

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

LIFESTYLE LIFT HOLDING, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:07-cv-14450
	)	
LEONARD FITNESS, INC., and JUSTIN	)	
LEONARD,	)	
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS**

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## **Introduction**

Defendants seek sanctions against plaintiff Lifestyle Lift Holding, Inc., and against its attorneys, Kenneth M. Zorn and Michael C. McKinnon, for filing a SLAPP suit that invokes phony trademark claims to harass defendants for giving dissatisfied customers a forum to criticize it. For several independent reasons, this suit had no chance of success. First, this Court lacked jurisdiction because the defendant does not have the requisite contacts with Michigan; indeed, jurisdiction was so plainly lacking as to support an inference that suit was brought in this district simply to make it harder for Leonard to defend against frivolous litigation. Second, the First Amendment barred the company's improper attempt to silence non-commercial consumer commentary. Third, the trademark claims lacked any basis in existing law because the complaint alleged no cognizable trademark injury, there was no likelihood of confusion (because the web site does not sell any products, let alone products that might be confused with the company's), dilution law does not apply because plaintiff's trademark is not famous, and the use of the marks constitutes fair use. Fourth, in several respects, plaintiff's claim rested on false factual allegations, such as that Leonard uses plaintiff's trademarks in meta tags, AdWords, and domain names. 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 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 OF ISSUE AND PRINCIPAL SUPPORTING AUTHORITIES**

Was plaintiff's suit for an injunction and damages, which was based on the fact that the text

of defendants' web site used plaintiff's name to denote the target of its former customers' criticisms, filed without reasonable inquiry into the facts alleged, without any basis in existing law, and without any reasonable hope of changing the law?

*ETW Corp. v. Jireh Pub.*, 332 F.3d 915 (6th Cir. 2003)

*Interactive Products Corp. v. a2z Mobile Office Solutions*, 326 F.3d 687 (6th Cir. 2003)

*Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002)

*Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996)

*Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003)

15 U.S.C. § 1125(c)(2)(A)

15 U.S.C. § 1125(c)(3)(A)(ii)

### **STATEMENT OF THE CASE**

Plaintiff Lifestyle Lift Holdings, Inc. ("Lifestyle"), is a Michigan corporation with its principal place of business in Troy, Michigan. Lifestyle is a franchisor of cosmetic surgery clinics whose services are supposed to make the patient look younger and more attractive. Lifestyle owns the federally registered trademark "lifestyle lift" for cosmetic surgery procedures. Among other means, Lifestyle advertises its franchisees' services through the placement of televised infomercials. The complaint does not allege that Lifestyle's mark is famous, and under the definition of the term "famous" that was adopted by the Trademark Dilution Revision Act in October 2006, any such allegation would have been legally frivolous.

Some Lifestyle patients have been dissatisfied, and have voiced complaints in a number of forums about pain, scarring, and general failure to improve facial appearance. One of the forums is a web site operated by the defendants, entitled InfomercialScams.com, located on the Internet at [www.informercialscams.com](http://www.informercialscams.com). As shown by the evidence submitted in support of defendants' motion to dismiss for lack of personal jurisdiction, defendant Justin Leonard is a resident of Arizona and the

creator and operator of InfomercialScams.com. Defendant Leonard Fitness, Inc., is a Nevada corporation (the two defendants are referred to generally as “Leonard”). Leonard does not now, and has not ever, maintained a physical office, owned property, or had a mailing address, telephone number, or fax number in the State of Michigan. Leonard does not now, and has not ever, targeted the State of Michigan for business development. Leonard does not now, and has not ever, had an employee, agent, or business representative of any kind in the State of Michigan. Leonard’s web site does not have any of its servers in Michigan, and is not registered to do business in Michigan. Until learning about the filing of the complaint in this case, Leonard was not aware that Lifestyle Lift was located in Michigan.

InfomercialScams.com is designed as an impartial forum for consumer information, where users can read and post reviews of products sold through infomercials. Leonard relies entirely on users of the web site to post the product reviews. He does not write any of the reviews himself.

