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IN THE THIRD JUDICIAL DISTRICT COURT OF IN AND FOR
UTAH COUNTY, STATE OF UTAH
125 NORTH 100 WEST, PROVO, UT 84601

LEGALLY MINE, LLC,

Plaintiff,

vs.

JOHN DOE,

Defendant

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

Case Number _____

Judge _____

Commissioner _____

TIER 2

Plaintiff, Legally Mine, LLC ("LM") submits the following memorandum in support of LM's motion for a temporary restraining order and preliminary injunction.

FACTUAL BACKGROUND

LM provides personal and business lawsuit protection services and products in the United States. On March 31, 2013, Defendant Doe published a negative review of LM on RipoffReport.com ("ROR"). In the review Doe stated that LM does not deliver service, has slow service, the company is in complete disarray, and provides paperwork like Legal Zoom. The name listed on ROR for Doe is AR from Ohio.

LM became aware of the review Doe posted on ROR on June 20, 2013, when it started appearing on searches of Legally Mine from Google.com.

On March, 4, 2014, LM contacted ROR inquiring as to the identity of Doe. ROR replied the next day providing an email for Doe. On April 14, 2014, LM posted a rebuttal to Doe's post on ROR, asking for Doe to contact LM in order to resolve Doe's concerns. LM's rebuttal asked that Doe contact them within two weeks or LM would seek appropriate legal action. As of May 1, 2014 Doe has not contacted LM.

Since Doe's post appeared on ROR, the sales rate and total sales at LM have decreased significantly. Between May 2013 and April 2014 the ratio of sales at events has fallen from 5.8% to 2.2% and the total number of sales compared from the same period last year has dropped from 185 to 129.

Doe's review is currently listed as the fourth option when Legally Mine is searched on Google.com. The review made by Doe on ROR is still visible at the following URLs:
www.ripoffreport.com/reports/specific_search/legally%20mine;
[Http://www.ripoffreport.com/r/Legally-Mine/Internet-tah-84059/Legally-Mine-Daniel-McNeff-estate-planning-Internet-Utah-1039422;](http://www.ripoffreport.com/r/Legally-Mine/Internet-tah-84059/Legally-Mine-Daniel-McNeff-estate-planning-Internet-Utah-1039422) [http://www.ripoffreport.com/r/Legally-Mine/.](http://www.ripoffreport.com/r/Legally-Mine/)

ARGUMENT

This action arises from John Doe's ("Doe") untrue, defamatory, and damaging comments discovered June 20, 2013. Doe made his comments on RipoffReport.com, which now is one of the first results of a Google search for Legally Mine ("LM"), and makes multiple factual statements that are patently false, including but not limited to: LM does not deliver service, is slow to respond to inquiries, and the company is in total disarray. These comments are tortuous

interference with an economic interest, defamatory, and should be taken off the internet immediately through a temporary restraining order and preliminary injunction (“TRO/PI”).

Despite numerous attempts to contact Doe and resolve this issue, LM has not been able to contact the individual, and has been harmed and continues to suffer appreciable economic harm by the individual’s false and defamatory comments. In order to obtain a TRO/PI under rule 65a of the Utah code you must meet four requirements: 1) The applicant will suffer irreparable harm unless the order or injunction issues; 2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; 3) The order or injunction, if issued, would not be adverse to the public interest; and 4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

While Rule 65A requires that notice be given to the defendant in order to receive the TRO/PI, if the applicant certifies to the court that acceptable efforts have been made to give proper notice and that the applicant will suffer immediate and irreparable loss if the TRO/PI is not granted, the court may grant the requested TRO/PI. Evidence of applicant’s attempts to give proper notice, and of immediate and irreparable loss to applicant if the TRO/PI is not granted is listed below.

LM has already suffered significant economical harm and, even worse, harm to the goodwill and name of the company. The injury to LM significantly outweighs the nuisance of having the defamatory and damaging comment taken down temporarily until an official judgment is forthcoming. The TRO/PI, if issued, would not be adverse to the public interest. LM has two claims against Doe, both of which have a substantial likelihood of success on the merits.

A. LM has Suffered and Continues to Suffer Irreparable Harm

Under Rule 65A of the Utah Code, a TRO/PI is the appropriate remedy to remove defamatory and damaging comments from the internet. When requesting a TRO/PI under rule 65A, the most important consideration is usually the first prong, whether there will be irreparable harm to the applicant. System Concepts, Inc., v. Dixon, 669 P.2d 421, 427 (1983); see also 11 Wright & Miller, Federal Practice and Procedure: Civil § 2948 (1973). In addition, Hunsaker v. Kersh makes it clear that injunctive relief is “not purely limited to cases where no other possible remedy will be available.” Hunsaker v Kersh, 991 P.2d 67, 69 (1999). In Hunsaker, the harm at issue was the defendant’s refusal to allow water to reach the plants and trees on the plaintiff’s land. Id. at 67. While the trial court assumed that because the trees could be given a monetary value, a monetary remedy should be sufficient, the Utah Supreme Court disagreed, saying: “A preliminary injunction is an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one.” Id. at 69. The Court reasoned that while you could give a monetary value to the trees, the value would not be able to account for the loss of agricultural, ornamental, and shade value lost. Id. at 70. Furthermore, the customers that were lost due to the loss of business and goodwill may constitute irreparable harm susceptible to injunction. Id. (See also, Dixon, 669 P.2d at 428–29). The Utah Supreme Court made it clear that loss of business and goodwill may constitute irreparable harm susceptible to injunction, and will depend on the specific facts of the case. Id. at 69-70.

