darke would be available for consultation. Racich supposedly told Mr. Darke that his already-drafted complaint was accurate; apparently this was a phone conversation the day that the complaint was filed. *Id.* ¶ 19.

But Mr. Darke's hearsay about this supposed statement by Racich is actually inconsistent with the affidavit that Racich gave to support Houlihan's reply brief in support of the preliminary injunction. DN 19. In that affidavit, executed when Forte's web sites had been substantially redacted in compliance with the TRO, not only does Racich say **nothing** about the accuracy of paragraphs 31 to 38 of the complaint, but he even implies that he can't tell whether they are accurate without more information. The purpose of the affidavit was to introduce some doubt about the paragraphs in Forte's affidavit, DN 16-2, ¶¶ 22-32, that explained how the allegations in ¶¶ 31-38 were inaccurate. Racich averred that he could not tell without seeing the actual code on the web sites (code that Racich had purportedly reviewed on April 15) whether Forte's affidavit was true.

The accuracy of Mr. Darke's recounting of his conversation with Racich at some point between the sending of the emails and the filing of the complaint later that day would matter only if the award of attorney fees depended on a finding of subjective bad faith. Because the test is objective, the question for the Court is whether Houlihan has now offered any factual basis for believing that it had any colorable basis for filing a complaint based on the "fact" that Forte was putting either Houlihan's name, or various derogatory words, into the hidden code of her web sites. Mr. Darke's account is not evidence of the truth of what Racich may have said. Only an affidavit from Racich can attest to that. And because there is no affidavit from Racich recounting his analysis of the Code, it is apparent that the motions for a TRO and preliminary injunction, which required evidence and not merely allegations, were filed in bad faith.

In defense of their reliance on the supposed abuse of hidden code, Houlihan and its counsel lean heavily on the fact that certain allegations were put forward only based on information and belief. But that contention does not help them, for several reasons. First, although Mr. Darke avers that the allegations about the hidden code were “all on information and belief,” ¶ 65, most of the allegations were not so limited to. Paragraph 31 of the complaint is not on information and belief, but it alleges that “the Website Defendants . . . combine their own original content with each posting to ensure that the false statements occupy or are associated with Plaintiffs on search results.” Paragraphs 33 and 35 contain no reference to information and belief, but they assert that the “Website Defendants” inserted content into “HTML scripts,” and “description meta tags” that contain “the defamatory content and the intellectual property of Plaintiffs in the HTML.” (Paragraph 34, by contrast, makes the same allegation about the so-called “title meta tag” but only on information and belief.) Paragraphs 37 and 38 were also not alleged on information and belief. Paragraph 37 includes the assertion that “the original content provided by the Website Defendants . . . results in the intentional, constant and repeated publication of defamatory material about Plaintiffs throughout the Internet . . .” Paragraph 38 asserts, “The Website Defendants’ intended consequence of using such sensational words, such as ‘scam,’ ‘scam artist,’ ‘ex-con,’ and ‘fraud’ is to increase traffic to the Websites . . .” As Judge Kendall ruled at the preliminary injunction hearing, the code shown to her contained none of this. The allegations were false; Houlihan submitted a verified pleading to the Court, sworn by two principals on personal knowledge, despite the fact that they had no such personal knowledge. That is the epitome of bad faith.

According to the 1993 Advisory Committee Note for Rule 11,

Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants

from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.

Here, Houlihan had the HTML code to look at, and there is simply no **evidence** supporting the proposition that there was a colorable basis for making the allegations.

Third, Houlihan did not simply file a complaint; it sought a TRO and preliminary injunction, and it could not do that without having **evidence**. Yet the verified complaint on which it relied to evade Forte's section 230 immunity against a TRO and preliminary injunction made several key factual assertions based on information and belief; thus Houlihan now admits that it had no evidentiary basis for injunctive relief. Moreover, in arguing for a TRO and preliminary injunction, Houlihan's brief repeatedly referred to cited paragraphs 31 to 38 of its verified complaint as if they contained proven facts that could support a preliminary injunction. Memorandum Supporting TRO at 3-5, 15, 18-19 (DN 6-2). Now that it admits that it had no evidence and that the cited material was really just a belief, Houlihan is implicitly conceding that its brief was written in bad faith.

