PUBLIC CITIZEN LITIGATION GROUP
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June 16, 2014

Roberta Horton, Esquire
Arnold and Porter
555 - 12th Street, NW
Washington, D.C. 20004

Dear Ms. Horton:

I represent Skylar Shatz and his firm, SkyGraphX. I write in response to your cease-and-desist letter dated June 3, 2014. You claim that the following design "misappropriates," "infringes," and "dilutes" the trademark that Philip Morris has in the so-called "roof" design, consisting of two red isosceles triangles standing on end and forming the implied white house between and beneath:


Your trademark claims are nonsense. Shatz' use is plainly parody. He uses the design to call attention to the serious consequences of smoking your client's Marlboro products – it kills people, and thus "filters" the population. Nobody could possibly look at this design and think that it is sponsored by your client, so there is no actionable likelihood of confusion. Your client's target

customers may be addicted, but they aren't stupid. Nor is there actionable dilution; the design may be aimed squarely at your client's reputation (and deservedly so), but it does not undermine the reputation of the mark. *Universal Communication Systems, Inc. v. Lycos*, 478 F.3d 413 (1st Cir. 2007). If anything, it reinforces the association between your mark and your client's harmful products.

Moreover, critical speech directed at a major company and its harmful products is squarely protected by the First Amendment, hence any application of trademark law to quash such uses is highly suspect. Although the Tshirts bearing the design are sold, their contents are noncommercial speech, which qualifies for full First Amendment protection. *Ayres v. Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997); *see also Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 812 (9th Cir. 2003); *Smith v. Wal-Mart Stores*, 537 F. Supp.2d 1302, 1340-1341 (N.D. Ga. 2008). The First Amendment protection for non-commercial speech extends to bar trademark claims. *E.S.S. Entertainment 2000 v. Rock Star Videos*, 547 F.3d 1095, 1099-1101 (9th Cir. 2008); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-976 (10th Cir. 2003); *CPC Intern. v. Skippy Inc.*, 214 F.3d 456, 462-463 (4th Cir. 2000); *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987). You claimed on the telephone that the "population filter" design was not a parody because it is sold. As these cases make clear, your statement is a nonsequitur.

When we spoke on the telephone, you told me that there were hundreds of other cases where sellers of like designs had caved in to your client's demands. I am very disappointed to learn that you have been so successful at bullying other parodists. Skylar Shatz is not going to be one of your victims. He is not going to take down his designs and he is not going to stop offering it for sale printed on Tshirts. If you believe your client's interests require you to file suit over this protected speech, we will be ready to defend the action. I do look forward to learning in discovery which other parodists have given into such bullying, because it may well be that relief broader than simply dismissal of your claims will be appropriate.

When I spoke to you on the telephone and asked you whether you had in mind to sue Shatz in the Second Circuit or the Fourth Circuit, you hung up on me, even though you called me back a few minutes later. Please let me know which jurisdiction you have in mind to invoke, so that we can obtain the appropriate local counsel. I am going to be out of town for the rest of the month; in my absence, you may contact my colleague Jehan Patterson to let us know about your litigation plans.

Sincerely yours,

Paul Alan Levy