

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

DYNETECH CORPORATION and
GLOBALTEC SOLUTIONS, LLP

Plaintiffs,

v.

Case No. 6:07-cv-114-Orl-28 DAB

LEONARD FITNESS, INC. and
JUSTIN LEONARD, individually,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants Justin Leonard and Leonard Fitness, Inc. hereby move to dismiss this action under Federal Rule of Civil Procedure 12(b)(2) because the defendants are not subject to personal jurisdiction in Florida and under Federal Rule of Civil Procedure 12(b)(6) because the complaint fails to state a claim upon which relief can be granted.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

A company that markets controversial investment products through television infomercials seeks, by means of this lawsuit, to suppress constitutionally protected criticism of its products on the Internet. The target of the lawsuit is an Arizona resident whose websites offer consumers a forum to share their experiences, whether good or bad, with a wide range of products marketed through infomercials. Although the complaint asserts twelve separate claims—ranging from trademark infringement, to unfair competition, to false advertising, to interference with a business relationship—all of the claims are based on the fact that the trademarked names of the company's products appear in the product reviews displayed on the websites.

For several independent reasons, this suit has no reasonable chance of success and cannot support reasonable arguments to change existing law. First, this Court lacks jurisdiction because the defendant does not have the requisite contacts with Florida. Second, the First Amendment bars the company's improper attempt to silence non-commercial consumer commentary. Third, the trademark claims lack any basis in existing law because the complaint alleges no cognizable trademark injury, the trademark laws do not extend to non-commercial use, there is no likelihood of confusion (because the websites do not sell any products, let alone products that might be confused with the company's), and the use of the marks constitutes fair use, non-trademark use, and nominative fair use. Fourth, the remaining claims, which are derivative of the trademark claims, fail both on their own terms and because they are barred by the federal Communications Decency Act.

Just two years ago, this Court dismissed indistinguishable trademark, unfair competition, and false advertising claims against a consumer watchdog website. *Whitney Info. Network v. Xcentric Ventures, LLC*, 2005 WL 1677256 (M.D. Fla. July 14, 2005). Courts do not, and should not, tolerate such baseless attempts to use litigation to accomplish the improper purpose of suppressing non-defamatory critical commentary. *See Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089 (11th Cir. 1994) (imposing sanctions on a Florida corporation that brought a frivolous interference with business relationship claim against an animal rights activist who criticized the company's business practices), *appeal after remand*, 87 F.3d 1252 (11th Cir. 1996) (affirming award of sanctions).

STATEMENT

Justin Leonard is a resident of Arizona and the creator and operator of InfomercialRatings.com and InfomercialScams.com. *See* Leonard Decl. ¶¶ 1, 3. These

websites are designed as impartial forums for consumer information, where users can read and post reviews of products sold through infomercials. *Id.* ¶ 5.¹ Leonard relies entirely on users of the websites to post the product reviews. *Id.* ¶ 6. He does not write any of the reviews himself or edit the reviews that others have written. *Id.*²

Leonard is also the author of an Internet-based newsletter, LeonardFitness.com, on which he posts health information, training tips, and reviews of fitness-related products. *Id.* ¶ 4. Through his experience reviewing fitness products on his newsletter site, Leonard became knowledgeable about products sold on television infomercials, some of which he found to be legitimate, but others of which he discovered to be ineffective or to charge high prices for health information that could be obtained for free. *Id.* ¶¶ 4-5. About seven years ago, Leonard started his first infomercial-related website, FitnessInfomercialReview.com. *Id.* ¶ 5. The site allows consumers to review health-related infomercial products. *Id.* He later created InfomercialRatings.com and InfomercialScams.com for users to review other kinds of products. *Id.* Leonard's websites are widely read and have been featured in the

¹ Infomercials are program-length television advertisements. A typical infomercial takes the form of a half-hour talk show devoted exclusively to the product being marketed, accompanied by a toll-free telephone number to order the product. *See generally* Lewis, *Infomercials, Deceptive Advertising, and the Federal Trade Commission*, 19 Fordham Urb. L.J. 853 (1992). Infomercials are used to sell products such as exercise machines, miracle diets, balding cures, moisturizers, tooth whiteners, and real estate investment schemes, and are often associated with deceptive marketing. *Id.* at 865-66. However, observers of the industry report that in recent years it has become more difficult for marketers to make deceptive claims through infomercials: "Since the late 1990's the Federal Trade Commission has intensified efforts to stop false claims," and "online sites like infomercialscams.com mean complaints about products can reach more people faster." Andrews, *The Unending Pull of Exercise Machines*, Seattle Post-Intelligencer, May 3, 2007.