Houlihan makes three other arguments to justify its allegations about Forte's manipulations of HTML code, arguing that it was never relying exclusively on hidden code. First, it points to the subparagraph in Forte's affidavit in opposing a preliminary injunction that mentions that, at one time, every page on her web site included a button that stated "Phone Fraud: Report It! Stop It!" Houlihan argues that this shows that Forte was deliberately associating Houlihan with the word "fraud," and hence could properly be sued on the theory that she was an information content provider and not just a provider of interactive computer services. But apart from the fact that Forte put that button on **every** page of her site, not just those associated with Houlihan's number, and that Forte never put Houlihan's name on **any** page, and hence could not be guilty of associating that name with **anything**,

there are two reasons why Houlihan cannot rely on the button to escape a conclusion that it sought injunctive relief in bad faith.

The first is that Houlihan paid no attention to the button in filing its complaint or moving for injunctive relief. None of its papers seeking a TRO referred to the content of this button. It was Forte who mentioned the button in the course of speculating why search engine results from late February using “Houlihan Smith fraud” as a search string returned some 800Notes web pages among the search results. Even then, Houlihan made no mention of the button in its reply brief in support of a preliminary injunction, DN 19; it was only during its rebuttal argument at the preliminary injunction hearing that the button was first mentioned. Tr. 70-71.

Moreover, in its haste to seize on some basis for seeking injunctive relief, and now in its anxiety to find a colorable basis for having sued, Houlihan ignores what Forte actually said about the button. She noted that, until she revised her web sites in February 2010, all the pages on her web site had the button; and they would have continued to have the button only until February 28, 2010. Forte Affidavit ¶ 29(c). And the button was **never** on the whocallsme.com web page, as shown by the HTML code that was attached to Houlihan’s March 2, 2010 pre-litigation discovery petition—the words “Phone Fraud: Report It! Stop It!” cannot be found in that document. DN 16-3, Exhibit P. Consequently, even if Houlihan could in theory have had a colorable factual basis for alleging the button in a complaint for **damages**, it had no colorable basis for seeking a TRO or preliminary injunction against all the web pages about Houlihan based on a button that had been removed from the pages six weeks before. To the extent that Houlihan now claims that its motions for a TRO and

preliminary injunction were based on the button, Houlihan has convicted itself of bad faith.²

Next, Houlihan points to its allegation that Forte “enter[s] into agreements with entities such as Google . . . to ensure the defamatory postings are associated with Plaintiffs’ name and identities,” citing ¶ 36 of the Complaint. The only factual basis for this argument is a murky sentence in paragraph 14 in Mr. Darke’s affidavit, claiming that “on June 6, 2010 [sic], Plaintiffs’ counsel discussed the ‘related to search’ results with a representative of Google [also unidentified] who insinuated that the ‘related to searches’ were associated in some fashion with advertising on Google and use of the Google ADsense.” Mr. Darke then cites two time entries that are attached to his affidavit at Exhibit T; at most, they show that Mr. Darke sent emails to a Google representative on April 6 and April 7. No time entry reflects a conversation with a Google representative.³ Although Mr. Darke purportedly provided Forte with complete list of time entries for his firm’s work on this case, the entries now attached were **not** among the time entries provided to plaintiffs pursuant to Local Rule 54.3. Darke Aff., Exh. B, M.

² Moreover, a search engine user is not likely to use the search string “Houlihan Smith fraud” if she is looking only for neutral statements about Houlihan. As a matter of public policy, members of the public who are **looking** for highly charged criticism of Houlihan ought to be able to find it, so that a web site operator that uses meta tags to enhance its pages’ search visibility to users searching for the terms that the pages users use to describe a company under discussion has done nothing deceptive. In any event, the record here shows that Forte doesn’t use such meta tags—she puts only the telephone number in the meta tags, because her site is aimed at people trying to learn and discuss what happens when they get calls from a particular phone number.

³The April 7 time entry reports that Mr. Darke had a conversation with Ian Dolby at Houlihan “regarding status of case and reason for delay obtaining injunction against Website operators; discussion with David Curkovich [an associate at Duane Morris] regarding same and ability to push the Judge to enter the necessary orders.” In addition, the entry reads “email Google-Chicago regarding AdSpa” with the rest cut off. It appears that by April 6 and 7, Duane Morris was already pursuing injunctive relief against Forte and others. Yet on the first page of its memorandum supporting a TRO, Houlihan represented that it was on April 9 that it learned “for the first time” of the April 6 posting that supposedly created an emergency necessitating a TRO.

