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BY EMAIL AND FAX

January 26, 2018

Anne G. Sanford, Esquire
Mary A. Stearns-Montgomery, Esquire
Stearns-Montgomery & Proctor
291 Alexander Street SE
Marietta, Georgia 30060-2084

Re: *Mary A Stearns, P.C. v. John Doe aka X.X.*
No. 17-1-9737-40 (Superior Court of Cobb County, Georgia)

Dear Ms. Sanford and Ms. Stearns-Montgomery:

I write in response to Ms. Sanford's January 10, 2018 letters, which ask Yelp, Inc. to remove a 2013 consumer review about your law firm, as you appear to claim is provided by an order that your firm prepared for the Court's signing and obtained on an ex parte basis earlier this month. Insofar as the order purports to demand action by Yelp, it violates the United States Constitution, the Georgia Constitution, federal law and state law. Using papers signed by Ms. Stearns-Montgomery, you obtained the order without any notice to Yelp, despite the fact that it is apparent from the papers that your intent from the outset was to obtain relief against Yelp, and so far as I can tell, Ms. Stearns-Montgomery deliberately withheld both adverse facts and adverse controlling legal authority from the Superior Court in obtaining the order, in violation of her ethical duty of candor to the tribunal. Moreover, although the order recites that the court had considered "evidence presented by the Plaintiff," the publicly available documents posted on the court's electronic docket do not include any admissible evidence on which determinations of either factual falsity or the other elements of a defamation claim could have been made. Accordingly, Yelp is not prepared to accede to your request, and unless you are ready to agree to have the parts of the order directed to "any third-party" rescinded, Yelp is prepared to seek reconsideration of that order and, failing such rescission, to appeal the order.[1]

The lawsuit in question pertains to a review posted on Yelp's popular web site, which allows members of the public — free of charge — both to read and to write reviews about their experiences with local businesses. (Businesses can also post responses to reviews if, like Stearns-Montgomery & Proctor, they have claimed their pages by establishing a business account which is also free of

[1] In this letter, I use "you" to refer to your law firm generally. Moreover, although all of the court papers in this case have been signed "Mary A. Montgomery," and the name that appears in the Georgia bar directory is Mary Agnes Montgomery, your web site consistently refers to its partner as "Mary A. Stearns-Montgomery." This letter uses the hyphenated surname.

charge). The review in question, posted on June 12, 2013, by a consumer using the initials X.X., relates the user's perspective on an unhappy experience as a prospective client: the reviewer paid for a consultation relating to a "divorce with minor children," but was unable to obtain answers to questions about what the cost of legal services would be and, indeed, was apparently unable to get his or her calls returned. Based on these facts, and contending that knowledge that children were involved should have impelled you to respond quickly, the consumer expressed the opinion that yours is a "horrible horrible firm" that other consumers should avoid.

You learned of the existence of this review not long after it was posted, in that, on October 22, 2013, your employee Natalie Tyler contacted Yelp to complain about the review and ask for its removal. Yelp refused to remove the review because it appeared to be within Yelp's Terms of Service — that is, it is presented as a review by a consumer, presenting his or her own experiences and expressing opinions about the significance of those facts. Although you threatened at the time to sue either the reviewer, or Yelp itself, for defamation, Yelp told you that it is immune from such lawsuits under section 230 of the Communications Decency Act, but that, if provided with a final judicial determination that the review was defamatory, Yelp would consider exercising its discretion with respect to the review. By email on October 24, 2013, you next asked Yelp to give you information that might help you identify the Doe reviewer so that you could obtain such a court decision. Yelp promptly responded that it does not provide such information in response to mere letter requests, but pointed you to its Privacy Policy to learn how to get identifying information. In fact, there is a well-established means by which parties claiming to have been defamed by an anonymous or pseudonymous communication can obtain information enabling them to identify the alleged defamer: namely, by serving a legally sufficient subpoena from a court of competent jurisdiction. *Yelp, Inc. v. Hadeed Carpet Cleaning Co.*, 770 S.E.2d 440 (Va. 2015); *Doe v. Dominique*, 2014 WL 12061534, at *7 (N.D. Ga. Apr. 9, 2014). Yelp did not receive any subpoena; in fact, it heard nothing further from you about this matter until your January 10 letter to its registered agent for service of process in Georgia.

