

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.)	

MOTION TO DISMISS

Pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure, and based on the accompanying memorandum of law, affidavit of Justin Leonard, and accompanying exhibits, defendants move the Court to dismiss this action for lack of standing, lack of personal jurisdiction, and failure to state a claim on which relief can be granted.

CERTIFICATION OF ATTEMPTED CONFERENCE

Lead counsel Paul Alan Levy made repeated but unsuccessful efforts to discuss the legal basis of this motion with Allan Rubin, counsel for plaintiff. During their first conversation, Mr. Rubin told Mr. Levy that he needed to study the papers in the case before he could confer, and counsel agreed to postpone their conversation until Monday, December 10. On December 10, Mr. Rubin did not call Mr. Levy, and when Mr Levy called, he was directed to Mr. Rubin’s voicemail. Mr. Levy left a message asking Mr Rubin to call back. Mr. Rubin called on December 12 shortly after noon, but despite repeated efforts by Mr. Levy to call him back during the afternoon of December 12, Mr. Rubin was either at lunch, in a meeting, or “cannot be disturbed” throughout the afternoon.

Respectfully submitted,

/s/ Paul Alan Levy

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December 13, 2007

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Introduction

This is a SLAPP suit that invokes phony Lanham Act claims to harass defendants for giving dissatisfied customers a forum to criticize a cosmetic surgery firm. For several independent reasons, the action should be dismissed. First, this Court lacks jurisdiction because the defendant does not have the requisite contacts with Michigan. Second, the First Amendment bars the company's improper attempt to silence non-commercial consumer commentary. Third, the trademark claims lack any basis because the complaint alleges no cognizable trademark injury, there is 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, plaintiff lacks standing to sue for false advertising, and the use of the marks constitutes fair use. This Court should not tolerate this baseless attempt to use litigation to accomplish the improper purpose of suppressing critical commentary.

STATEMENT OF ISSUES AND PRINCIPAL SUPPORTING AUTHORITIES

May the Arizona defendants be sued in Michigan over the use of plaintiff's trademark in portions of a web site that criticize plaintiff?

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

Construed in light of the First Amendment, does the Lanham Act authorize plaintiff's claims under sections 43(a) and 43(c) of the Lanham Act based on the truthful use of plaintiff's trademark to denote the content of web pages where plaintiff is criticized by its former customers?

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)

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)

Does plaintiff have standing to sue for false advertising under section 43(a)(1)(B)?

Stanfield v. Osborne Indus., 52 F.3d 867 (10th Cir. 1995)

STATEMENT OF THE CASE

Plaintiff Lifestyle Lift Holding, Inc. (“Lifestyle”), is a Michigan corporation whose principal place of business is Troy, Michigan. Lifestyle licenses its name to cosmetic facial surgeons. Lifestyle owns the federally registered trademark “lifestyle lift” for cosmetic surgery procedures. Among other means, Lifestyle advertises its licensees’ services through televised infomercials.

Some Lifestyle patients are dissatisfied and have voiced complaints about pain, scarring, and general failure to improve facial appearance. One forum for such complaints is a web site operated by defendants at www.InformercialScams.com. Defendant Justin Leonard is a resident of Arizona and the creator and operator of [InformercialScams.com](http://www.InformercialScams.com). Defendant Leonard Fitness, Inc., is a Nevada corporation (both defendants are referred to generally as “Leonard”). Leonard Affidavit ¶¶ 2-4.¹ Leonard has never maintained a physical office, owned property, or had a mailing address, telephone number, or fax number in Michigan, has never targeted Michigan for business development, and has never had an employee, agent, or business representative of any kind in Michigan. The web site does not have any servers in Michigan, and Leonard Fitness is not registered to do business in Michigan. Leonard Aff. ¶¶ 3-4, 8, 11, 12. Indeed, until Leonard received the complaint in this case, he was not even aware that Lifestyle Lift was located in Michigan. *Id.* ¶ 12.