² Leonard Fitness, Inc., is a Nevada corporation of which Justin Leonard is the president, sole officer, and sole employee. Leonard Aff. ¶ 2. Leonard Fitness, Inc., owns the websites at issue in this case. *Id.* Because Leonard Fitness acts only through Justin Leonard, *id.*, the two are jointly referred to as "Leonard" unless otherwise noted.

media, including the New York Times, and on influential consumer-information websites. *See, e.g.,* Andrews, *The Unending Pull of Exercise Machines*, *supra*; Bernstein, *Shaving My Wallet A Lot Better Than My Face*, New York Times, April 12, 2007, at G3; Popken, *InfomercialScams.com Exposes TV Snakeoil*, Consumerist, April 24, 2007, available at <http://consumerist.com/consumer/infomercials/Infomercialscamscom-exposes-tvsnakeoil-254826.php>. Leonard Decl. ¶ 8.

Leonard raises money to pay for the costs of running his websites and for his time by selling advertising space on the sites. *Id.* ¶ 9. Although he is willing to sell advertising space directly to companies that are interested in advertising on the sites, the vast majority of advertising is placed by one of three third-party advertising brokers. *Id.* Leonard has no control over which advertisements the brokers put on his sites. *Id.* ¶ 10. He has never sold any products or services from any of his websites—including LeonardFitness.com, InfomercialRatings.com, and InfomercialScams.com—and he has never been in competition with any of the products or services sold by the plaintiffs. *Id.* ¶ 11.

Plaintiffs Dynetech and GlobalTec (jointly, “GlobalTec”) are affiliated companies that sell financial products and services through the use of television infomercials. Wizetrade is a GlobalTec product marketed for purposes of day trading on the stock market. *See* <http://new.wizetrade.com/Info/Features.aspx#overview>. It purports to indicate, with the use of red or green lights, whether a stock is likely to increase or decrease in value over the next several minutes or days, or over longer periods of time. <http://www.globaltecsolutions.com/products.asp> (“Wizetrade™ software is the only real-time stock trend recognition software that’s as easy as red light-green light!”). 4X Made Easy is a similar product, but is designed for trading in foreign currencies instead of stocks. *See* <http://4x.wizetrade.com/Info/Features>

.aspx#overview. Although GlobalTec claims that its software is effective if used properly, it has faced media criticism for its software and business practices and has been described as marketing a “get-rich-quick scheme.” See Malisow, *Wize Guys: Here’s your chance to get rich quick—or lose your shirt, in which case, GlobalTec disavows all responsibility for, well, anything*, Houston Press, Feb. 2, 2006, available at <http://www.houstonpress.com/2006-02-02/news/wize-guys/full>; Jaffe, *Don’t be stupid: ‘Made Easy’ TV pitch is way to drop coin*, Boston Herald, March 29, 2005, Sec. B. GlobalTec is also facing a class-action lawsuit in Colorado, scheduled to go to trial next year, brought by consumers seeking a refund of the purchase price of the 4X Made Easy software. *Brummit v. Dynetech, Inc.*, No. 04-778 (Colo. Dist. Ct., City and County of Denver).³

On Leonard’s InfomercialScam’s.com site, eleven consumers have posted complaints about GlobalTec’s Wizetrade software, criticizing it for its high price (more than \$4000) or disputing the effectiveness of its predictions about likely changes in stock value. See <http://www.infomercialscams.com/scams/wizetrade>. Three users (at least one of them an employee of GlobalTec) posted defenses of the product, which generally express the opinion that the negative reviews came from users who had not taken the time necessary to learn how to use the software. See <http://www.infomercialscams.com/defenses/wizetrade>. The InfomercialRatings.com site has only one consumer review of the Wizetrade software, which gave it one out of a possible five stars. See <http://www.infomercialratings.com/product/wize-trade>. GlobalTec’s 4X Made Easy software received similar reviews. See

³ The Federal Trade Commission warns consumers against software that purports to “signal[] precisely when to buy and when to sell a particular security.” See <http://www.ftc.gov/bcp/online/pubs/invest/daytrade.shtm>.

http://www.infomercialscams.com/scams/4x_made_easy/; http://www.infomercialscams.com/defenses/4x_made_easy. The reviews constitute the opinions of the users of Leonard’s websites—Leonard did not post any of the reviews himself or alter any of the reviews posted by others. Leonard Decl. ¶ 6.

Users searching for the words “Wizetrade” and “4X Made Easy” on the Google or Yahoo! search engines are likely to find links to these reviews on Leonard’s websites. Cmpl. ¶¶ 17-20. Each search engine uses its own proprietary mathematical formula, or algorithm, to rank the relevance of web pages to search terms, and Leonard has no direct control over which results search engines return in response to any particular search. Leonard Decl. ¶¶ 13-14. Leonard does not attempt to manipulate these results by paying search engines to display links to his websites, by using metatags or other hidden tags containing trademarks (including GlobalTec’s trademarks), or in any other way. *Id.* ¶ 13. In general, however, search engines are more likely to return links to a website when the site contains the searched-for terms, and when the site is linked to by many other websites. *Id.* ¶ 14. Therefore, the most likely reasons that Leonard’s websites turn up in searches for “Wizetrade” and “4X Made Easy” is that those words appear in the text and titles of reviews of those products, and that Leonard’s websites are highly regarded and linked to by many other sites and are thus considered relatively authoritative by search engine algorithms. *Id.* Users searching the Internet for Wizetrade or 4X Made Easy are likely to be interested in reading reviews (either positive or negative) of those products and are thus likely to consider these results highly relevant. On the other hand, users are not likely to expect that every search result returned by Internet search engines would direct them to GlobalTec’s official website. *See* <http://www.google.com/search?q=wizetrade> (returning approximately 129,000

results to a search for the term “Wizetrade,” the vast majority of which do not lead to any of GlobalTec’s official sites).