In any event, Houlihan has provided no evidence supporting the allegation in paragraph 36 of the complaint that Forte has any agreements with Google that affect Google’s organic search results in any way. The hearsay from an unidentified “representative of Google” who Mr. Darke says “insinuated” a connection simply does not provide an evidentiary basis that would permit the Court to conclude that this part of Houlihan’s complaint had an objective basis.⁴ Even more telling, this argument provides no evidence supporting the proposition that Houlihan’s motions for a TRO or preliminary injunction were filed in good faith.

Finally, Houlihan’s memorandum advances an argument that it never made on the merits — that the appearance, at the bottom of pages of Google search results, of such “suggested searches” as “Houlihan Smith complaints” and “Houlihan Smith rip off” is “original content [that] resulted from Google’s use of the terms on 800Notes.com, pursuant to the Google Ad Sense program.” Opp. Mem. 17. But it was not Forte who created that “original content,” it was Google. In any event, Forte is not liable for the content created by Google; Houlihan knew better than to sue Google for its creating this content through its algorithm; and Houlihan never made such arguments in support of its motion for a TRO and preliminary injunctions against Forte. Hence it cannot use the argument to claim its emergency proceedings were undertaken in good faith.⁵

⁴As Forte stated in her affidavit in opposition to the TRO, ¶ 28, although Google allows web site owners to buy advertising that appears on Google search results pages, Google does **not** allow those ads to affect its organic search rankings.

⁵Houlihan does not explain why Google’s “original content” is actionable—would it have been defamation to suggest to search engine users who searched for “Houlihan Smith scam” that they try “Houlihan Smith rip off” too?

2. Houlihan's Intellectual Property Contentions Were in Bad Faith.

Houlihan contends that its trademark and right of publicity claims provided a colorable basis for injunctive relief against Forte, but it never explains how such claims could possibly succeed in a case like this one. First, Forte never did **anything** to place Houlihan's name—the only trademark that is at issue in this case—on any of her web pages; nor did she place the names of any of Houlihan's employees on any of the pages. It was exclusively the **users** of her pages, the commenters, who did that. The opening brief in support of an award of attorney fees cited several cases that held that the use of trademarks in the hidden code of web sites whose purpose was to express opinions about the trademark holder, or to offer the trademark holder's goods for sale, do not violate the trademark laws. DN 39-1, at 16. So even if Forte had placed Houlihan's name in the meta tags of web pages where Houlihan was discussed, that would not have been a violation of the trademark laws. In its opposition to fees, Houlihan does not cite a single case suggesting that use of such meta tags on a page about the trademark holder states a viable cause of action, just as it cited no such case in its briefs seeking emergency injunctive relief. Such meta tags would be a use of the trademark to “tell the truth” about the web page (regardless of whether the comments on the pages told the truth about Houlihan). And trademarks may always be “used to tell the truth.” *Prestonnettes v. Coty*, 264 U. S. 359, 368 (1924).

Moreover, even the users who used Houlihan's name in their posts did not suggest that Houlihan was the sponsor or source of their comments or of the web page on which the comments were placed. No rational consumer could look at any of the web pages and think that Houlihan had voluntarily associated itself with that page, or that they should trust that page, or react favorably to the advertisements displayed by Google on those pages, simply because Houlihan's name appeared

there. But it is only those consumer reactions—relying on the page or acting on its advertisements because of the positive associations that they have with the term “Houlihan” —that trademark law is trying to protect from deceit. Consequently, Forte did not violate the trademark laws by allowing those consumer comments to remain on her web pages.

Consider this hypothetical: this brief has Houlihan’s name on almost every page, and the name appears at the very beginning of the caption. Like other briefs in Public Citizen cases, it may be posted on our web site, which also contains a donations link. But anybody who sued Public Citizen for violating Houlihan’s trademark by placing its name in this brief without its permission would be laughed out of court. It would be a suit brought in bad faith, even if the lawyer bringing the case could say with a straight face that he actually believed that the cause of action was valid.

The trademark claims against Forte in this case differ little from the hypothetical lawsuit about this brief. If the trademark claims in this case were valid, nobody could criticize or even speak about Houlihan without its permission. Of course, if the statements about Houlihan on the web page were false and deceptive, those words could well be actionable, but it is a different set of laws—the defamation laws—that protect Houlihan from such deception. Defamation claims, however, are not exempt from Section 230 immunity. Even more so than by its factually false claims about the hidden code, by parading its defamation claims under an intellectual property label to try to evade section 230, Houlihan crossed the line protecting its right to bring reasonable but unsuccessful claims. Houlihan’s trademark theories were absurd, and the inclusion of those claims in its motion for emergency injunctive relief (and indeed in the complaint itself) was objectively bad faith.