Nonetheless, on December 29, 2017, the day before the beginning of the New Year's holiday weekend, you presented several papers to the clerk of the Superior Court of Cobb County, Georgia. First, you filed a complaint, verified only "to the best of my knowledge and belief." Second, you filed a motion for leave to provide service by publication, claiming that you had tried your best to identify the Doe reviewer but had been unable to do so, again verified only "to the best of my knowledge and belief." This affidavit made no reference to the October 2013 correspondence, and one might well question the veracity of the affidavit in light of that omission. Third, you filed a motion for award of emergency relief, claiming that you had spent time trying to identify the review but could not do so (again, with no mention of the October 2013 correspondence), and arguing that injunction was needed to prevent injury to your reputation during the litigation of the case.

The case was assigned to the Honorable Robert E. Flournoy, III, but you obtained an order dated January 3, 2018, from Senior Judge George H. Kreeger. The electronic record does not reflect the filing of a proposed order, but the order eventually entered reflects that it was **you** that prepared

the document. Oddly, although the order purports to have been issued on that date, the order was not added to Court's electronic docket until this week. The order directs the anonymous defendant to "retract[] remove[] and delete" the review, and, in the event that the Doe fails to take such action, it provides that your firm may provide the order to "any third-party" and requires such a third party to "aid Plaintiff in having the review retracted, removed as deleted as quickly as possible." The order does not purport to be limited in duration, and the papers submitted in support of the order recite no effort to provide notice to Yelp, the third party at whom the order is aimed, and provide no explanation of why Yelp could not have been given such notice.

Your letter is somewhat contradictory about whether you are simply "request[ing]" that Yelp remove the review, or whether you are taking the position that the order **requires** Yelp to remove the review. The order does not, on its face, impose any such requirement. The order only purports to require "any third party" that has the ability to aid plaintiff in having the review "retracted, removed and deleted" to "aid" the plaintiff in having that done. The Doe defendant X.X. has the ability to remove the review him or herself, and on January 12, 2018, Yelp aided you by forwarding the order to the defendant Doe X.X. at the email address that X.X. gave Yelp when X.X. established a member account with Yelp.

Even construed only to require Yelp to provide this sort of assistance, the order so flagrantly violates federal and state constitutional and statutory law that it is void.

First, the order violates the First Amendment. The First Amendment forbids the issuance of injunctive relief against speech for the purpose of protecting reputation, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("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 use of the injunctive power of a court."). In addition, the First Amendment forbids granting emergency relief restricting free speech rights absent a persuasive showing that there was no way to give notice to the enjoined persons in time to allow them to participate in a hearing on the proposed relief. *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175, 182-185 (1968). Considering the fact that Yelp told you more than four years ago how you could obtain information identifying X.X., and considering the fact that you knew how to communicate promptly with Yelp by email when you wanted a prompt response, your deliberate refusal to use those means renders the injunction a violation of the First Amendment under *Carroll v. Princess Anne.*

The First Amendment also bars granting relief on a defamation claim based on the expression of opinions that do not imply unstated false facts, *Milkovich v. Lorain Journal*, 497 U.S. 1, 19-20 (1990), and in this case, the consumer's characterization of your law firm as a "horrible, horrible law firm" certainly is an opinion based on certain facts disclosed in the review. Your complaint does not allege that the underlying facts are false. The First Amendment further requires the plaintiff in a defamation case pertaining to statements on a matter of public concern to present evidence of falsity and of at least negligence. *Philadelphia Newspapers, Inc. v. Hepps*, 475 US 767,

776 (1986). Because the papers we have seen did not include any admissible evidence on these questions in support of the order you obtained, the order was constitutionally invalid.