¹Leonard’s affidavit can be considered on the motion to dismiss for lack of standing and personal jurisdiction. *Brunner v. Hampson*, 441 F.3d 457, 462 (6th Cir. 2006). In addition, because Leonard’s web site is alleged as a basis for the complaint, the actual site can be considered in connection with the motion to dismiss under Rule 12(b)(6) without converting the motion into one for summary judgment. *Weiner v. Klais and Co.*, 108 F.3d 86, 89 (6th Cir. 1997).

Leonard, a former bodybuilding champion, operates an Internet-based newsletter, LeonardFitness.com, where he posts health information, training tips, and reviews of fitness-related products. Through his experience reviewing fitness products, 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. *Id.* ¶¶ 5-6. Leonard's sites are widely read and have been featured in the media and on consumer-information web sites. *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>.

InfomercialScams.com is an impartial forum for consumer information where users can read and post reviews of about 260 different products sold through infomercials. Leonard relies on users of the web site to write the product reviews; he does not write any reviews himself. Leonard Aff ¶¶ 6-7. Nor does he endorse opinions about products expressed on the site. *Id.* Exhibit C, page 1.

Leonard pays for the costs of running his web sites and for his time by selling advertising space. 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 third-party advertising brokers.

Advertisements 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. *Id.* ¶¶ 8-11.

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. *Id.* Exhibit B.

The complaint alleges that Lifestyle’s trademark is used in the URL for defendant’s “site,” ¶ 13, but that is not correct. The domain name for the web site is infomercialscams.com, and that is the domain name for every page of the web site. 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).² On a product complaint page, the product

²In a URL, the domain name denotes the web server where the entire site can be found. The path denotes the location on the server where files for a given page can be found. When the web site

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 and http://www.infomercialscams.com/defenses/lifestyle_lift_complaints. Accordingly, 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. Leonard Affidavit ¶ 14 and Exhibit B.

Similarly, although the complaint alleges very generally that defendants include plaintiff’s trademark into “their website,” and that consequently search engine users are directed to their “website” when plaintiff’s mark is entered as search terms, ¶ 14, the truth is that the term “lifestyle lift,” like the names of other companies whose products and services are reviewed on plaintiff’s web site, appears **only** on the pages where that product is discussed (as well as on the site’s index pages, which list all of the products discussed with hyperlinks to the individual pages). The individual pages within InfomercialScams.com are very clear about providing **commentary**. The title of the web site, [infomercialscams.com](http://www.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. Near the top of the complaints pages are links that

operator is not using a content management system, such files often have names that describe the file. *Interactive Products Corp. v. a2z Mobile Office Solutions*, 326 F.3d 687, 691 (6th Cir. 2003).

allow readers to “Report This Product” and to “Read Defenses”; in corresponding position on the defenses page are links allowing users to “Defend This Product” or to “Read Complaints”; after that appear the comments submitted by individual consumers. Leonard Affidavit, ¶ 14 and Exhibit B. 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, ¶ 14, alleges that search engines such as Google and Yahoo! include Leonard’s web site in their list of search results when a computer user enters the words “Lifestyle Lift” as search terms on those search engines; Exhibit C to the original complaint was an example of a Google search.³ However, the complaint never alleges 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, 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 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), showing 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

³No example of a Yahoo! search was attached. In an experiment conducted while drafting this brief, Leonard’s web site did not appear in the first five pages of Yahoo! search results for the search term “Lifestyle Lift.” Exhibit D.

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.⁴

I. THE COURT LACKS PERSONAL JURISDICTION OVER LEONARD.

Even though the complaint admits that defendants are located in other states, ¶¶ 2-3, and even though plaintiff has the burden of showing that personal jurisdiction exists, *Brunner v. Hampson*, 441 F.3d 457, 462 (6th Cir. 2006), the complaint makes no allegations justifying the assertion of personal jurisdiction in Michigan. In fact, defendants have no contacts with Michigan — they do no business in Michigan, have no property here, have no addresses or representatives here, and have no other relevant ties to Michigan. Leonard Affidavit ¶¶ 3-4, 8, 11.