3. Houlihan’s Continued Invocation of Anonymous Accusations About Forte Shows Its Bad Faith.

In opposing the preliminary injunction, Forte took issue with Houlihan’s attempt to rely on

anonymous Internet criticisms of Forte as a basis for seeking a preliminary injunction against her because, after all, not only were the posted criticisms unsworn and inherently unreliable as **evidence** because of their anonymous nature, but Forte’s affidavit expressly denied them and showed that the anonymous posts could not be true. One of the posters asserted that she was a former employee of Forte’s, but Forte averred that the sites are run only by her husband and herself. Forte First Affidavit ¶ 38, DN 16-2. Houlihan brought these anonymous postings to the state-court TRO hearing, where they apparently impressed the state judge, who allowed the complaint to be amended to include them as exhibits. DN 9 at 3-4. Houlihan again invoked them both in its reply brief in support of its motion for a preliminary injunction, DN 19 at 27-28, and in oral argument before Judge Kendall, who gave them short shrift. Hearing Tr. 29-33.

Knowing that the post could not be true because the undisputed facts in the record show that Forte has no employees—indeed, Mr. Darke’s affidavit recites that Forte has no employees, ¶ 81—Houlihan has reproduced in its brief the five-paragraph anonymous statement from the purported former employee. Opp. Mem. 17-18. It also quotes another anonymous accusation claiming that Forte called her on the telephone to demand a payment for taking down a post, which, because it was posted on February 11, 2011, could have had no role in Houlihan’s decision to pursue this case.⁶ The only possible purpose for including the text of these anonymous posts in its brief is for “olfactory evidence” against Forte, hoping that the Court will wonder whether the statements might be true and rule against Forte accordingly. Of course, these anonymous posts have no more probative value in litigation than the anonymous criticisms over which Houlihan has sued. Using

⁶ The Forte affidavit opposing a preliminary injunction shows that this posting could not be true either—Forte explained that she avoids talking to complaining members of the public on the telephone, and prefers to communicate only in writing. First Forte Affidavit ¶ 38, DN 16-2.

them on this motion shows Houlihan's bad faith.

B. The Manner and Purpose of Houlihan's Emergency Proceeding Also Show Its Bad Faith.

Forte's opening brief argued that Houlihan's deliberate denial of notice to Forte to allow her to defend herself against its TRO, and its deliberate concealment of relevant facts and relevant authority in a proceeding that it **knew** was going to be ex parte, as well as the strong evidence of its improper purpose on bringing this case, show its bad faith. Houlihan's responses to these arguments are unconvincing.

Houlihan tries to explain away its lack of notice by contending that it could not find a **street address** for Forte and hence could not serve her with process. But the notice required for a TRO hearing is not hand-delivery of a summons; it is simply the delivery of a copy of the TRO or preliminary injunction papers. 11A Wright, Miller & Kane, *Fed. Prac. & Proc.: Civil* ¶ 2952, at 273 (2d ed. 1995). Not only did Houlihan have a mailing address for Forte, but it was able to send her a letter several days before it sued her, **and** it got a prompt response to its letter. Moreover, Houlihan's claimed inability to give notice is inconsistent with the argument advanced by Mr. Darke in his affidavit, ¶ 16, although not mentioned in the Opposition, that Mr. Darke expected that undersigned counsel Mr. Levy would represent Forte in this case because he had represented it in another pending case. But if Houlihan knew who Forte's lawyer was, why not give notice to the lawyer? The reason is obvious—Houlihan knew full well that the only way it could get any relief in this case was by proceeding ex parte, where it could misrepresent both the facts and the law.

The proof of this pudding is in the results of the litigation. Houlihan won against an empty chair but had no chance once opposing counsel was in the case. Houlihan urges the Magistrate Judge to read its own briefs on the merits to assess whether it had a colorable basis for its complaint and

its motions. Forte agrees, but the Court should read the briefs of both sides as well as the hearing transcript, including Judge Kendall's oral ruling, which is attached to this memorandum for the Court's convenience, in making a judgment about whether there was a colorable basis for this case and for the TRO and preliminary injunction motions.

