

PUBLIC CITIZEN LITIGATION GROUP

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BY TELECOPIER: (949) 453-8774

June 26, 2008

Thomas D. Georgianna, Esq.
Horwitz, Cron & Jasper¹
Four Venture Plaza, Suite 390
Irvine, California 92618

Dear Mr. Georgianna:

I write to you on behalf of Julia Forte, the owner of 800notes.com, whom you have threatened to sue if she does not remove from that web site comments to which your client, mynutritionstore.com, objects. As I explain below, your claims have no basis whatsoever, and if you file suit as you threatened to do, you will be exposing both your client and, perhaps, yourself to possible counterclaims for abuse of process as well as subjecting your client to an anti-SLAPP motion.

Forte's web site, 800notes.com, provides an interactive forum for consumers to share notes about telephone numbers associated with telemarketers whose calls they find annoying, or which otherwise produce bad experiences for the calls' recipients. Apparently, a member of the public received a call from your client mynutritionstore.com, which markets the opportunity to sell vitamins and herbal supplements for which various health claims are made. This consumer reported a bad experience with your client, and submitted a report form which duly appeared on Forte's web site at <http://800notes.com/Phone.aspx/1-888-712-3888>. Some other consumers reported similar experiences, to which a number of responses have been published, although Forte has discovered that several of the "positive" comments on your client seem to originate with a single computer that appears to be associated with your client itself. Still, consistent with her general approach of letting everybody have their say, Forte has not attempted to censor your client's attempt to make it appear that some members of the public support its efforts.

On June 18, 2008, you submitted a comment form on the 800Notes web site asserting that the site contained "libelous material" and asking that you be contacted for assistance "identifying and removing the material" without requiring "more drastic measures." You also sent Forte a letter, dated June 20, 2008, containing a similar demand, and attaching nineteen separate posts – the entirety of the comments on the page concerning your client – which the letter described as "false

¹I am uncertain whether this is the proper name for your firm. The signature of your emails and your letterhead give that name, but your firm's web site gives the name Horwitz & Cron.

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and defamatory.” Forte, who did not receive your letter until today, promptly responded to the emailed threat by reminding you that her site is an interactive one and, hence, she is immune under the Communications Decency Act (“CDA”), 47 U.S.C. § 230, from liability for any allegedly defamatory statements made by visitors to the site. *See Fair Housing Councils v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

Your June 20 email response to Forte’s email is perplexing at best. First, instead of identifying the allegedly defamatory statements, you demanded the removal of **all** references to “mynutritionstore.com, Jim Stepanian, Nicole Stepanian and their number (888) 712-3888.” You did not explain what was defamatory, but only claimed that the comments somehow related to “another dispute in another context.” However, you refused to provide any specifics “as it is governed by the attorney-client privilege.” Surely you cannot expect Forte to respond favorably when you do not specify the defamatory material, and when you refuse to spell out the basis for your claims that statements are either defamatory or false.

Second, your email complains that the postings “contain detailed knowledge about the identity and relationship of the owners of mynutritionstore.com, which is not common knowledge.” But that fact suggests that the posts are **truthful**, which alone defeats your claim of defamation. Moreover, the specific references to individuals are in positive statements about your client, which, as I noted earlier, appear to have been put on the web site by your own client and for the purpose of rebutting the criticisms. You also complain that the messages contain “only conclusory allegations concerning the products of mynutritionstore.com,” but you are surely aware that, even with respect to the anonymous posters, conclusory allegations are far more likely to be treated as constitutionally protected opinions that are, therefore, outside the scope of a proper defamation action. *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App.4th 1027, 72 Cal.Rptr.3d 210 (Cal. App. 2 Dist. 2008).

Third, and most distressing, although you do not deny that Ms. Forte is immune under the CDA, you threaten to force her to hire a lawyer by naming her as a nominal defendant, and then seeking a preliminary injunction against her leaving the material on her web site. This strategy will fail, not only because the CDA protects her against injunctive relief as well as damages, but also because a preliminary injunction against defamation would be forbidden as a prior restraint. *Balboa Island Village Inn v. Lemen*, 40 Cal.4th 1141, 1155-1156, 156 P.3d 339 (2007); *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993). *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.”). Moreover, your apparent effort to use a “carrot and stick” approach, trying to induce compliance with your baseless demands through the bringing of litigation that runs up the costs of a party who is immune from liability, is the worst sort of abuse of process. If you file such an action, both you and your client will incur liability. In addition, if you bring this suit in California, we will seek relief under the anti-SLAPP statute, Cal. Code of Civil Procedure § 425.16, but if you sue in North Carolina we will argue that the anti-SLAPP statute applies because

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it is the law of the plaintiff's forum. *Cook v. Winfrey*, 141 F.3d 322, 329 (7th Cir. 1998). In addition, there is every reason to question whether a California court would have personal jurisdiction here. *See Dailey v. Popma*, — S.E.2d —, 2008 WL 2415024 (N.C. App. 2008).

I trust that you will conclude that you have no basis for proceeding against Forte. We would appreciate your sending a prompt response acknowledging this fact.

Sincerely yours,


Paul Alan Levy