Leonard is also operates an Internet-based newsletter, LeonardFitness.com, on which he posts health information, training tips, and reviews of fitness-related products. 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 overpriced. About seven years ago, Leonard started his first infomercial-related website, FitnessInfomercialReview.com. That site allows consumers to review health-related infomercial products. He later created InfomercialRatings.com and Infomercial Scams.com for users to review other kinds of products. Leonard’s web sites are widely read and have been featured in the media, including the New York Times, and on influential

consumer-information web sites. *See, e.g.,* Andrews, *The Unending Pull of Exercise Machines*, Seattle Post-Intelligencer, May 3, 2007; 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 raises money to pay for the costs of running his web sites and for his time by selling advertising space on the sites. 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. Advertisement are not placed directly on the web site; rather, would-be advertisers must contact Leonard or the third-party brokers directly. Leonard does not decide which advertisements the brokers put on his sites. However, it is his policy not to allow advertising for products or services that compete directly with products or companies that are reviewed on the pages of his web site, and he reviews the ads being placed to try to ensure that this policy is followed. He has never sold any products or services from any of his web sites and he has never been in competition with any of the products or services sold by Lifestyle.

Individual consumers are encouraged to post either complaints about the infomercial products, which appear on the “complaints” pages of the web site, or praise for the products, which appear on the “defenses” pages of the web site. The criticized companies, too, are allowed to post responses to complaints, which similarly appear on the “defenses” pages. The “defenses” pages each include a link to the “complaints” pages, which is labeled “Read Complaints.” By the same token, the “complaints” pages each include a link to the “defenses” pages, which is labeled “Read

Defenses.” In this way, a reader who is interested in learning about other consumers’ experiences with a product is exposed to views on both sides of the issue.

Although the complaint alleged that Lifestyle’s trademark is used in defendants’ domain names, ¶ 15, that is not correct. The domain name for the web site is infomercialscams.com. The particular product that is the subject of commentary on each product-related page is reflected in the “path” section of that page’s web address, or Uniform Resource Locator (“URL” for short).<sup>1</sup> On a product complaint page, the product name appears in the URL using the format “infomercialscams.com/scams/[product\_name]\_complaints.” On a product defense page, the product name appears in the URL using the format “infomercialscams.com/defenses/[product\_name]\_complaints.” Thus, in the case of the complaints and defenses pages devoted to statements about Lifestyle’s services, the URL’s are, respectively, [http://www.infomercialscams.com/scams/lifestyle\\_lift\\_complaints](http://www.infomercialscams.com/scams/lifestyle_lift_complaints) and [http://www.infomercialscams.com/defenses/lifestyle\\_lift\\_complaints](http://www.infomercialscams.com/defenses/lifestyle_lift_complaints). Thus, even in the path portion of the URL, the name of the product is accompanied by words indicating that the pages contain **commentary** on the product.

The complaint also alleged that infomercialscams.com attracts Internet traffic from people who use search engines to find information by including the trademark in meta tags or AdWords. Both allegations are false. As the evidence in this case showed, the InfomercialScams web site pages do not include any meta tags specifically describing the products on which the pages comment,

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<sup>1</sup>In a URL, the domain name indicates the web server where the entire web site can be found. The path denotes the location on the server where the particular files for a given page can be found. When the web site operator is not using a content management system, such files often have descriptive names.

whether or not trademarked. To the contrary, each page on the web site, including not only the home page but also every one of the product-related pages, has the **same** set of meta tags, which relate to the subject matter of the web site as a whole, not the subject matter of particular pages.<sup>2</sup> This fact would have been obvious to anybody who used the “view source” feature that is available with most modern web browsers (for example, in Mozilla Firefox, it is called “View Page Source”; in Internet Explorer, it is called “View Source”). Similarly, Leonard does not use AdWords, or any other paid advertising, to promote his web site. This fact would have been obvious had plaintiff examined the Google search result that is attached as Exhibit C, because the link to InfomercialScams.com appears in the organic search results, and not in the “Sponsored Links” where placement is purchased through the AdWords program.