Although Houlihan argues that the fact that a state court judge granted its motion for TRO negates the possibility that its suit lacked a colorable basis, its ex parte papers were deliberately prepared in a way that concealed the weaknesses in Houlihan's case. Houlihan points to its reference to section 230 to show that it was not concealing the relevant authority, but it coupled that citation with the inclusion of plainly fallacious factual representations and legal arguments to evade section 230's protection. In its haste to defend its good faith, Houlihan now argues that "all of Plaintiffs' allegation [sic] concerning the Forte's Defendants' use of hidden code was alleged on information and belief," Opp. Mem. 12, but that is not how Houlihan characterized the allegations in its argument to the state court judge. It presented the allegations as facts, even though they were sworn only by two investment bankers who had no basis for attesting to them on personal knowledge. Even Mr. Darke does not claim that he has personal knowledge of these facts. Without opposing counsel there to point out what was happening, the state court judge was snookered, while Judge Kendall, who had the benefit of an adversary process as well as expertise in HTML code, was not.

Houlihan defends its trademark arguments by making two contentions. First, it contends that the alleged contents of the HTML code were not truthful. That is simply wrong. The statements made by Forte's users may or may not have been truthful—Forte is agnostic about that, having seen nothing but Houlihan's unilateral contentions about those facts—but even if Houlihan's name and the derogatory words had been in the hidden code, **the code would have been a truthful portrayal**

of the contents of the page. And that is the key point for trademark law purposes.

Houlihan points to the fact that it cited two cases about the use of trademarks in the code or domain names for web sites, but the use of those cases was misleading because both involved the use of trademarks for a web site that competed with the trademark holder, either by offering a competing physiotherapeutic device, *North American Medical Corp. v. Axiom Worldwide*, 522 F.3d 1211 (11th Cir. 2008), or by luring users with a web site that appeared to be Jews for Jesus' own site but actually proselytized for Judaism and not for Christianity. *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998). By citing these cases while ignoring the cases that are directly on point—the cases where a mark was used for a web site about the trademark holder—Houlihan misled the Court and it did so knowing that, given the ex parte setting, nobody could correct its deception.

Houlihan also disputes the contention that its real purpose in this case was to use false claims about Forte to force the removal of allegedly defamatory posts knowing that both section 230 and the doctrine of prior restraint forbade a preliminary injunction based on its defamation claims. To support that argument, Forte relied on the contents of Houlihan's April 12 letter as evidence that the real purpose of the lawsuit was to get criticisms removed and not to fix the allegedly infringing code (that never existed). After all, that is all the letter "requested." Houlihan defends the tone of the letter as not being abusive, Opp. 25, but does not respond to the citation of the letter as showing Houlihan's real objective.

Forte's opening brief also pointed out the exceptional breadth of the emergency relief that it sought, enjoining all criticism, not even just defamatory matter not to speak of not being limited to the accusation that one of its principals was a convicted felon. Houlihan denies that it sought relief forbidding any criticism on the web site, and indeed derides Forte for arguing that it sought to

ban all criticism, Opp. 22, *see also* Darke Aff. ¶¶ 58, 60, implicitly recognizing that a request for such relief could indeed represent bad faith. But that is exactly how far both the temporary injunction and the ad damnum paragraphs in the Complaint extended. In each count of the complaint, ad damnum paragraph (1) asked that “all Defendants [including Forte]’ be barred “from publishing any further statements regarding Houlihan Smith and Company, Inc., Houlihan Smith Advisers LLC, and all of their principals, employees, agents or representatives.” Moreover, ad damnum paragraph (2) in most of the counts, page 17, 18-19, 24-25, 28-29, 30, 33 and 35, sought an injunction requiring the web site defendants to **remove** all existing statements about Houlihan and staff. The memorandum supporting the motion for a TRO, at page 27, demanded just the same relief: “(1) [a TRO] prohibiting all Defendants . . . from publishing any further statements regarding [Houlihan] and any of their employees, agents, or representatives; (2) [a TRO] ordering all Defendants to remove all statements regarding [Houlihan] and any of their employees, agents, or representatives.” And the TRO that the state court judge signed did exactly that as well: it ordered Forte to “block all statements, including statements published via pseudonyms, of a factual nature, or which appear to be of a factual nature, regarding Houlihan or any of their principals employees, agents or representatives.”⁷ These were all blanket prohibitions on any discussion of Houlihan. Such an order is plainly forbidden by the rule against prior restraints and went far beyond what a proper trademark injunction could have done. Houlihan knew very well that it could not have got such broad injunction without proceeding ex parte. Proceeding ex parte showed its bad faith.

