

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 SUPPLEMENTAL MOTION FOR SANCTIONS

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Introduction

Defendants seek sanctions against plaintiff Lifestyle Lift Holding, Inc. (“Lifestyle”), and against its attorneys, Allan Rubin, Kenneth M. Zorn, and Michael C. McKinnon, for pursuing a SLAPP suit that invokes phony claims under the Lanham Act to harass defendants for giving dissatisfied customers a forum to criticize plaintiff. In response to the motion for sanctions that was served a month ago, plaintiff amended its complaint to remove some of the most egregiously false allegations, and it repleaded some causes of action to make them more vague. A cause of action for false advertising was added, along with some new false factual allegations that were apparently intended to bolster that claim. Accordingly, without in any way retracting the reasons set forth in their earlier motion for Rule 11 sanctions, defendants seek sanctions on the additional grounds that several factual claims not discussed in the first motion are false, and that the new legal claim neither has any basis in existing law, nor is supported by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.

STATEMENT OF ISSUE AND PRINCIPAL SUPPORTING AUTHORITIES

Was plaintiff’s suit for damages, and for an injunction seeking to “shut down” a web site that hosts consumer criticism, on the theory that the mention of the name of a company that is criticized on the site constitutes false advertising, filed without reasonable inquiry into the facts alleged, without any basis in existing law, and without any reasonable hope of changing the law?

15 U.S.C. § 1125(a)(1)(B)

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

Neyyas v. Morgan, 309 F. Supp.2d 673, 679-681 (E.D. Pa. 2004)

Fashion Boutique of Short Hills v. Fendi USA, 314 F.3d 48, 56 (2d Cir. 2002)

Semco v. Amcast, 52 F.3d 108, 111-114 (6th Cir. 1995)

American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, 185 F.3d 606, 614, 618 (6th Cir. 1999)

STATEMENT OF THE CASE

Plaintiff Lifestyle is a Michigan corporation with its principal place of business in Troy, Michigan. Lifestyle licenses the use of its name to 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. InfomercialScams.com is designed as an impartial forum for consumer information, where users can read and post reviews of products sold through infomercials. Defendant Leonard (which as in previous memoranda refers both to Justin Leonard and to Leonard Fitness, Inc.) relies entirely on users of the web site to post the product reviews. He does not write any of the reviews himself, and does not endorse the opinions posted.

Leonard raises money to pay for the costs of running this web site and for his time by selling advertising space on the site. Although he is willing to sell advertising space directly to companies that are interested in advertising on the site, 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” page for each product includes a link to the “complaints” page for that product, which is labeled “Read Complaints.” By the same token, the “complaints” page for each product includes a link to the “defenses” page, 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.

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 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 (apart from individuals comments that criticized companies sometimes post in defense of their products).

THE COMPLAINT RESTS ON SEVERAL FALSE FACTUAL ALLEGATIONS

The Amended Complaint contains several allegations of fact that are either patently false or phrased so broadly as to be meaningless. Inspection of the web site at issue would have revealed the falsity of these allegations.

For example, paragraph 12 of the Amended Complaint alleges as follows:

Defendants use this website to advertise and further their business interests. Upon information and belief, the Defendants use the site to draw consumers to purchase products of their “sponsors” and to market Defendants own products. Defendants, either directly, or indirectly engage in commerce through the website.

In fact, although the web site contains paid advertising, the advertising is not for “defendants’ business interests.” The advertising is sold either directly or through brokers, to companies such as eBay, Taylor Gifts, the maker of Bowflex exercise equipment, and the like. Leonard Affidavit, ¶ 8 and Exhibit B. Except insofar as the web site carries advertising, defendants do not have any “sponsors” or “own products,” *id.* ¶¶ 10-11. It appears that paragraph 12 of the Amended Complaint was drafted as it was to try to provide support for plaintiff’s new “false advertising” claim, so that defendants could avoid a motion to dismiss by contending that the inclusion of the “Lifestyle Lift” name in the post-domain path and in headlines on certain pages of the web site was a deliberate

effort to “advertise” for “defendants’ products,” despite the fact that such an allegation is patently false.