The individual pages within InfomercialScams.com are very clear about providing **commentary**. The title of the web site, infomercialscams.com, appears in large lettering at the top of each page with the word “infomercial” in dark black lettering and the word “scams” in bright red lettering, with the subtitle “uncensored infomercial complaints” beneath it. Next appears the title of the individual page, in bright red letters, either “Lifestyle Complaints” or “Lifestyle Defenses,” and a statement of the total number of complaints or defenses on the page. Following links that allow readers to “Report This Product” on the complaints page or “Defend This Product” on the

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<sup>2</sup> The description meta tag is “Uncensored infomercial complaints!” The keyword meta tags are, “infomercial scams, infomercial reviews, infomercial ratings, justin leonard, commercials, rip offs, scams, business, fraud, ripoffs, consumer protections, consumer complaints, bad business practice, infomercial resources, make money, money making schemes, legal action, how to take legal action, report a crime, crime victims, products.”

defenses page, and invite consumers to “Read Defenses” or “Read Complaints,” there appear the individual comments submitted by individual consumers. No reasonable person could visit these pages and think that they are put out by the owners of the products or services being discussed.

The complaint alleged that search engines such as Google and Yahoo! include Leonard’s web site in their list of search results when a computer users enters the words “Lifestyle Lift” as search terms on those search engines, ¶ 14, and attached an example of a search as Exhibit C to the complaint. However, the complaint never alleged that a reasonable Internet user viewing this list of search results would be confused about whether Lifestyle sponsors the Leonard web pages linked from the list of search results. Indeed, inspection of Exhibit C to the Complaint, which is a fairly typical set of search results, makes clear why Lifestyle never alleged that the search results are confusing. The first set of search results on the page are sponsored links. The next search result, the first of the unpaid, or “organic,” search results, shows the title of the home page of Lifestyle’s own web site, “Welcome to the Lifestyle Lift.” The second organic search result, for a web site purportedly placed by a consumer who endorses Lifestyle, has the title “My Lifestyle Lift Diary.” The third and fourth links lead to pages within the “RealSelf” web site (which contain mostly negative reviews of Lifestyle’s services), show the titles “Lifestyle lift: is it worth it? Lifestyle lift reviews, cost ...” and “Lifestyle Lift recovery. How fast and normal results?” The fifth search result, which links to the page on Leonard’s web site that comments on Lifestyle, reveals the title “INFOMERCIAL SCAMS.COM - LIFESTYLE LIFT COMPLAINTS,” followed by the beginning of the text of the first complaint appearing on the web site: “10/16/2007 - Karina writes: I had the Lifestyle lift in 2006. The procedure was supposed to take an hour, it took almost three hours. ...”

It is apparent from viewing this list of search results that some of the pages are sponsored by Lifestyle, and that others comment on Lifestyle. Moreover, the content of the search result linking to Leonard's web site reveals to the reasonable viewer its mostly negative content. No reasonable viewer would think that, by selecting the infomercialscams.com web site instead of the other fourteen sponsored or organic links on the page, the visitor would be taken to a page sponsored by Lifestyle.

**I. LIFESTYLE'S SUIT WAS FRIVOLOUS BECAUSE UNDER SETTLED LAW THE COURT LACKED PERSONAL JURISDICTION OVER LEONARD.**

The first reason this action was frivolous is that Lifestyle filed suit in a court that plainly lacked personal jurisdiction over defendants. The complaint acknowledged that both defendants were located in other states – Justin Leonard in Arizona, and Leonard Fitness in Nevada. The complaint contained no allegations justifying the assertion of personal jurisdiction in Michigan, and in fact the record shows that Leonard has no contacts with Michigan – Leonard does not do business in Michigan, has no property here, has no addresses or representatives here, and has no other relevant ties to Michigan. Moreover, the fact that the InfomercialScams.com web site can be viewed in Michigan is not a proper basis for filing suit here under a line of Sixth Circuit authority beginning with *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (2002). Instead, where jurisdiction is based solely on an Internet web site, the Sixth Circuit applies the “*Zippo* sliding scale” approach in evaluating whether a defendant's contact with the forum state constituted purposeful availment. Under *Zippo*, there are three categories of interactivity for a website: 1) highly interactive where the web site provides the ability to download and enter into contracts (which supports exercise of