Moreover, the fact that the InfomercialScams.com web site can be viewed in Michigan does not constitute "purposeful availment" of the privilege of transacting business in the forum state, and hence 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), and *Bird v. Parsons*, 289 F.3d 865

⁴Exhibit A, attached, shows a Google search in color, more clearly separating the paid listings from the organic listings than as they appear in the poorly reproduced Exhibit C to the complaint.

(2002). See also *Dynetech Corp. v. Leonard Fitness*, — F. Supp.2d —, 2007 WL 4191834 (M.D. Fla. Nov. 26, 2007). 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 amounts to purposeful availment under the Due Process Clause.

Zippo recognizes three categories of web site interactivity: 1) highly interactive where the web site allows users 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 (which may or may not support personal jurisdiction); 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 does not support personal 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, and allows some limited return communication, 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); *Digital Filing Sys. v. Frontier Consulting*, 2006 WL 1663281, *3-*4 (E.D. Mich. June 13, 2006). Even if the web site is commercially interactive with the nation as a whole, the defendant must have “directly target[ed] its web site to the state, knowingly interacting with residents of the state via its web site . . .” *Roberts v. Paulin*, 2007 WL 3203969, *6 (E.D. Mich. Oct. 31, 2007). In this case, there is **no** commercially interactive feature on InfomercialScams.com,

and hence no basis for the exercise of personal jurisdiction over defendants.

Although the Court could dismiss without prejudice or transfer this case to Arizona, we urge the Court to dismiss on the merits because, as explained below, the claims are utterly frivolous.

II. THE FIRST AMENDMENT BARS PLAINTIFF'S CLAIMS.

Lifestyle's claims are barred by the First Amendment. In this case, Lifestyle seeks to use the trademark laws to silence unwanted critical commentary about its controversial products. But the only way in which Lifestyle's trademarked product name is used on Leonard's web site is to identify the subject matter of some of the consumer reviews published there. The reviews are noncommercial speech which is fully protected by the First Amendment, and Lifestyle's name is used truthfully to call Internet users' attention to the fact that noncommercial speech about Lifestyle is present on certain pages of the web site. 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 web site, or in a printed newspaper or magazine—would be able to bring a trademark action to halt publication of the unwanted review.

Consumer commentary is core speech protected by the First Amendment, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and 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 Leonard's—which publish commentary about a mark-holder's products rather than compete with them—are protected against attempts to silence that commentary through the trademark laws. *See, e.g., Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 423-25 (1st Cir. 2007); *Bosley Medical Inst. 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.’” 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., 214 F.3d at 462.

“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*, 971 F.2d 302, 307 (9th Cir. 1992).

The prospect of commercial injury to Lifestyle’s business does not make Leonard’s web site commercial speech. *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1016-1017 (9th Cir. 2004). After all, the same was true of the leaflets disseminated about the realtor in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), 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.” *Id.* at 419. Similarly, in *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), the Sixth Circuit invalidated as 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. *Id.* at 225.

That Leonard’s web site is 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) (accord[ing] full First Amendment protection to a paid advertisement in a newspaper). “Speech is protected even though it is carried in a form that is sold for profit. . . . The fact that expressive materials are sold does not diminish the degree of protection to which they are entitled under the First Amendment.” *ETW Corp. v. Jireh Pub.*, 332 F.3d 915, 924-925 (6th Cir. 2003).

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 in *Bankers Trust*, the Sixth Circuit

invoked the prior restraint rule to overturn a preliminary injunction against *Business Week*, which, of course, carries advertisements.

Here, the underlying speech is entirely non-commercial, and Leonard uses the Lifestyle Lift name truthfully — whether in the post-domain path of certain web pages, or as headlines or index listings on specific pages of his web site. The name is used only to denote, accurately, those pages and sections of pages where Lifestyle Lift is discussed. Accordingly, plaintiff’s claims are barred by the First Amendment.

III. LIFESTYLE’S TRADEMARK CLAIMS LACK MERIT.

Apart from the First Amendment bar to Lifestyle’s claims, the complaint should be dismissed because, in several different respects, it does not state a claim under the trademark laws.