GlobalTec filed suit against Justin Leonard and Leonard Fitness, Inc. on January 24, 2007, seeking damages (including treble and exemplary damages) and attorneys’ fees, as well as a permanent injunction prohibiting Leonard from using the names Wizetrade or 4X Made Easy on his websites. The complaint asserts claims for trademark infringement, trademark dilution, unfair competition, deceptive and unfair trade practices, false advertising, interference with a business relationship, misappropriation, and unjust enrichment. All these claims rest on the same basic allegation of fact: that the names of GlobalTec’s products appear in reviews on Leonard’s websites and thereby in Internet search results (what GlobalTec calls “organic listings”). Cmplt. ¶¶ 17-22. Leonard now moves to dismiss the complaint because there is no personal jurisdiction over him in Florida and because the complaint fails to state any claim upon which relief can be granted.⁴

ARGUMENT

I. LEONARD IS NOT SUBJECT TO PERSONAL JURISDICTION IN FLORIDA.

A federal district court may exercise personal jurisdiction over a defendant only if the defendant has “certain minimum contacts with [the state] such that the maintenance of the

⁴ Leonard has attached his declaration solely to support his argument that personal jurisdiction is lacking. The Court may rely on his declaration for that purpose, but “must construe the allegations in the complaint as true, to the extent they are uncontroverted by defendant’s affidavits or deposition testimony.” *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). Leonard’s argument that the complaint fails to state a claim on which relief can be granted, however, relies solely on the allegations in the complaint and, to the extent relevant, on the contents of Leonard’s websites. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (court may rely on documents extrinsic to the complaint in deciding a motion to dismiss if they are central to the plaintiff’s claim and are undisputed).

suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted); *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). A court’s jurisdiction over a defendant can be either general or specific. “General jurisdiction arises from the defendant’s contacts with the forum that are not directly related to the cause of action being litigated, while specific jurisdiction is founded on a party’s activities in the forum that are related to the cause of action alleged in the complaint.” *Stubbs*, 447 F.3d at 1360 n.3 (citations omitted). Here, GlobalTec cannot meet its burden of establishing either form of jurisdiction because all the relevant events occurred outside the state. Leonard therefore could not reasonably have anticipated being haled from Arizona into court in Florida.

A. Leonard Is Not Subject to General Personal Jurisdiction in Florida.

General personal jurisdiction applies only if there are “continuous and systematic general business contacts between the defendant and the forum state.” *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000). GlobalTec has alleged no contacts with Florida that would justify the exercise of general jurisdiction over Leonard, and there are none. As explained in the attached declaration, Leonard lives in Arizona and runs his websites entirely from there. Leonard Decl. ¶¶ 1, 15. His websites are not hosted in Florida, and he has no contract with any Internet service providers in Florida. *Id.* ¶¶ 15. He has never sold any products or services to Florida residents. *Id.* ¶¶ 11, 17. The vast majority of the advertising on his websites comes from third-party advertising brokers that are not located in Florida, and Leonard exercises no control over the advertisements placed on his websites by these brokers. *Id.* ¶¶ 9-10.

Leonard has never owned or leased any property, owned any bank accounts, owned any investments, had any employees or agents, sold any products or services, or engaged in any other business in Florida. *Id.* ¶ 17. He has never been licensed to do business in Florida, nor has he paid any taxes, filed any lawsuits, solicited any business, or advertised via print or broadcast media in the state. *Id.* ¶¶ 18-19. Indeed, he has not even visited Florida since he moved out of the state when he was twelve years old, about seventeen years ago. *Id.* ¶ 16. Moreover, Leonard's corporation, Leonard Fitness, Inc., is not registered to do business in Florida, acts only through Leonard, and has no greater connection to the state of Florida than he does. *Id.* ¶ 20. In short, neither Justin Leonard nor Leonard Fitness, Inc. has a connection with Florida supporting the exercise of general jurisdiction in the state.

B. Specific Personal Jurisdiction Over Leonard Is Also Lacking.

A defendant is subject to specific personal jurisdiction in a state only if he purposefully avails himself of the privilege of acting in the state, and the claims arise out of actions in the state such that he should reasonably anticipate being haled into court there. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1220 (11th Cir. 1999). Simply using a trademark on a website that is accessible equally in all states is not the sort of purposeful availment sufficient to subject a party to jurisdiction in every state where that website can be viewed. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 400 (4th Cir. 2003); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002); *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363, 1367 (S.D. Fla. 1999). Rather, something more is required to show that the defendant intentionally targeted the forum state. *Pebble Beach Co.*, 453 F.3d at 1158.