jurisdiction); 2) middle ground interactive where commercial information is exchanged between users in different states; and 3) passive where only information is available and the web site does not permit users to enter into contracts and/or exchange commercial information (which supports denial of jurisdiction). *Pride Distributors v. Nuzzolo*, 2007 WL 1098286, \*3 (E.D. Mich. Apr. 10, 2007); *Audi AG v. D'Amato*, 341 F. Supp.2d 734, 742-43 (E.D. Mich.2004). A web site is considered “passive” for *Zippo* jurisdiction purposes even if the web site supports the provision of contact information but products cannot be bought through the web site. *Becker v. Rotary Air Force Management*, 2007 WL 677895, \*8 (E.D. Mich. Mar. 6, 2007), citing *McGill Tech. v. Gourmet Techs.*, 300 F. Supp. 2d 501, 507 (E.D. Mich. 2004). In this case, there is **no** commercially interactive feature on InfomercialScams.com, and hence no basis for the exercise of personal jurisdiction over defendants. The applicability of the *Zippo* sliding scale in this district has been well established for more than five years, and Lifestyle’s filing of this case in complete disregard of its teachings was frivolous.

## **II. THE FIRST AMENDMENT SO PLAINLY BARRED A PRELIMINARY INJUNCTION THAT LIFESTYLE’S REQUEST FOR IT WAS FRIVOLOUS.**

Apart from the patent lack of personal jurisdiction, the trademark claims advanced against Leonard were legally frivolous, in several respects. First of all, in light of the Sixth Circuit’s holdings on the issue of prior restraint, Lifestyle’s request for a preliminary injunction was frivolous.

Through this lawsuit, Lifestyle sought to use the trademark and unfair competition laws to silence unwanted critical commentary about its controversial products. But the only way in which Lifestyle’s trademarked product names are used on Leonard’s web site 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, Lifestyle's lawsuit had no basis in existing law and could not have supported a reasonable argument for a change in existing law. Indeed, if courts were to allow suits like Lifestyle'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.

Lifestyle's requested preliminary injunction would have been a prior restraint directed at a web site that is devoted solely to the criticism of a private company and thus represents core speech that is fully protected by the First Amendment. The Sixth Circuit has been unequivocal in condemning prior restraints absent the most compelling circumstances. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). Similarly, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Supreme Court held that an injunction forbidding a community group from distributing leaflets criticizing a local real estate company was an impermissible prior restraint. By the same token, an injunction directed at a web site whose sole purpose is to facilitate consumer commentary about a private company is also an impermissible prior restraint. Indeed, the denial of First Amendment rights, even for a moment, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Taubman v. WebFeats*, No. 01-2725 (6th Cir. Mar. 11, 2002) (granting stay of preliminary injunction against maintenance of critical web site at [www.taubmansucks.com](http://www.taubmansucks.com)).

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 web sites 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 v. Lycos, Inc.*, 478 F.3d 413, 423-25 (1st Cir. 2007); *Bosley Medical Inst., Inc. v. Kremer*, 403 F.3d 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).

Lifestyle’s claims that the prospect of commercial injury to its business made the web site commercial speech and hence not subject to the rule against prior restraints, were similarly frivolous. After all, the same was true of the leaflets disseminated about the realtor in *Organization for a Better Austin v. Keefe*, but the Supreme Court nevertheless held that the injunction was an impermissible

prior restraint: “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 the use of the injunctive power of a court.” 402 U.S. at 419. Similarly, in the *Bankers Trust* case, the Sixth Circuit invalidated as a an abuse of discretion a preliminary injunction against the publication of Business Week magazine, and squarely rejected “private litigants’ . . . commercial self-interest” as a basis for a prior restraint, thus overturning a preliminary injunction that had been issued in favor of a company whose private documents had been discussed in a news publication. 78 F.3d at 225.

That Leonard’s web sites 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 Business Week transforms political opinion columns or product reviews in those publications 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 the Blind*, 487 U.S. 781, 801 (1988); *cf. New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (accordng 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 an 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*, 95 F.3d at 971-73. And, of course,

in the *Bankers Trust* case, the Sixth Circuit invoked the prior restraint rule to overturn a preliminary injunction against a news magazine, which certainly carried advertisements. The same serious First Amendment issues made Lifestyle’s prayer for a preliminary injunction, and indeed its claims for damages and permanent injunctive relief, frivolous and worthy of sanctions.