Finally, Houlihan defends against the charge of abusive litigation by arguing that, because

⁷The relief requested in the TRO memorandum (at 27-28) did not mention the hidden code.

Forte secured pro bono representation, the litigation actually cost Forte nothing. Opp. Mem 25.⁸ To the extent that this argument is intended to imply that pro bono lawyers should not be awarded attorney fees, the argument is contradicted by well-settled precedent. *Blum v. Stenson*, 465 U.S. 886, 892, 895 n.11 (1984); *People Who Care v. Rockford Bd. of Ed.*, 90 F.3d 1307, 1310 (7th Cir. 1996). Nor, indeed, could Forte be sure that she could get pro bono representation from Public Citizen's Litigation Group, a small public interest law firm. Although Public Citizen is pleased to represent Forte because her user-created reverse telephone directory offers a useful service to consumers dealing with often-unwanted calls from telemarketers, it cannot always free up a lawyer on short notice to handle a TRO proceeding for a period of several weeks. Public Citizen is not like Duane Morris, a 600-lawyer firm that could assign seven different lawyers to work intensely on a particular case on short notice. Moreover, Forte's resources do not match an investment bank like Houlihan.

II. The Fee Application Was Timely.

Houlihan argues that the fee application was filed too late. Houlihan relies on Rule 54.3(b), which requires a fee application to be filed within 91 days of the termination of the litigation. However, Rule 54.3 sets forth a detailed procedure that the parties are required to follow throughout the 91-day period in an "attempt to agree" on the amount of fees, with the proponent and opponent exchanging evidence relevant to the amount of fees, 21 and 42 days after the litigation ends (in this case, the deadlines were August 27 and September 17, respectively). Fourteen days after that deadline (October 1), the opponent then tells the proponent precisely which hourly rates and hours

⁸Forte's affidavit opposing the TRO shows that her web sites are a two-person operation with no employees. In the part of the Darke affidavit cited on page 25 of the Opposition Memorandum, ¶¶ 80-85, Mr. Darke cites as fact some financial figures about the two Forte web sites at issue in this case, plus another site that he attributes to Forte, which he found on a web site that purports to estimate the revenues and net worth of various web sites. The data have no probative value.

spent the opponent accepts and disputes; after that happens, the parties have fourteen more days to develop an attorney-fee version of a pre-trial statement reflecting what the parties agree and disagree about (October 15); and only then, 21 days later, does the proponent of fees file her motion (in this case, November 5). The procedure is intended to structure the dispute, encourage settlement, and reduce the extent to which the Court must adjudicate disputes over the amount of fees.

Forte was unable to meet this deadline because Houlihan simply refused to meet its deadlines, just as it failed to meet deadlines throughout the case. On August 27, Forte met her first deadline supplying all the evidence on which she would rely to show the amount of fees to be awarded for her lead counsel; there was delay with respect to local counsel's information because he was ill, but that information was later presented. When Mr. Levy sent another piece of evidence a few days later, Houlihan took the position that this delay effectively extended its own deadline under Local Rule 54.3(d) to September 22; Mr. Levy accepted that position. Levy Second Fee Affidavit ¶ 2 and Exhibit 15. However, as recounted in Forte's opening brief, Houlihan neither met its September deadline nor communicated with Mr. Levy about when such information would be forthcoming. Under Local Rule 54.3(g), Forte moved for instructions compelling Houlihan to provide the papers required by the rule.⁹

At the presentment of that motion on October 5, the Court set a new deadline of October 19 for the provision of Houlihan's required information. DN 37. This order did not expressly change any of the other deadlines provided by Local Rule 54.3, but Houlihan apparently agrees that the

⁹Mr. Darke's affidavit, ¶ 88, seeks leave to present in camera an explanation of his need for more time last September. Had Mr. Darke simply called Mr. Levy to ask for an extension of time citing unspecified personal reasons, instead of ducking Mr. Levy's questions, Levy Fourth Affidavit ¶ 21, Mr. Levy would have consented, no questions asked. There is no need for an explanation now.

remaining deadlines were implicitly extended, so that the next deadline was 14 days later, or November 2. By that date, Houlihan had to provide a specification of the hours and rates with which it agreed, and with which it disagreed, and the total fee that it agreed should be awarded assuming that **any** fees were allowed; the parties' joint statement was now due 14 days after that, or November 16, and the fee application was now due 35 days after that, or December 7.