After defining the word “website” as meaning “www.infomercials.com,” plaintiffs allege in paragraphs 13 and 14 of the amended complaint that the HTML code “for this site” contains the words Lifestyle Lift in the URL, ¶ 13, that defendants “incorporat[ed] . . . Lifestyle Lift into their website, ¶ 14, and that by this means defendants are successfully trying to “cause search engines . . . to be directed to Defendants’ website when a computer user types in the words ‘Lifestyle Lift’.” ¶¶ 13, 14. These allegations are deliberately stated in a manner that is misleading because it is overly broad.

The trademarked phrase “Lifestyle Lift” does appear in the post-domain path, and in the text (and headlines) of certain pages on the infomercialscams.com web site:

(a) it appears in the URL and in headlines on those pages where viewers actually discuss their experiences with plaintiff’s services;

(b) it appears in the headline for a short article on the home page that summarizes some complaints and links to the viewer postings (and, more recently, includes a reference to this lawsuit); and

(c) it appears in a link on the index page for “beauty” products promoted by infomercials, which links to the viewer postings.

When a link to InfomercialScams.com appears in the results for a Google search for the search phrase “Lifestyle Lift” (such as Exhibit C to the Complaint), that link leads only to the page of viewer postings about Lifestyle Lift. Hence, although it would have been accurate to have alleged

that the trademark appears on individual web pages that discuss Lifestyle Lift, and hence those pages are indexed by search engines and returned as search results when searchers use plaintiff's name as a search term, it was false to allege such facts about the site as a whole.¹

Finally, paragraph 15 of the Amended Complaint alleges, "The design of Defendants' website and its URL deliberately use the words "Lifestyle Lift" with the intent to create confusion, mistake and deception in the minds of the purchasing public." This allegation is false, and plaintiffs never had any evidence supporting this allegation of "deliberate" use of the mark "with intent to create confusion." To be sure, plaintiffs often allege intent without specific proof of the defendant's mental state, because there are facts from which intent can be inferred and the plaintiff anticipates that discovery will adduce additional evidence of intent. However, the plaintiff must at least allege sufficient facts from which such intent can be inferred. *Cf. Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-1965 (U.S. 2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). However, there were no facts in the Amended

¹ The allegation in ¶ 14 of the Amended Complaint that the Yahoo! search engine is directed to InfomercialScams.com is even more misleading. In a search conducted in December, 2007, it was discovered that when searching for "lifestyle lift" on the Yahoo! search engine, a user had to click through to the **eighth** page of search results, finding InfomercialScams.com as the 77th result for that search. Yet the common wisdom in the search engine is that it is the rare searcher who looks past the first page of search results – fewer than ten percent of all searchers click on any result after the first page, and the fraction that proceeds goes down with each next succeeding page. *E.g., The Importance Of Top Search Engine Rankings*, available at <http://www.searchenginepromotionhelp.com/m/articles/search-engine-optimization/aol-data-top-search-rankings.php>. Thus, although the allegation that the Yahoo! search engine is directed to defendants' web site is literally true, the implicit allegation that more than a handful of searchers will even see the search result for that site, not to speak of visiting it, is demonstrably false.

Complaint from which intent could have been inferred, and plaintiff never showed that, when the complaint was filed or at any other time, there was any reason to believe that it was likely to obtain such evidentiary support through investigation or discovery. The mark was used **solely** for the purpose of accurately identifying the pages relating to a topic on which the site's users wanted to comment, and that identification was, in fact, truthful.

Indeed, defendants did not learn about plaintiff from some other source and then set about adding a set of pages to their web site in order to invite views, and comments, from members of the public. A member of the public, identified as "Gregg," submitted a complaint form about Lifestyle Lift out of the blue. Defendants, after verifying that this was in fact an infomercial product, set up pages to hold Gregg's complaint and any other complaints or defenses that members of the public desired to submit.² The allegation of "deliberate use . . . with intent to confuse" was patently false, and sanctions should be imposed on plaintiff and its counsel for filing and pursuing a complaint based on that false allegation.

