

PUBLIC CITIZEN LITIGATION GROUP

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August 10, 2017

George A. Kurisky, Jr.
Johnson, DeLuca, Kurisky & Gould, P.C.
Suite 1000
1221 Lamar
Houston, Texas 77010

Re: *ADB Interests v. Lanum*
ADB Interests v. Dorenkamp

Dear Mr. Kurisky:

Michelle Lanum and Tilly Dorenkamp have asked me to represent them in response to the lawsuits that you have filed against them in the 113th and 165th District Courts of Harris County, Texas. I had hoped to be able to talk to you informally about this matter without the need to put my concerns in writing. However, because you have not called me back, I am sending you this letter. Public Citizen has not yet committed its resources to filing briefs and other papers on behalf of Lanum and Dorenkamp; its decision about whether to do so depends in part on the nature of your response—or non-response.

Your client is the LLC for Ashley Black, who has had a fair amount of success promoting a product called the “fascia blaster” in various media outlets, including the national media. To the best of my understanding, the product is a Class I medical device that, apparently, can have a number of serious side effects and has never been found after a clinical trial to be safe and effective. Early this year, whether for purposes of making public claims in its advertising or in the hope of submitting data for FDA review, your client conducted something of a trial about the device’s safety and effectiveness. So far as I can tell, there was no institutional review board consideration. Participants in the study, including Lanum and Dorenkamp, were required to sign a form contract that included some clauses directed at protecting your client’s control over its trademarks, as well as a limited non-disclosure agreement forbidding premature disclosure of the study’s “protocols” and “study materials.” Nothing in the agreement forbade participants from criticizing your client or describing their own experiences as study participants. And your client has never released the findings of the “trial.” If I have any of these facts wrong, please let me know.

Late last month, you filed suit against Lanum and Dorenkamp claiming that, by criticizing your client and explaining various ways in which they were dissatisfied with the trial or disillusioned about the device, they both breached the contract they signed and defamed your client (more

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precisely, that they engaged in business disparagement). Your petition against both Lanum and Dorenkamp recites the contract language that you claim was violated. In addition, your petition against Lanum quotes several fragments of language from her statements that you claim breach the contract and/or are defamatory. The petition against Dorenkamp is considerably more conclusory: it only provides vague characterizations of things that you allege she said; the petition appears to allege that she violated your client's rights simply by "answer[ing] questions about the Study from other members of [a Facebook] group." Based on these claims, your client seeks damages awards of two million and five million dollars, as well as a temporary and permanent injunction barring Lanum and Dorenkamp from making any future statements that criticize your client pending a judicial determination of the veracity of the statements, and in any event from making any future statements to your client's "customers and clients."

As I see it, none of your client's claims would survive a motion to dismiss under the Texas Citizen's Participation Act, thus exposing your client both to an award of attorney fees and to an award of deterrent sanctions. Before I and Texas counsel expend more compensable hours on this matter, I hope you will consider dismissing the petitions against these two individuals. On the other hand, if the reasons that I provide below why your client's claims cannot succeed are faulty, I'd be grateful for your explaining why.

Your Breach of Contract Claims Appear Unsound

The main claim asserted in both cases is breach of contract, but neither of the two clauses cited in the petition is a non-disparagement clause that purports to forbid the participants in your client's study from criticizing your client. The clause cited in paragraph 11 of the petitions against Lanum and Dorenkamp forbids them from disclosing "these protocols and . . . study materials [which are] confidential until released," and further provides that "procedures, protocols and research data . . . may not be reproduced without permission." I see several problems with this part of the contract claim.

First, even assuming that Lanum or Dorenkamp made statements that would otherwise have been barred by this provision, they were all made after March 11, 2017. That is the date when Ashley Black identified both Dorenkamp and Lanum, along with other study participants, and told the nearly 300,000 members of her Facebook group that they should "ask them your #research questions. Want to know what protocols we had them follow . . . These ladies are excited to hear from YOU!" Black has characterized her Facebook group as the "official [Facebook] group for FasciaBlasters who wanna share their experiences, stories, techniques, and results, ask questions and join the discussion!" The March 11 message plainly gave Lanum and Dorenkamp permission to talk about the study in which they participated, and **specifically** authorized the sharing of protocols. There was, for this reason alone, no violation of the limited non-disclosure clause.

Second, the statements that the petitions accuse Dorenkamp and Lanum of making do not

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contain any protocols, study materials, procedures or research data. Rather, the statements described side effects and symptoms that Lanum and Dorenkamp experienced personally; they also expressed their general opinions about your clients' lack of scientific background, general concerns about lack of scientific soundness without any specific disclosure of the protocols, and possible disadvantages of your clients' product. None of that is forbidden by the limited non-disclosure clause cited in the petitions. Although paragraph 13 of each petition objects to Lanum and Dorenkamp having commented on "the outcome of the study," the non-disclosure clause does not include any limit on discussion of the outcome of the study.