In examining whether “something more” supports jurisdiction in the forum, many courts follow the lead of the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* by looking to “the level of interactivity and commercial nature of the exchange of information” on the website. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Under the *Zippo* “sliding scale” test, those sites that are more interactive and commercial in nature are more likely to subject their operators to personal jurisdiction in the forum. *Id.*

In this case, Leonard’s websites are interactive only to the extent that they allow users to post reviews of infomercial products online. Numerous courts have held that this sort of user feedback is insufficient to subject a website operator to jurisdiction in the forum state. *See Carefirst*, 334 F.3d at 400-01 (holding the court lacked personal jurisdiction based on a website that allowed users to exchange information); *Revell v. Lidov*, 317 F.3d 467, 476 (5th Cir. 2002) (holding jurisdiction lacking over the operator of an electronic bulletin board). Moreover, “[w]ebsite interactivity is important only insofar as it reflects commercial activity.” *Instabook Corp. v. Instantpublisher.com*, 469 F. Supp. 2d 1120, 1125 (M.D. Fla. 2006) (quoting *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804 (D. Md. 2004)). The interactivity on Leonard’s sites is completely noncommercial in nature—the sites merely allow users to post feedback about products they have used and do not offer any goods or services for sale. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (holding that the defendant was not subject to jurisdiction when he had “conducted no commercial activity over the Internet in [the forum state]”). They therefore do not include the sorts of commercial interactivity on which courts following the *Zippo* test have based

jurisdiction.⁵

Even a highly interactive or commercial website is insufficient to support jurisdiction if it is not expressly aimed at residents in the forum state. *See Instabook Corp.*, 469 F. Supp. 2d at 1125-26. Here, nothing on Leonard’s websites targets readers in Florida more than readers in any other state. The sites are of general interest to *all* consumers of infomercial products—a demographic that is national or even global in scope. Leonard Decl. ¶ 7. Due process, however, requires “contacts that tie the defendant to a particular state, not those that merely link with equal strength the defendant to all states.” *JB Oxford Holdings*, 76 F. Supp. 2d at 1367; *see also Carefirst*, 334 F.3d at 401 (rejecting personal jurisdiction where a website did not reach out to residents of the forum state other than in a generalized request for donations); *Revell*, 317 F.3d at 475 (finding no personal jurisdiction over a message-board site because the site was “directed at the entire world,” but not specifically at the forum state). Moreover, it is the users of Leonard’s websites, not Leonard himself, who post reviews about infomercial products including the reviews of GlobalTec’s products. Leonard Decl. ¶ 6. Because Leonard does not control which products users review, he cannot target those reviews to readers of any particular state. *See Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1165-66 (W.D. Wis. 2004) (“If defendant is not creating the text, then defendant is not purposefully directing its activities toward any particular company or state.”).

⁵ *See, e.g., Berthold Types, Ltd. v. Eur. Mikrograf Co.*, 102 F. Supp. 2d 928, 933-34 (N.D. Ill. 2000) (holding that a company’s partially interactive website did not give rise to jurisdiction in a state because sales could not be conducted over the site); *JB Oxford Holdings*, 76 F. Supp. 2d at 1367-68 (holding personal jurisdiction lacking in Florida where the defendant sold no products to consumers in the state).

This case closely resembles *Hy Cite Corp.*, where the court rejected personal jurisdiction over the operator of a similar Web-based forum for consumer complaints. 297 F. Supp. 2d 1154. Because the website at issue in *Hy Cite Corp.* was of interest to a national audience, the court held that the defendant had “not targeted [the citizens of the forum state] more than the citizens of any other state” and that personal jurisdiction was therefore lacking. *Id.* at 1164. Similarly, the court in *Full Sail, Inc. v. Spevack* rejected jurisdiction over a consumer complaint site that allowed users to post comments about sailing schools, noting that, although one of the targeted companies was located in Florida, the website was not “purposefully directed at Florida readers.” No. 03-887, 2003 WL 25277185, at *4 (M.D. Fla. Oct. 21, 2003). Here also, although one of the plaintiff companies is apparently headquartered in the state, Cmplt. ¶ 1, the challenged websites target a wide variety of products sold by companies throughout the country. The presence of a single company in the forum state does not give rise to jurisdiction in the state without evidence that the website intentionally targeted readers there. *See Revell*, 317 F.3d at 475; *JB Oxford Holdings*, 76 F. Supp. 2d at 1367-68. “To hold otherwise would subject millions of internet users to suit in the state of any company whose trademarked name they happen to mention on a website.” *Hy Cite Corp.*, 297 F. Supp. 2d at 1166.⁶