### **III. LIFESTYLE’S TRADEMARK CLAIMS WERE LEGALLY AND FACTUALLY FRIVOLOUS.**

The Court dismissed Lifestyle’s complaint for several reasons. In the following respects, the trademark claims were not just lacking in merit but frivolous.

#### **A. Lifestyle’s Complaint Set Forth No Cognizable Trademark Injury.**

First, the trademark claims were entirely frivolous because Lifestyle did not show that it had suffered 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 [Lifestyle] ultimately arises from its being criticized on the [InfomercialScams.com] website.” *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 Kremer 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. Lifestyle’s Claims of Likelihood of Confusion Were Frivolous, Particularly in Light of *Taubman v. WebFeats*.**

Even if Lifestyle had a tenable claim of trademark injury, it did not come close to establishing 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 Lifestyle’s trademarks on Leonard’s web site “cannot mislead consumers into buying a competing product—no customer will mistakenly purchase [cosmetic surgery] from [Leonard] under the belief that the service is being offered by [Lifestyle]”—“[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).

The groundlessness of Lifestyle’s trademark claims is underscored by the Sixth Circuit’s overturning of a preliminary injunction against consumer commentary web sites in *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2002). In that case, a consumer established a web site praising a local shopping mall at [www.shopsatwillowbend.com](http://www.shopsatwillowbend.com), using the trademarked name of the mall both on the web site itself and in the domain name, and, after the shopping mall owner sued him over the first web site, he created a site to criticize the shopping mall’s owner at [www.taubmansucks.com](http://www.taubmansucks.com), using that company’s name both on the web site and in the domain name. The Sixth Circuit squarely

held that because the web sites themselves did not pose any likelihood of confusion about who owned the web sites, no claim of likelihood of confusion could be advanced based on the domain names themselves. 319 F.3d at 776-777. *See also Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005). Here, Leonard’s web site makes clear that it is a **commentary** web site, not a web site selling cosmetic surgery services, and Lifestyle’s complaint never alleged that the web site itself created any likelihood of confusion. It follows that Lifestyle’s claim of trademark infringement and unfair competition had no basis in law.

The claims also had no basis in fact. Lifestyle alleged that Leonard used its trademark in the domain name for his web site, but in fact the domain name is [www.infomercialscams.com](http://www.infomercialscams.com), which does not have the Lifestyle trademark anywhere within it. The Lifestyle name does appear in the path of those pages of the InfomercialScams.com web site that pertain to Lifestyle — the segment of the Internet address that appears after the domain name. But the reason domain names can create a likelihood of confusion – although such use can be permitted when the domain name is for a web site about the trademark holder, as in *Taubman* — is that Internet users who do not know the trademark holder’s Internet address might “guess” that the domain name combines the trademark with a top-level domain like .com. No Internet user is going to “guess” that Lifestyle’s web site can be found at the domain name [InfomercialScams.com](http://www.infomercialscams.com), even if he or she properly guesses the “path” at which pages about that company can be found within the [InfomercialScams.com](http://www.infomercialscams.com) web site. Thus, in the only Sixth Circuit case that has addressed the trademark implications of including a trademark in the “path,” the Court found no trademark violation: “Because post-domain paths do not typically signify source, it is unlikely that the presence of another’s trademark in a post-domain path of a URL

would ever violate trademark law.” *Interactive Products Corp. v. a2z Mobile Office Solutions*, 326 F.3d 687, 698 (6th Cir. 2003); *see also PACCAR v. Telescan Technologies*, 115 F. Supp.2d 772, 780 (E.D. Mich. 2000), *aff’d in part and vacated in part on different ground*, 319 F.3d 243 (6th Cir. 2003); *Patmont Motor Werks v. Gateway Marine*, 1997 WL 811770, at \*4 n. 6 (N.D. Cal. Dec.18, 1997). Moreover, even in the “path,” Leonard does not use Lifestyle’s name or trademark alone, but couples the mark with a word showing that the page has **commentary** about Lifestyle – namely, [www.infomercialscams.com/scams/lifestyle\\_lift\\_complaints](http://www.infomercialscams.com/scams/lifestyle_lift_complaints) and [www.infomercialscams.com/defenses/lifestyle\\_lift\\_complaints](http://www.infomercialscams.com/defenses/lifestyle_lift_complaints). The contention that this path poses even the slightest risk of confusion about whether Lifestyle sponsors the page is ludicrous.