However, there was a further problem with the schedule, because Houlihan's submission on October 19 did not include all the bills its counsel had invoiced. Mr. Levy pointed out these errors to Mr. Darke, who agreed to supplement his submission; after delaying the submission several times, Houlihan finally supplied the information on November 8. Darke Aff. ¶ 101 and Exh. M.¹⁰ This delay extended the remaining deadline, so that Houlihan's new deadline for telling Mr. Levy what hours and rates were accepted, and what the total amount Houlihan agreed was payable (again, on the assumption that any fees were awardable), became November 22, with the fee application itself being due 35 days later on December 27, 2010. Apparently, although Houlihan itself had previously taken the position that Forte's delay in providing required information extending its subsequent deadline, Houlihan now disputes that its own delay extended Forte's deadline.

Moreover, at this point, Houlihan failed to take the required next step by telling Forte which hours and rates it would accept, and hence the amount of fees that it agreed were reasonable.¹¹

¹⁰In opposing the motion for fees, Houlihan has supplied yet additional time entries. Darke Aff. Exh. G, T.

¹¹In the language of Local Rule 54.3(d)(5): "Within 14 days after the above exchange of information is completed and before the motion is filed, the parties shall specifically identify all hours, billing rates, or related nontaxable expenses (if any) that will and will not be objected to, the basis of any objections, and the specific hours, billing rates, and related nontaxable expenses that in the parties' respective views are reasonable and should be compensated. The parties will thereafter attempt to resolve any remaining disputes."

Lacking this information, Forte was unable to draft the Joint Statement required by Local Rule 54.3(e). Forte had already given Houlihan the data required by 54.3(e)(1), but Houlihan simply refused to specify the awardable amount of fees as required by Rule 54.3(e)(2).¹² Still, Forte was prepared to file her fee application no later than December 27.

But in the course of preparing the application, Mr. Levy contacted Mr. Darke to try to stipulate the manner of filing Duane Morris' firm's billing records, which under the Local Rules are deemed presumptively confidential and hence to be subject to a protective order if they need to be filed. It is undisputed that Mr. Darke then offered a specific figure to settle the fee controversy, and Mr. Levy accepted. First Levy Fee Aff. ¶ 22; Darke Aff. ¶ 108. The parties discussed and agreed on non-financial terms, such as the degree of confidentiality. Mr. Darke said he would draft the agreement. It is undisputed that the agreement was not consummated because Houlihan would not allow Mr. Darke to execute the agreement. First Levy Fee Aff. ¶ 24; Darke Aff. ¶ 110,

Based on this agreement, Forte did not file a fee application by the December 27 deadline. Houlihan now argues that the deadline for filing the fee application passed irrevocably when Forte, lulled into inaction by Houlihan's apparent agreement to a settlement, did not file its fee application on December 27. Finally, while Mr. Levy was on vacation outside the continental United States, Mr. Darke notified him that the settlement had fallen through. After his returned from vacation, Mr. Levy completed the fee application.

Houlihan argues that Forte should have protected the record by filing a motion to extend the

¹²“(2) the total amount of fees and/or related nontaxable expenses that the respondent deems should be awarded (If the fees are contested, the respondent shall include a similar table giving respondent's position as to the name, compensable hours, appropriate rates, and totals for each biller listed by movant.)”

deadline. In retrospect, such a motion would have been the safer course, but Forte acted in reliance on an oral settlement agreement with Houlihan's counsel, and on Mr. Darke's promise to draft the settlement agreement. Houlihan should be equitably estopped from arguing that the time expired while Forte was relying on its counsel's promises. The time limits in Local Rule 54.3 are not jurisdictional, and Houlihan makes no showing that it suffered any prejudice from the delay. Accordingly, the fee application should be deemed timely.

CONCLUSION

Forte's motion for an award of attorney fees and expenses should be granted.

Respectfully submitted,

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May 23, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2011, I have filed the Motion and Memorandum using the Court's ECF filing system, which will cause it to be served on counsel for plaintiffs. I am emailing the document to defendant Jamon Silva at email@jamon.name, per his preference to receive service by email only.

/s/ Paul Alan Levy

May 23, 2011