⁶ In *Whitney Information Network v. XCentric Ventures, LLC*, the Eleventh Circuit in an unpublished decision reversed the district court’s dismissal for lack of personal jurisdiction of a defamation suit against the same company for which jurisdiction was rejected in *Hy Cite Corp.* 199 Fed. Appx. 738 (11th Cir. 2006). The court, however, held only that the company was subject to jurisdiction under Florida’s long-arm statute, a proposition that Leonard does not dispute. *Id.* at 744. The court explicitly left open the question whether personal jurisdiction would be consistent with due process, which was the basis for the court’s rejection of jurisdiction in *Hy Cite Corp.* *Id.* Moreover, the court based its holding solely on the plaintiff’s allegation that the defendant had authored and modified

II. THE FIRST AMENDMENT BARS GLOBALTEC'S ATTEMPT TO SILENCE THE CONSUMER COMMENTARY PUBLISHED ON LEONARD'S WEBSITES.

Through this lawsuit, GlobalTec attempts to use the trademark and unfair competition laws to silence unwanted critical commentary about its controversial products. But the only way in which GlobalTec's trademarked product names are used on Leonard's websites is to identify the subject matter of some of the consumer reviews published there. Because the reviews are fully protected by the First Amendment, and because the trademark and unfair competition laws cannot encroach upon the zone protected by the First Amendment, GlobalTec's lawsuit has no basis in existing law and cannot support a reasonable argument for a change in existing law. Indeed, if courts were to allow suits like GlobalTec's to proceed, any company dissatisfied with a bad review of its products or services—whether in a website, or in a printed newspaper or magazine—would be able to bring an infringement action to halt publication of the unwanted review.

It is well-established that consumer commentary is core speech protected by the First Amendment, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and that the First Amendment fully applies to Internet communications, *Reno v. ACLU*, 521 U.S. 844 (1997). More specifically, the federal appellate courts have uniformly held that websites like Mr. Leonard's—which publish commentary about a mark-holders' products rather than compete with them—are protected against attempts to silence that commentary through the trademark and unfair competition laws. *See, e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 423-25 (1st Cir. 2007); *Bosley Medical Inst., Inc. v. Kremer*, 403 F.3d

some of the challenged company reviews. *Id.* at 743. GlobalTec has not made that allegation, and Leonard has specifically denied it. Leonard Decl. ¶ 6.

672, 679-80 (9th Cir. 2005); *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005); *TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003); *CPC Int'l v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000).

As these courts have recognized, “it is important that trademarks not be ‘transformed from rights against unfair competition to rights to control language.’” *CPC Int'l*, 214 F.3d at 462 (quoting Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710-11 (1999)). “Such a transformation would diminish our ability to discuss the products or criticize the conduct of companies that may be of widespread public concern and importance.” *Id.* “Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.” *New Kids on the Block v. News America Publ'g, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992).

To guard against improper intrusion into the zone of protected speech, courts strictly limit the reach of trademark law to protection of the *source-identifying* function of trademarks. “[T]rademarks are not merely descriptive; they answer the question ‘Who made it?’ rather than ‘What is it?’” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1216-17 (11th Cir. 2000); *accord Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900-01 (9th Cir. 2002) (“It is the source-denoting function which trademark laws protect, and nothing more.”). Because GlobalTec’s marks are used only descriptively in Leonard’s websites, the First Amendment would prevent enforcement of the trademark law here, even if otherwise applied. “When unauthorized use of another’s mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right.” *Id.* at 900 (quoting *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267,

276 (S.D.N.Y. 1992)).

Courts also strictly foreclose any application of the trademark laws to noncommercial speech, which is fully protected by the First Amendment. Speech is commercial in nature if it does “no more than propose a commercial transaction.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *United States v. United Foods*, 533 U.S. 405, 409 (2001); *see also Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998) (commercial use of a trademark is entitled to intermediate First Amendment protection). The use of GlobalTec’s marks on Leonard’s websites, however, is entirely noncommercial. Because Leonard’s websites do “not offer any products for sale”—and therefore do not use GlobalTec’s trademarks to sell products, let alone products that could be confused with GlobalTec’s—there is “no reason to deny full First Amendment protection” to Leonard. *CPC Int’l*, 214 F.3d at 462-63.

That Leonard’s websites are supported by advertising does not transform the commentary published on his sites into commercial speech any more than the sale of advertisements in *The New York Times* or *The Orlando Sentinel* transforms the political opinion columns or product reviews in those newspapers into commercial speech. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996). “It is well settled that a speaker’s rights are not lost simply because compensation is received.” *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 801 (1988); *cf. New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (accord[ing] full First Amendment protection to a paid advertisement in a newspaper). In *Universal Communication Systems*, for example, a company brought a trademark dilution claim under Florida law against Lycos, the operator of a Internet message board on which anonymous users had made critical comments about the

company. 478 F.3d 413. Even though Lycos “derives advertising revenues from the use of its web sites,” the First Circuit held that the trademark dilution claim could not survive, not only as a matter of Florida trademark law, but also “because of the serious First Amendment issues that would be raised by allowing [the company’s] claim.” *Id.* at 423; *see also Cardtoons, L.C.*, 95 F.3d at 971-73. The same serious First Amendment issues prevent GlobalTec’s claims from going forward here.