A. Lifestyle’s Complaint Does Not Allege a Cognizable Trademark Injury.

First, Lifestyle does not allege a 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 source of dissimilar goods. *Wells Fargo & Co. v. WhenU.com*, 293 F. Supp.2d 734, 757-754 (E.D. Mich. 2003). 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*, 403 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 under Section 43(a) of the Lanham Act Lack Merit, and Lifestyle Lacks Standing to Sue for False Advertising.

Even if Lifestyle had a tenable claim of trademark injury, it does not allege the “essential element” of any infringement claim under the Lanham Act—“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 v. Toy Loft*, 684 F.2d 821, 831 (11th Cir. 1982). *See also Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988); *Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979) (“It is the source denoting function which trademark laws protect, and nothing more”). Indeed, the complaint alleges an “intent to confuse,” ¶ 15, but does not allege likelihood of confusion. Because references to Lifestyle’s marks on Leonard’s 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 frivolity of Lifestyle’s trademark claims is underscored by the Sixth Circuit’s reversal 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, using the trademarked name of the mall both on the web site itself and in the domain name; 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, 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. 319 F.3d at 776-777. *See also Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005). Here, the court can consider the web site itself because it is alleged in the complaint and is central to plaintiff's claim, *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), and Leonard's web site makes clear that it is a **commentary** web site, not a web site selling cosmetic surgery services. It follows that Lifestyle's claim of trademark infringement must fail.

Although the original complaint, ¶ 15, falsely alleged that Leonard uses trademark in the **domain name** for his web site, Original Complaint ¶ 15, plaintiff now alleges only that the mark appears in the "URL" for the site. Amended Complaint ¶ 13. That sort of claim, however, has been repeatedly rejected by the courts. "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). The reason domain names can create a likelihood of confusion – although such use can be lawful 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 such as “.com.” No Internet user is going to “guess” that Lifestyle’s web site can be found at the domain name InfomercialScams.com, even if he or she properly guesses the “path” at which pages about that company can be found within the InfomercialScams.com web site. 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 and 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.

The complaint also alleges, ¶ 14, that the use of plaintiff’s mark on Leonard’s web site “cause[s] search engines . . . to be directed to Defendants’ website when a computer user enters the words Lifestyle Lift” as a search term. But defendants never allege that the search results are in any way confusing, or that users who see a search result drawn from Leonard’s web site will be in any way confused about whether it is a site sponsored by plaintiff, and hence will visit Leonard’s site in the expectation of finding the official Lifestyle Lift web site. The sample Google search contained in Exhibit C of the original complaint shows why such an allegation could not have been made — not only does Leonard’s site appear only after several results that are either from plaintiff, or favorable to it, but the text of the search result plainly shows that it is a site to visit to see **complaints** about Lifestyle. Moreover, there is nothing illegitimate about the fact that defendants’ Lifestyle Lift page appears in a list of search engine results obtained when entering plaintiff’s mark as a search

term, because, as courts have recognized, Internet users use search engines to find critiques of trademark holders as well as the markholders' own web sites. *Playboy v. Welles*, 279 F.3d 796, 803-804 (9th Cir. 2002). To be sure, plaintiff might prefer to squelch public access to Leonard's web site by excluding it from search engine results, but such suppression is not a proper function of trademark law. *CPC Int'l v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000). See generally Goldman, *Online Word of Mouth and Its Implications for Trademark Law* (Oct. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020695.

