

PUBLIC CITIZEN LITIGATION GROUP

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BY EMAIL: lc@gilhams.com

October 25, 2010

Leigh Ellis, Esquire
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Second Floor
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Dear Mr. Ellis:

I write in response to your letters to Julia Forte, the operator of 800Notes.com, and to SoftLayer Technologies, the hosting service that provides server space to 800Notes.com. Without identifying the specific messages to which you object, you identified three categories of messages that the web site's users have posted criticizing GDS Publishing, a New York company that is owned by your English corporate client and that makes cold marketing calls promoting its programs and publications, seeking either attendance or advertising. The web site contains several hundred messages, posted over the past three-and-a-half years by the recipients of your client's calls as well as by its former employees, reporting their bad experiences with your client. Various of the messages suggest that your client's staff provide misleading information about sponsorship or endorsements, promote sales through calls that begin by suggesting only that they are looking for information to be included in your clients' programs, and are abusive to their listeners. Some of the posts also suggest that your client's New York management are abusive toward their own staff. The letter to SoftLayer Technologies represents that a schedule of allegedly defamatory postings was attached; but in fact there was no such attachment. You only sent the schedule when I asked for one; your assistant claimed that the previous omission was an "oversight."

Your letters further complain that the operators of the web site have never contacted your client to learn whether the critical statements are true or false, and you threaten to initiate a proceeding for defamation unless the critical statements by the web site's users, which you claim are false, are promptly removed from the web site. Finally, your letter to Forte claims an entitlement to compel Forte to preserve any identifying information that she may have about the posters of the allegedly defamatory messages.

It is not Forte's practice to remove postings just because the subjects of the postings claim that they are false. If your client believes that it is being unfairly maligned on 800Notes.com, it is free to respond to the criticisms and explain what the true facts are. A review of the pages on 800Notes that pertain to calls from your client's 212 area code number reflect that a number of

message are posted providing just such a defense — whether posted by your client or by others I cannot be certain. The readers can judge the arguments made by the two sides, and we can be confident that true opinions will emerge from the operation of the marketplace of ideas.

In suggesting that you can enforce your view of libel law against Forte or SoftLayer Technologies, you are apparently under a misimpression about the relevant law. First, under the Communications Decency Act, 47 U.S.C. § 230, neither Julia Forte, who operates 800Notes.com, nor SoftLayer Technologies, can be sued over the content of messages that the web site's users post there. Second, although the schedule of allegedly defamatory postings that you have sent me includes some statements that are factual in nature and hence could be defamatory if you can prove that they are false and that they were posted with actual malice, many of the statements are pure hyperbole or otherwise are nonactionable opinion, and hence are protected against libel litigation by the First Amendment. Third, although you claim that certain messages are false, and that they were posted with reckless disregard for the truth, you provide no evidence supporting your contentions, and in any event neither Forte nor SoftLayer has any basis for believing your contentions. All Forte knows is that you claim that the statements are false. And given the evident carelessness shown by your failed efforts to communicate with Forte, discussed below, the accuracy of all of your statements is called into question.

Moreover, although your letter suggests that your client is going to try to bring suit against Forte in England over her hosting of comments about your client's New York subsidiary, recent legislation protects Forte against misguided efforts to suppress the freedom of speech on her web site. Under the SPEECH Act, signed into law this past summer, a defamation judgment against Forte (or SoftLayer) will not be enforceable in the United States unless it is consistent with the First Amendment to the United States Constitution, 28 U.S.C. § 4102(a), unless the exercise of personal jurisdiction would be consistent with the Due Process Clause of the Fourteenth Amendment, 28 U.S.C. § 4102(b), and unless the judgment is consistent with 47 U.S.C. § 230. 28 U.S.C. § 4102(c). None of those conditions will be satisfied in this case. You should be forewarned that, in the event you take steps in the United States to enforce an English judgment in violation of the SPEECH Act, the law also requires an award of attorney fees against your client.

Finally, your letter to SoftLayer Technologies makes the bizarre claim that Forte has told you that she bears no responsibility for the operation of the 800Notes web site. That letter states Forte made this claim in correspondence that was allegedly attached to your letter. Apparently, the omission was another "oversight." Now that I have that correspondence, it is apparent that it is only your own carelessness and stubbornness that led to the miscommunication.

Your letter to SoftLayer Technologies reveals that you have reviewed the WHOIS record for 800Notes.com; your letter accurately recites some of the details from that record. But your letter never tells SoftLayer Technologies the email address to which you wrote, or sets forth the email address that appears in the whois record. In fact, you sent your emails to a New York lawyer named

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Julia Forte, not to the Julia Forte who runs 800Notes. The Julia Forte to whom you wrote told you that she had no affiliation with the web site. When you wrote to her yet again, she reminded you that she had no affiliation with the web site and asked you to stop sending her email. She even told you firmly that you had written to the wrong email address.

At that point, you could have double checked to make sure that you were sending your threats of litigation to the right person. Indeed, one of your client's officials, Spencer Green, has had no trouble communicating with Forte in the past to complain about allegedly "libellas" statements on the site. Forte has responded to Green, and she has removed some of the statements about which Green complained, including statements making allegations of a sexual nature. Forte encouraged Green to report other specific postings that he deemed inappropriate. That approach, rather than the blunderbuss initiative undertaken by your correspondence, would be the wiser course.

Moreover, your letters sent to the wrong Forte reveal that you knew that I have represented Forte in other litigation, and you could have written to me. It is not at all difficult to find my contact information online. Instead, you chose to write to SoftLayer Technologies, demanding without any legal basis whatsoever that it take down unidentified messages about your clients and "implement technical measures to prevent further comments of the nature referred to above."

In short, the statements about which you complain will not be removed, and you have no basis for any suit against Forte. If you try to sue her, you will simply be exposing your client to an award of attorney fees. I trust that this will not happen.

If, on the other hand, you desire to proceed against the anonymous posters, you will need to obtain a North Carolina subpoena, and you will need to be ready to follow the protocol that applies to subpoenas to identify anonymous Internet critics in the United States, by providing notice of the subpoena to the posters, specifying the actionable words, identifying the legal claims that you are bringing over those words, providing admissible evidence — not just a lawyer's say so — supporting your legal claims, and showing that on balance your client's interest in being able to sue outweighs the First Amendment right of its critics to speak anonymously. *See Dendrite v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001).

Sincerely yours,


Paul Alan Levy

cc: SoftLayer Technologies