III. GLOBALTEC’S TRADEMARK CLAIMS HAVE NO BASIS IN EXISTING LAW.

The majority of the claims asserted in GlobalTec’s complaint—specifically, the first, second, third, fourth, fifth, sixth, and eighth counts—allege violations of state or federal trademark law. In addition to the First Amendment, the trademark claims fail for several independent reasons.

A. The Complaint Alleges No Cognizable Trademark Injury.

First, the trademark claims all fail because the complaint does not allege any cognizable trademark injury. Trademark injury arises from an improper use of a mark to denote the source of similar products sold by others—or, in the case of dilution, to denote the use of a similar mark on dissimilar goods. The use of trademarks solely to identify the subject matter of consumer commentary on a website, therefore, is not a use against which the trademark laws are designed to protect. “Any injury to [GlobaltTec] ultimately arises from its being criticized on the [infomercialscams.com and infomercialratings.com] website[s].” *Universal Communication Sys.*, 478 F.3d at 423; *see also Bosley*, 304 F.3d at 680 (“Any harm to Bosley arises not from a competitor’s sale of a similar product under Bosley’s mark, but from Kremer’s criticism of their services. Bosley cannot use the Lanham

Act either as a shield from Kremer’s criticism, or as a sword to shut Kramer up.”). As far as the trademark laws are concerned, it does not matter whether the criticism directed at the markholder is considered legitimate or illegitimate—or even whether it is true or false. To the contrary, “if the injury alleged is one of critical commentary, it falls outside trademark law, whether the criticism is warranted or unwarranted.” *Universal Communication Sys.*, 478 F.3d at 424.

B. Because Leonard Has Not Engaged in the Commercial Use of the GlobalTec’s Marks, the Trademark Laws are Not Implicated.

Second, the trademark laws do not extend to noncommercial use. Recognizing the limits that the First Amendment imposes, both the language of the trademark statutes and the decisions construing those laws limit the application of trademark law to noncommercial speech. Under the Federal Trademark Dilution Act, “any noncommercial use of the mark . . . shall not be actionable under this section.” 15 U.S.C. § 1125(c)(3)(C). Similarly, an infringement claim may be brought against use of the mark only “in connection with the sale, offering for sale, distribution, or advertising of any goods or services.” 15 U.S.C. § 1114(1)(a). State trademark laws are similarly construed “to provide breathing room for First Amendment concerns.” *Universal Communication Sys.*, 478 F.3d at 425 (interpreting Florida anti-dilution law). The question of commercial use boils down to whether the defendant’s use of the plaintiff’s mark was “in connection with the sale of goods or services,” and more specifically, “whether [the defendant] offers *competing* services to the public.” *Bosley*, 304 F.3d at 679 (emphasis in original). Under that test, consumer criticism does not constitute commercial use. *Id.* (“Kremer is not Bosley’s competitor; he is their critic. His use of the Bosley mark is not in connection with a sale of goods or services—it is in

connection with the expression of his opinion *about* Bosley’s goods and services.”) (emphasis in original).

On the question of commercial use, this case is materially indistinguishable from *Universal Communication Systems*. As discussed above, in that case, UCS claimed that Lycos diluted UCS’s trade name in violation of Florida law by permitting users on one of Lycos’s financially oriented message boards to engage in critical discussions about UCS. The court held that although Lycos derived advertising revenues from its websites and was indisputably “a commercial venture,” its use of the plaintiffs’ trademark to facilitate users’ commentary was not “‘commercial’ in the relevant sense under trademark law.” *Universal Communication Sys.*, 478 F.3d at 424. Although Lycos “might profit by encouraging others to talk about” UCS and the other companies discussed on its message boards, the court explained, “neither that speech nor Lycos’s providing a forum for that speech is the type of use that is subject to trademark liability.” *Id.*

Were the courts to hold otherwise, any publication that both displays advertising and publishes critical commentary about a markholder’s products or services—as do almost all newspapers and magazines, and many websites—would be engaging in commercial use subject to trademark liability. Speakers and publishers would be forced to work for free or pay their expenses out of their own pockets to have their speech protected.

C. GlobalTec Has Not Alleged, and Cannot Demonstrate, Any Likelihood of Confusion.

Third, even if GlobalTec could demonstrate trademark injury and commercial use, it has not alleged and cannot establish the “essential element” of any infringement claim under the Lanham Act—“proof by the plaintiff that the alleged infringement by the defendant

creates a likelihood of confusion on the part of consumers as to the source of the goods.” *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 831 (11th Cir. 1982). Because the references to GlobalTec’s trademarks on Leonard’s websites “cannot mislead consumers into buying a competing product—no customer will mistakenly purchase [investment software] from [Mr. Leonard] under the belief that the service is being offered by [GlobalTec]”—“[t]he dangers that the Lanham Act was designed to address are simply not at issue in this case.” *Bosley*, 403 F.3d at 679-80; *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006).⁷