Moreover, your breach of contract claims are contradicted by the business disparagement count in your petition, in that you allege that the very same statements that are alleged to violate the contract are "false and disparaging." False statements are not actionable under a non-disclosure agreement. *Glassdoor, Inc. v. Superior Court*, 9 Cal. App.5th 623, 647, 215 Cal. Rptr. 3d 395, 415 (Cal. App. 6th Dist. 2017).

Nor was there a violation of the clause cited in paragraph 12 of the two petitions, which provides that certain "tradenames . . . and other trademarks and service marks" belong to your client and forbids the study participants to "use . . . copy, reproduce . . . or otherwise exploit" the marks without Black's consent. Not a single one of the comments alleged in paragraphs 22 through 26 of the Lanum petition or the Dorenkamp comments corresponding to the general characterizations in paragraphs 13 to 17 and 22 to 23 of the Dorenkamp petition uses the trademarked name "Fascia Blaster," or any other trademark belonging to your client. Even if they did use the name of the product, restrictions on the misuse of trademarks do not generally extend to the identification of a trademarked product name as a subject of commentary or criticism. *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 546 (5th Cir. 1998).

Perhaps it is your plan to argue that, despite the limited language of these contract provisions, they should be construed broadly to forbid disparaging communications about your client that would otherwise be protected by the First Amendment. But the Texas courts frown on the recognition of such waivers: "Free speech rights are the heart of our democratic system and involve not only the right of the individual to speak freely, but also the citizenry's interest in public discourse. Thus, if free speech rights can be waived in Texas . . . , a court must find clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 110 (Tex. App.--Austin 2003, no pet.). *Brammer* reserved judgment about whether Texas law allows the waiver of free speech rights at all. The Texas Supreme Court has also never addressed that question, but it **has** applied the "clear and unequivocal" waiver standard to clauses invoked as the purported waiver of statutory rights and held that, "to meet this standard, a waiver provision must state specifically and separately the rights surrendered." *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991). Nothing in either of the clauses that you cite provides the slightest notice that the contract waives the First Amendment right to criticize your client.

Even if your client's contract had forbidden criticism under the guise of forbidding "disclosures" about the possible bad effects of your client's product (which it cannot reasonably be read to do), the question presented would be whether that contract clause was lawful. The question would arise under the Texas law of unconscionability; my discussion with medical professionals leads me to believe that it is unheard of for participants in a clinical trial to be asked to sign a contract forbidding them to talk about their experiences as patients in such a trial. Your client has also undermined, if not entirely waived, this claim by admitting that its product may cause the very symptoms the Lanum and Dorenkamp complained about: "rashes, bumps, redness, irritation, itching, nausea, emotional reactions, vomiting, hormone changes, increased sensitivity, headaches, acute inflammation, changes in cycle, reoccurrence of pre-existing condition, weight gain and other toxicity-associated symptoms."

Finally, the lawfulness of the clause is also subject to challenge under the Consumer Review Fairness Act, 15 U.S.C. § 45b. Under the CRFA, which was enacted on December 14, 2016, any clause in a form contract used in the course of selling or leasing goods or service became void as of March 14, 2017, *id.* § 45b(h)(i)(1), if the clause forbids the consumer from providing "a written, oral or pictorial review, performance assessment of, or other similar analysis of [your client's] goods, services, or conduct." *Id.* §§ 45b(a)(2), 45b(a)(3). The contract in question was used by your client in the course of selling its "Fascia Blaster" products, in that the evident purpose of the study was to enable your client to promote sale of its fascia blaster product.

In sum, your client cannot succeed in its contract claims against Lanum and Dorenkamp.

The Tort Claims Appear to Be Unsound

Your two petitions also include business disparagement claims. However, the pleadings are facially deficient, and the information I have seen so far makes it highly unlikely that your client's petitions could survive a motion to dismiss under the TCPA. Perhaps you can enlighten me by showing contrary evidence that supports the disparagement claim

First, the TCPA motion filed by Karen Wallace amply demonstrates that Ashley Black is a public figure: she has repeatedly bragged about how famous she is, and she has received national media coverage of her claims for her product. She operates a Facebook group for her product, mentioned above, that has nearly 300,000 members, which your client described as "the largest female support group on Facebook." Yet your petitions never allege that Lanum or Dorenkamp made their statements about your client with actual malice—that is to say, knowledge of falsity or subjective awareness of probable falsity. The petition against Dorenkamp fails to identify the allegedly defamatory words, as you would have to do to satisfy the pleading standards for a defamation claim, and many of the statements on which your disparagement claims against Lanum are based consist of non-actionable opinion rather than statements of fact. Moreover, although your petition recites the words "special damages" in passing, it does not plead the claimed special

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damages in sufficient detail. *Nationwide Bi-Wkly. Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 147 (5th Cir. 2007); *Barrash v. Am. Ass'n of Neurological Surgeons*, 2013 WL 4401429, at *4 (S.D. Tex. Aug. 13, 2013). Nor could the required special damages from Lanum and Dorenkamp's statements be shown, given the torrent of criticism your client's products and protocols have received, including its "F" rating with the Better Business Bureau.