THE "FALSE ADVERTISING" CLAIM IN LIFESTYLE'S SUIT WAS LEGALLY FRIVOLOUS.

In several respects, plaintiff's false advertising claim contravenes well-settled law, and plaintiff has no argument that it was seeking to extend, modify or reverse this existing law.

First, section 43(a)(1)(B) of the Lanham Act only applies if Leonard's use of the mark constitutes "commercial advertising or promotion" — that is, speech "by a defendant [1] who is in

²Indeed, it appears that plaintiff is taking advantage of the "Read Defenses" page to submit multiple statements for posting on InfomercialScams.com. Leonard has recently been spammed with multiple "defenses," purportedly from consumers, that evidently come from the same sources.

commercial competition with plaintiff . . . [2] 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) (emphasis and numbering added for clarity), which adopted the so-called *Gordon and Breach* four-part test that determines whether communications should be treated as “commercial advertising or promotion.” *Gordon & Breach Sci. Pub. v. American Inst. of Physics*, 859 F. Supp. 1521, 1535-1536 (S.D.N.Y. 1994).³ The four-part test, and more important for present purposes, parts (1) and (2) as identified above, have gained widespread acceptance. *E.g.*, *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-1274 (10th Cir. 2000); *Coastal Abstract Serv. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996); *Enzo Life Sciences v. Digene Corp.*, 295 F. Supp. 2d 424, 428 (D. Del. 2003); *Johnson Controls v. Exide Corp.*, 152 F. Supp. 2d 1075, 1081 (N.D. Ill. 2001), *Gillette Co. v. Norelco Consumer Products Co.*, 946 F. Supp. 115, 133 (D. Mass. 1996); we have not identified any courts that have rejected those two requirements. And it was apparent from the outset of this case both that defendants never used the term “Lifestyle Lift,” or made statements about Lifestyle Lift, “for the purpose of influencing consumers to buy defendant’s goods or service,” and that defendants are not “in commercial competition with plaintiff.”

³ “In order for representations to constitute ‘commercial advertising or promotion’ under Section 43(a)(1)(B), they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services. While the representations need not be made in a ‘classic advertising campaign,’ but may consist instead of more informal types of ‘promotion,’ the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute ‘advertising’ or ‘promotion’ within that industry.”

Second, although the Sixth Circuit has never addressed the *Gordon & Breach* four-part test, or the two specific elements cited above, it has squarely embraced the requirement 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). Every other circuit that has considered the question has agreed that a false advertising claim is tenable only against commercial speech. *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999). In this case, however, as amply shown in support of defendants’ first motion for sanctions, defendants’ use of the Lifestyle Lift mark was in no way commercial speech.

Third, the Sixth Circuit has held that, 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 Phys. & Surg. v. American Bd. of Podiatric Surgery*, 185 F.3d 606, 614 (6th Cir. 1999). To obtain an injunction, plaintiff must allege and show a tendency to mislead consumers. *Id.* at 618. Other circuits follow a similar analysis. *E.g., Allsup, Inc. v. Advantage 2000 Consultants*, 428 F.3d 1135, 1139 (8th Cir. 2005); *Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 274 (4th Cir. 2002); *Coca-Cola Co. v. Tropicana Products*, 690 F.2d 312, 317 (2d Cir. 1982). On the facts alleged in the Amended Complaint, and the record developed in the litigation, the false advertising claim was frivolous for this reason as well. 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 claims are just as frivolous as the infringement and dilution claims.

CONCLUSION

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

Respectfully submitted,

Paul Alan Levy (DC Bar No. 946400)
Gregory Beck (DC Bar No. 494479)

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Barbara M. Harvey (P25478)

1394 E. Jefferson Avenue
Detroit, Michigan 48207
(313) 567-4228

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Attorneys for Defendants