Second, the order you obtained against "third parties" was precluded by federal law, at least insofar as you seek to apply the order to Yelp. Yelp is the provider of a web site where members of the public — like X.X. — may post their experiences with businesses, but Yelp itself does not write reviews. Yelp's web site is an interactive computer service, and under the Communications Decency Act, 47 U.S.C. § 230, companies that provide interactive computer services cannot be held liable, and cannot be sued, for statements made on their services by information content providers. *Internet Brands, Inc. v. Jape*, 760 S.E.2d 1 (Ga. App. 2014); *Dowbenko v. Google Inc.*, 582 Fed. Appx. 801, 804 (11th Cir. 2014).[2]

Third, the order violates Georgia law in several respects. The statute of limitations for libel claims is one year, O.C.G.A § 9-3-33, and Georgia applies the single publication rule, which provides that the statute of limitations for libel claims begins to run at the time of first publication. *McCandliss v. Cox Enterprises*, 265 Ga. App. 377 (2004) And it is clear that you knew of the allegedly defamatory review at least by October, 2013, more than four years before you filed the lawsuit. Moreover, Georgia law forbids the issuance of injunctions against libel, both as a matter of state constitutional law and as a matter of equitable principle, namely, that equity will not enjoin a libel. *High Country Fashions v. Marlenna Fashions*, 257 Ga. 267, 268 (1987). Your moving papers misleadingly cited a Georgia statute about retractions as implying that a retraction could be ordered — but that statute only provides that a failure to retract and a failure to demand retraction can be used as a basis for seeking or avoiding certain damages claims. *Mathis v. Cannon*, 276 Ga. 16, 25-26 (2002). In addition, you obtained what you claim to be injunctive relief against Yelp in violation of O.C.G.A. § 9-11-65, which requires notice to parties affected and a **valid** explanation for failing to give such notice, and further provides that an injunction issued ex parte and without notice must expire, by its own terms, within thirty days of issuance. Although your moving papers purport to seek a temporary injunction, the form of order on which you secured the judge's signature was not a temporary injunction.

Moreover, although your complaint alleges a claim for libel per se, the only factual statement about your firm that could possibly be actionable, if false, is that the firm failed to return telephone calls and to provide an estimate of cost with respect to a single client. Georgia law holds that charging a business with impropriety in a single instance is not defamation per se; hence you would

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[2]Issuing an order against Yelp would also violate constitutional due process in that there is no basis for asserting personal jurisdiction over Yelp. Yelp has no office in Georgia, and the complaint neither alleges action by Yelp that intentionally directed tortious conduct toward the plaintiff in Georgia, nor alleges action by Yelp in Georgia that has any relationship to the cause of action alleged. Indeed, under section 230, Yelp cannot be treated as a publisher or speaker of the review by defendant Doe X. X., and hence that review cannot afford a basis for personal jurisdiction over Yelp.

have to allege and show special damages in order to obtain relief. *Crown Andersen v. Georgia Gulf Corp.*, 554 S.E.2d 518, 521 (Ga. App. 2001).

Yet another objection under Georgia law is that an affidavit made in the form "to the best of my knowledge and belief" does not supply admissible evidence of the facts set forth in the affidavit. *Winn v. Miller*, 136 Ga. 388, 71 S.E. 658, 659-660 (1911). Such an affidavit can neither support or block a judgment, *Hodges v. Putzel Electric Contractors*, 260 Ga. App. 590, 595-596 (2002), nor support an injunction. *Stinchcomb v. Hoard*, 221 Ga. 77, 80 (1965).

In summary, then, although Yelp believes that its actions thus far represent compliance with the order, Yelp strongly objects to having been subjected to this order. I therefore request that you take prompt action to have paragraphs 3 and 4 of the order rescinded. Failing such action, we intend to move the Court to revise its order. If we are required to file such a motion, we reserve the possibility of seeking sanctions for frivolous litigation, and the possibility of raising additional legal arguments.

Sincerely yours,

Paul Alan Levy