Pleading aside, I see no likelihood that your client will be able to present "clear and specific" evidence of falsity, of actual malice, or of special damages. Most of the statements over which your client is suing describe the symptoms that Lanum and Dorenkamp suffered during the "clinical trial" in which they participated, symptoms of which they informed the personnel running the trial both orally and in writing, and which your client now admits are side effects of its products and protocols. Thus, your client's own web site warns that use of her product can result in "toxins" being "pulled out of the tissue [which] can cause rashes, bumps, redness, irritation, itching, nausea, emotional reactions, vomiting, hormone changes, increased sensitivity, headaches, acute inflammation, changes in cycle, reoccurrence of pre-existing conditions, weight gain, and other toxicity-associated symptoms." You have also sued Lanum for referring to your client's lack of scientific background as well as the questionable scientific validity of the study. Even if those statements are deemed to be assertions of fact rather than expressions of opinion, they are fair characterizations of flaws in the study and defects in your client's credentials. The failure to secure approval by an institutional review board, the apparent lack of control group, and the apparent failure to apply double-blind testing, among other flaws, condemn the scientific validity of the "trial." Moreover, Ashley Black has no scientific background and no scientific credentials: she claims only to be a "licensed massage therapist" (I note from the TCPA motion in *Black v. Wallace* that she is not registered in Texas – is she registered in California?) Moreover, the fact that she employed exercise therapists and a "holistic nutritionist" rather than medical personnel and trained scientists to run the trial shows that there was a factual basis for the statements that your clients' staff are not scientists.

As for special damages, the statements of which your client complains were all made on a Facebook page entitled "Blaster 'THE REAL STORY' FasciaBlaster Scam/ Fraud," most of whose participants were hostile to your client and its product. Even assuming that you can show loss of business, it is highly unlikely that you will be able to show by clear and specific evidence that it was actionable statements by Lanum and Dorenkamp, rather than by the many other dissatisfied users, that caused the loss of business. But it is injury by those specific statements, and traceability to those statements, that you will have to prove to establish the element of special damages. *In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015); *Playboy Enters., v. Editorial Caballero*, 202 S.W.3d 250, 267 (Tex. App.—Corpus Christi 2006, pet. denied).¹

¹ Even if your client did have valid claims, Lanum and Dorenkamp lack regular sources of employment income or assets against which your client can expect to execute. Consequently, the only value from pursuing this action is to deter others from criticizing your client.

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If, however, you have evidence supporting claims of falsity, of actual malice, and of special damages, I would be glad to consider it.

Other Flaws in the Petitions

Your petitions end with an application for a temporary restraining order and a temporary and permanent injunction. This relief will also be unavailable because the Supreme Court of the United States has held that preliminary injunctive relief based on a theory of injury to reputation is a constitutionally impermissible prior restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) The Texas Supreme Court has gone further, forbidding the imposition of permanent injunctive relief against future speech as a remedy for defamation, even when a statement had been proven to be false and defamatory. *Kinney v. Barnes*, 443 S.W.3d 87, 100 (Tex. 2014).

Finally, there is serious reason to question whether you will be able to maintain your lawsuit in Texas. Both Lanum and Dorenkamp live in the vicinity of Tampa, Florida, and the contract that they signed identifies Tampa as the venue of the study. Although Lanum and Dorenkamp have since learned that the LLC that is the plaintiff in this case is located in Houston, the LinkedIn page of Ashley Black, its managing member (indeed, the only member of the LLC so far as I can determine), indicates that she lives in California, and the petitions were verified by someone located in Minnesota. Neither Lanum nor Dorenkamp intentionally directed their allegedly tortious conduct toward Texas, and neither could reasonably anticipate being haled into court in that state. Consequently, the lawsuits against them are susceptible to dismissal for lack of personal jurisdiction.

Conclusion

For all of these reasons, your petitions are subject to dismissal under the TCPA. In addition, Texas lawyers with whom I have been discussing a co-counseling relationship, Peter Kennedy at Graves Dougherty Hearon and Moody, and R. James George, Jr., of George Brothers Kinkaid & Horton, have indicated that they are evaluating counterclaims under the Texas Deceptive Trade Practices Consumer Protection Act ("DTPA") against your client, seeking treble damages and attorney fees, in the event that your client persists in this litigation. Given the large number of dissatisfied former customers, those counterclaims could snowball into a class or mass action. I will leave it to them to describe the basis for those claims.

I have been in touch with counsel for Karen Wallace, and learned from him that you might prefer to dismiss the lawsuit against Karen Wallace if your client could avoid paying the attorney fees already accrued in that case. Because no appearances have been entered here as of yet, and no TCPA motion filed yet, nor have DTPA counterclaims yet been made, your client can still avoid facing more fee claims and more sanctions here. I hope that your client will avail itself of that opportunity.

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Sincerely yours,


Paul Alan Levy