The groundlessness of GlobalTec’s trademark claims is underscored by the fact that two years ago this Court dismissed indistinguishable trademark infringement claims brought against consumer complaint websites by a company that sells courses on real estate investing. *Whitney Info. Network*, 2005 WL 1677256, at *4. Here, as there, the “Defendants use Plaintiffs’ marks by posting consumers’ responses about Plaintiffs on their websites. However, Defendants do not sell similar products as Plaintiffs . . . A consumer looking for Plaintiffs’ [products] would not be confused by a consumer watch-dog website that is not selling any [similar products]. Hence, there is no likelihood of confusion.” *Id.* at *4; *see also id.* at *5 (dismissing parallel claim for common law trademark infringement because

⁷ Nor could likelihood of confusion be established based on “initial interest confusion”—the theory that in some circumstances it may be actionable to lure a customer by causing confusion about the source of a product or service even if the consumer would eventually learn, before the time of the purchase, that they were dealing with a different company. The theory does not work in this context because, upon reaching the allegedly infringing website, there are no competing products for the consumer to purchase. The courts that have recognized “initial interest confusion” have done so only where there was *actual competition for sales* between the markholder and the alleged infringer: “This critical element—use of another firm’s mark to capture the markholder’s customers and profits—

plaintiffs “failed to show a likelihood of confusion” and had not “shown actual or intended competition”). In response to this Court’s order, the plaintiffs in that case withdrew their state and federal trademark infringement claims and pursued only a defamation claim. *Whitney Info. Network*, 199 Fed. Appx. at 740.⁸

D. Leonard’s Use of GlobalTec’s Marks Constitutes Fair Use, Non-Trademark Use, and Nominative Fair Use.

Fourth, even if GlobalTec could demonstrate trademark injury, commercial use, and likelihood of confusion, its trademark claims would nevertheless fail because they cannot overcome the defenses of fair use, non-trademark use, and nominative fair use. *KP Permanent Make-Up v. Lasting Impression I*, 543 U.S. 111 (2004). Under settled Eleventh Circuit law, “a fair-use defense is established if a defendant proves that its use is ‘(1) other than as a mark, (2) in a descriptive sense, and (3) in good faith.’” *Int’l Stamp Art, Inc. v. United States Postal Serv.*, 456 F.3d 1270, 1274 (11th Cir. 2006). The first two elements are satisfied here because Leonard’s websites do not use GlobalTec’s marks as a trademark—that is, they do not use the marks to identify any product sold by Leonard, but only as a descriptive term in consumer commentary. Like *International Stamp-Art*, this case may best be understood as involving a “a non-trademark use” of GlobalTec’s marks. *Id.* at 1277.

simply does not exist when the alleged infringer establishes a gripe site that criticizes the markholder.” *Lamparello*, 420 F.3d at 316-17.

⁸ Although GlobalTec’s dilution claims do not require likelihood of confusion, they do require an improper association between GlobalTec’s marks and *other products*—a showing that GlobalTec cannot make. *Universal Communication Sys.*, 478 F.3d at 425; *Harley-Davidson Motor Co. v. Iron Eagle of Cent. Fla., Inc.*, 973 F. Supp. 1421, 1426 (M.D. Fla. 1997). In addition, dilution is reserved only for famous marks—marks that are essentially household names. 15 U.S.C.A. § 1125(c) (“a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”).

“Where, as here, use of the mark, as ‘the only symbol reasonably available’ [to refer to a company’s products] ‘does not attempt to capitalize on consumer confusion or to appropriate the cachet’ of the mark holder, it fails to ‘implicate the source-identification function that is the purpose of trademark.’” *Id.* (quoting *New Kids on the Block*, 971 F.2d at 308). The good-faith element is satisfied because Leonard obviously did not “intend[] to trade on the good will of the trademark owner by creating confusion as to the source of the goods or services.” *Id.* As discussed above, the possibility of consumer confusion is not implicated here, and the parties are not competitors. Because all three elements of fair use are satisfied, the use of the marks “cannot constitute infringement.” *Id.*

Courts reach the same conclusion under the label of nominative fair use. *See Century 21 Real Estate Corp. v. Lendingtree*, 425 F.3d 211 (3d Cir. 2005); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 (9th Cir. 2003); *New Kids on the Block*, 971 F.2d at 307. Leonard’s use of GlobalTec’s marks qualifies for this defense as well because GlobalTec’s products are not readily identifiable without the use of the trademarks, Leonard’s websites use only so much of the marks as are reasonably necessary to identify GlobalTec’s products, and Leonard does nothing to suggest sponsorship or endorsement by GlobalTec. *Id.*⁹

In sum, whether Leonard’s use “is viewed as a noncommercial use, as a nominative use, or in some other way,” *Universal Communication Sys.*, 478 F.3d at 425, GlobalTec’s trademark claims lack any basis in law.