Lifestyle’s allegations that Leonard uses either meta tags or AdWords to promote his pages to Internet users looking for his web site, or to sell advertising on his pages, were also false, as routine scrutiny of the HTML code on his web pages, and of the Google search results attached to the complaint as Exhibit C, would have shown. Lifestyle’s name appears nowhere in the meta tags of Leonard’s web site, and although Leonard’s web site appeared among the **organic** search results in the Google search, they did not appear among the “sponsored listings,” which is where a web site that is promoted through AdWords would appear. Nor is advertising sold on Leonard’s web site through the use of AdWords. And, indeed, even if Leonard **had** used the trademark in meta tags to help bring Internet traffic to his web site by improving his placement in search engine results, the case law uniformly upholds such use by Internet commentary sites. *J.K. Harris & Company v. Kassel*, 253 F. Supp. 2d. 1120 (N.D. Cal. 2003); *Bihari v. Gross*, 119 F. Supp.2d 309 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998).

Lifestyle's claim about Leonard's meta tags and AdWords was thus legally as well as factually frivolous.

**C. Lifestyle's Dilution Claims Were Frivolous Because Its Mark Is Not Famous and Famousness Was Not Even Alleged.**

Finally, Lifestyle's claims of federal trademark dilution were frivolous because Lifestyle did not allege, and could not possibly have alleged, a key element of a claim for dilution – that its trademark is “famous.” The cause of action for dilution is available only to “the owner of a famous mark,” 15 U.S.C. §§ 1125(c)(1), 1125(c)(5). Although some courts previously held that a mark could be famous only in a niche market, Congress overruled those decisions in the 2006 Trademark Dilution Revision Act, Pub. L. No. 109-312, § 2, 120 Stat. 1730 (Oct. 6, 2006), which provides that “a mark is famous if it is widely recognized by the general consuming public of the United States.” 15 U.S.C. § 1125(c)(2)(A).

Lifestyle does not allege that its trademark is “famous,” and the statutory definition that was adopted a full year before the filing of the complaint made such an allegation impossible. Lifestyle had no basis for alleging dilution in this case, making its complaint entirely frivolous.

**D. Leonard's Use of Lifestyle's Marks Was Fair Use, and Nominative Fair Use.**

Fourth, even if Lifestyle could have demonstrated trademark injury and likelihood of confusion, its trademark claims would nevertheless have failed because they could not overcome the defenses of fair use and nominative fair use. *KP Permanent Make-Up v. Lasting Impression I*, 543 U.S. 111 (2004). Under settled law, a fair-use defense is established if defendant used the plaintiff's mark (1) in its descriptive sense; and (2) in good faith. *ETW Corp. v. Jireh Pub.*, 332 F.3d 915 (6th

Cir. 2003). The first element is satisfied here because Leonard’s web site does not use Lifestyle’s mark as a trademark – he does not use the mark to identify any product sold by Leonard, but only as a descriptive term in consumer commentary. “Where, as here, use of the mark, as ‘the only symbol reasonably available 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.’” *International Stamp Art v. USPS*, 456 F.3d 1270, 1274 (11th Cir. 2006) (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 both 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. Although the Sixth Circuit has never decided whether to adopt the doctrine of nominative fair use, Congress has now written the concept into the Lanham Act, declaring that “fair use includ[es] a nominative or descriptive fair use . . . [and] includ[es] use in connection with . . . identifying and parodying, criticizing, or commenting” upon the mark owner or its goods or services.” 15 U.S.C. § 1125(c)(3)(A)(ii). Leonard's use of Lifestyle’s marks qualifies for this defense as well because Lifestyle'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 Lifestyle's products, and

Leonard does nothing to suggest sponsorship or endorsement by Lifestyle. *Id.* Because Lifestyle brought its trademark claims without any effort to take account of the defense of fair use, its claims were frivolous.

### **CONCLUSION**

The motion for an award of sanctions should be granted. Attorney fees should be awarded in the amount of \$---.

Respectfully submitted,

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