The Amended Complaint, ¶ 19, also alleges a false advertising claim under 15 U.S.C. § 1125(a)(1)(B), but the allegations of the complaint (in light of the actual web site) are seriously deficient. First, several circuits hold that standing to bring a false advertising claim is accorded only to companies whose products compete with the product of the allegedly false advertiser, *Jack Russell Terrier Network v. American Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005); *Stanfield v. Osborne Indus.*, 52 F.3d 867, 872 (10th Cir. 1995); *L.S. Heath & Son v. AT&T Info. Sys.*, 9 F.3d 561, 575 (7th Cir. 1993). Although some courts apply a multi-factor test that does not require direct competition, e.g., *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50*, 165 F.3d 221, 233 (3d Cir. 1998), even in those courts, consumer critics cannot be sued for false advertising. *Nevyas v. Morgan*, 309 F. Supp.2d 673, 679-681 (E.D. Pa. 2004). (The Sixth Circuit has not addressed standing to sue under section 43(a)(1)(B)). Not only does the complaint not allege that Leonard is plaintiff's competitor, but both Leonard's affidavit, ¶ 14, and the web site itself, Exhibit B, reveal that he is not, and that, instead, his cite contains consumer criticisms. Thus, the false advertising claim should be dismissed under Rule 12(b)(1).

There are several reasons why the false advertising claim must also be dismissed under Rule 12(b)(6) for failure to state a claim. First, section 43(a)(1)(B) only applies if Leonard’s use of the mark constitutes “commercial advertising or promotion” — that is, speech “by a defendant who is in commercial competition with plaintiff . . . for the purpose of influencing consumers to buy defendant’s goods or services.” *Fashion Boutique of Short Hills v. Fendi USA*, 314 F.3d 48, 56 (2d Cir. 2002). Review of the web site itself makes clear that Leonard is engaged in **neither** advertising **nor** promotion. Second, the Sixth Circuit has held that a false advertising claim may only be brought against speech that qualifies as “commercial speech” under the First Amendment, *Semco v. Amcast*, 52 F.3d 108, 111-114 (1995), and, as discussed above, Leonard’s web sites are not commercial speech. Third, to support a claim for damages for false advertising, the plaintiff must allege **either** that the defendant’s statements are literally false, or that any misleading statements actually deceived consumers. *American Council of Certified Podiatric v. American Bd. of Podiatric Surgery*, 185 F.3d 606, 614 (6th Cir. 1999). To obtain an injunction, plaintiff must allege a tendency to mislead consumers. *Id.* at 618. Here, the trademark’s use is literally true, because the mark is only used to identify pages on Leonard’s web site where plaintiff is discussed. And the Amended Complaint alleges neither actual deception of consumers, nor a tendency to deceive consumers. Accordingly, the false advertising claim must also be dismissed.⁵

⁵To the extent that the Amended Complaint alleges that Leonard’s web site is engaged in false advertising by implying that plaintiff’s services are a “scam,” ¶ 18, the claim falls afoul of the requirement that false advertising be based on statements of fact, not opinion. *Podiatric Council v. Podiatric Board*, supra, at 185 F.3d at 614. Even if the opinions expressed on Leonard’s web site were his own, and not that of his commenters, the word “scam” is non-actionable opinion. *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987).

C. Lifestyle’s Dilution Claim Must Be Dismissed For Lack of a Famous Mark.

Lifestyle’s claims of federal trademark dilution must be dismissed because Lifestyle does 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). Under the Lanham Act, as amended by the 2006 Trademark Dilution Revision Act, Pub. L. No. 109-312, § 2, 120 Stat. 1730 (Oct. 6, 2006), “a mark is famous [only] 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 makes such an allegation impossible.

D. Leonard’s Use of Lifestyle’s Mark Is Fair Use and Nominative Fair Use.

Even assuming the impossible — that Lifestyle can alleged trademark injury, likelihood of confusion, and dilution — its trademark claims would nevertheless fail because it cannot overcome a fair-use or nominative-fair-use defense. *KP Permanent Make-Up v. Lasting Impression I*, 543 U.S. 111 (2004). Under settled law, a fair-use defense is established if the 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, 920 (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 [to denote plaintiff as the subject of commentary] 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 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 written the concept into the Lanham Act — “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 web sites 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.* Lifestyle’s claims must be dismissed for these reasons as well.

CONCLUSION

The motion to dismiss for lack of personal jurisdiction, for lack of standing, and for failure

to state a claim should be granted.

Respectfully submitted,

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December 13, 2007

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing paper with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following:

Allan S. Rubin, Esquire
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All parties in the case are represented by counsel who receive service through the ECF system.

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