⁹ As amended in 2006, 15 U.S.C. § 1125(c)(3)(A) expressly defines the fair use defense to the federal dilution cause of action as extending to “(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.” Because Leonard’s only use of GlobalTec’s marks is to identify, criticize, or comment upon GlobalTec and its products, GlobalTec’s trademark dilution claim (count seven) also fails to overcome the fair use defense.

IV. GLOBALTEC'S NON-TRADEMARK CLAIMS LACK ANY BASIS IN EXISTING LAW.

GlobalTec's remaining claims are based on the same core allegation as the trademark claims—that Leonard's websites use GlobalTec's trademarks in the context of consumer reviews—and they fail for the same reasons. First, the claims for false advertising, deceptive and unfair trade practices, and unfair competition under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) apply only to "practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1). Because Leonard does not use his websites to distribute any goods or services, he is not engaged in "trade or commerce." Indeed, because removing GlobalTec's trademarks from his websites would make it impossible for consumers to find the reviews posted there, GlobalTec's proposed application of FDUTPA would subvert the law's purpose of protecting consumers, Fla. Stat. § 501.202(2), turning it instead into a tool for companies to conceal consumer complaints.

Moreover, FDUTPA is implicated only "if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Group, Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (internal quotation omitted). This standard requires a showing of "probable, not possible, deception" that is "likely to cause injury to a reasonable relying consumer." *Id.* (internal quotations omitted). As already explained, the use of trademarks on Leonard's sites is not likely to deceive anybody, and GlobalTec does not claim that anything on Leonard's sites—which include both positive and negative consumer reviews of products—is false. *See Holiday Inns, Inc. v. Holiday Out In America*, 481 F.2d 445, 449 (5th Cir. 1973) (rejecting unfair competition claims that were essentially duplicates of claims for trademark

infringement where there was no likelihood of confusion). In the absence of allegations that statements on Leonard's websites are false or misleading, GlobalTec's claims for false advertising, deceptive trade practices, and unfair competition cannot survive. *See Whitney Information Network*, 2005 WL 1677256, at *5 (holding that a "consumer watchdog board where third parties provide information about their past experiences" with products and services was not subject to a false advertising or unfair competition claim where "the Defendants [were] not trying to pass off their products or services as those of the Plaintiffs"). These statements not only fall outside of FDUTPA's coverage, they are protected by the First Amendment. *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 328 (S.D.N.Y. 2006) (rejecting a FDUTPA claim against protected First Amendment speech).¹⁰

GlobalTec's claim for interference with a business relationship is equally baseless. To state a claim for this tort, a plaintiff must specify a particular identifiable agreement that has been disrupted. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994) (rejecting a claim based on "speculation" that relationships were affected). Pointing generally to a company's customer base, or to the population as a whole, is insufficient to state a claim. *Id.*; *Ferguson Transp., Inc. v. N. Am. Van Lines, Inc.*, 687 So. 2d 821, 822 (Fla. 1996). Because GlobalTec appears to allege only general disruption of its business, it has failed to make this showing. Moreover, the tort of interference with a business relationship prohibits only interference that is intentional and unjustified. *Ethan Allen*, 647 So. 2d at 814. "There is of course no liability for interference with a prospective contractual relation on the

¹⁰ A practice can also violate FDUTPA if it "offends established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985). There are no allegations that Leonard engaged in this type of conduct.

part of one who merely gives truthful information to another.” *Worldwide Primates v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) (quoting Restatement (Second) of Torts § 772, cmt. b) (holding a similar claim to be frivolous and imposing sanctions on the plaintiff pursuant to Fed. R. Civ. P. 11). In any case, the First Amendment would prohibit the imposition of civil tort liability based on truthful speech. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1116-17 (11th Cir. 1992).¹¹

Finally, to the extent GlobalTec’s FDUTPA and tort claims are based on the content of the product reviews on Leonard’s site, Leonard would be immune from liability under the Communications Decency Act, 47 U.S.C. § 230 (CDA). Aside from intellectual property claims, such as trademark claims, the CDA “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997); *see also Doe v. America Online, Inc.*, 783 So. 2d 1010, 1013 (Fla. 2001) (holding that the CDA preempts state-law causes of action). The CDA thus protects website owners from liability for the content of third-party statements or consumer reviews on Internet message boards. *Universal Communications Sys.*, 478 F.3d at 422 (holding that a website devoted to financially oriented message boards was immune from liability for posts about companies made by its users); *Whitney Information Network*, 199 Fed. Appx. at 739-40. Because all the consumer reviews on Leonard’s sites are posted by users of the sites, Leonard Decl. ¶ 6, Leonard is immune

¹¹ Plaintiffs’ claim for unjust enrichment requires a showing that Leonard obtained a benefit from plaintiffs that it would be inequitable to allow him to retain. *Thompkins v. Lil’ Joe Records, Inc.*, 476 F.3d 1294, 1314 (11th Cir. 2007). Because Leonard has not violated any of plaintiffs’ rights, any benefit he may have received “cannot be characterized as unjust.” *Id.*

from liability for the content of those reviews.

CONCLUSION

The Court should dismiss the complaint for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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