This concept is supported again in System Concepts, Inc., v. Dixon, when the Utah Supreme Court stated that the misappropriation of a business’ goodwill “could be estimated only by conjecture and not by any accurate standard.” System Concepts, Inc., 669 2.Pd at 428. In System Concepts, an employee had broken a proprietary information agreement and moved to a

different company. Id. at 424. More applicable to the case at hand, the employee's public image and high level responsibilities allowed her to develop goodwill for her former employer, which goodwill was appropriated and damaged in her transfer to the competitor business. Id. at 424, 426. The Utah Supreme Court reasoned that a final judgment of monetary damages would not restore the benefits of the goodwill lost, making a TRO/PI the appropriate remedy. Id. at 429.

Just as Hunsaker lost customers and goodwill, the defamatory comments by Doe have caused LM to lose significant goodwill. LM generates the majority of its business through informational seminars and events. The irreparable, continuing harm caused by Doe's comments is affecting the goodwill that those events generate, and while LM can quantify a current economical harm of \$400,000, there is a more pressing, and unquantifiable harm that continues daily. Similar to LM's \$400,000 loss, Hunsaker's lost trees had a specific monetary value attached to them, but the goodwill and customers lost because of the lost trees constituted irreparable harm, just as LM's loss of goodwill and reputation is causing irreparable harm to LM.

B. The Threatened and Continuing Injury to LM Outweighs Whatever Damage the Proposed Order or Injunction may cause Doe, and does not Adversely Affect Public Interest.

While there is not extensive case law relating to these prongs, In re Discipline of Trujillo makes it clear that rule 65A (e)(2) is a balancing of factors that justifies the determination. In re Discipline of Trujillo, 24 P. 3d 972, 979 (2001); see also Hunsaker v. Kersh, 991 P.2d 67. In the case at hand, the balancing effect clearly falls in favor of LM. LM has suffered \$400,000 worth of damages, unquantifiable damages to goodwill and reputation, and continues to face these damages daily. Should the TRO/PI be issued, Doe will have the minor annoyance of having his defamatory review of LM taken down until it can be proven false. Furthermore, defamation law has a clear stance that freedom of speech does not apply to defamatory statements, therefore Doe

has no freedom of speech right nor is there a public interest in his ability to maintain the defamatory review posted on ROR, as discussed in part C under defamation. See New York Times Co. v. Sullivan, 376 US 254 (1964); Curtis Publishing Co. v. Butts, 388 US 130 (1967); and Gertz v Robert Welch, Inc., 505 US 377 (1992).

C. There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim.

Rule 65A requires the applicant to show a substantial likelihood that the merits of the underlying claim will prevail. There are two claims being made against Doe regarding the review posted on ROR: 1) Defamation and 2) Tortious Interference of an Economic or Business Interest (“TIEBI”). Both of these claims have a prima facie showing of success on the merits, though the defamation claim may have passed its statute of limitations allowance. If either one of the claims is deemed to have a substantial likelihood that LM will prevail on the merits, the TRO/PI is an appropriate remedy.

Defamation:

Under Utah defamation law, five elements must be established: (1) The defendant published the alleged defamatory statements in print or in oral communications; (2) the defamatory statements are false; (3) the defendant did not have a privilege to make the defamatory comments; (4) the defendant published the defamatory comments with the “requisite degree of fault;” and (5) the alleged defamatory comments resulted in the plaintiff suffering damages. Jacob v. Bezzant, 2009 UT 37, 21 (Utah 2009)

While the statute of limitations for civil defamation is one year, the discovery rule should be applied in this case. The comments were not discovered until late June of 2013; and the significant damages weren’t recognized until the beginning of 2014. Furthermore, when the

comments were discovered in June they were not nearly as prominent as they are now, having gained traction and publicity over time. It should not be LMs responsibility to look through every blog and website to find possibly defamatory statements, and so the rule of discovery should apply.

In the defamation context, publication means any communication of a defamatory statement to a third person. Restatement (Second) Of Torts § 577(1). The publishing of Does review on the ROR website clearly established publication. If given the opportunity, LM can submit substantial evidence to show that the contents of Doe's review are false; namely, testimonials as to LMs services, documents showing that the business structure is appropriate and working, and legal forms produced by LM that meet the quality standards advertised. Furthermore, Doe published the review on an open website in response to personal issues and problems, indicating that no privilege was present to protect the comments.

While the requisite degree of fault can vary based on the individual, LM is a private business that has not thrust itself into a public issue by the performance of its everyday business, and so the requisite degree of fault that LM must show is that Doe was negligent in making the defamatory comments. Oman v. Davis Sch. Dist., 194 P. 3d 956, 960 (Utah 2008). LM should not be considered a public figure or limited purpose public figure, and so the actual malice standard will not apply. The negligence standard being much less strict than the standard for actual malice, it is clear that Doe posted the review knowingly and the comments have caused significant harm – more than \$400,000, as mentioned above.

Doe published a defamatory review. The review's contents were false. Doe did not have a privilege to publish them, he was negligent in publishing the review, and the review has caused and continues to cause significant harm to LM. Doe is liable for defamation.

TIEBI:

The “tort of intentional interference with prospective economic relations reaches beyond protection of interest in existing contract and protects a party's interest in prospective relationships of economic advantage not yet reduced to a formal contract (and perhaps not expected to be).” Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 302 (Utah 1982). The common law claim for TIEBI requires that three elements be met: 1. there was intentional interference by the defendant with the plaintiff’s existing or potential economic relations, 2. the interference was conducted through improper means, and 3. the interference caused injury to the plaintiff. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982). Improper means requires that “the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules.” Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982). The list of improper means includes “violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.” *Id.* At 307 (quoting Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 210 n. 11, 582 P.2d 1365, 1371 n. 11 (1978)).

The claim made by Doe in his review on ROR was a TIEBI in the prospective relationships of economic advantage of LM. Doe interfered with these relationships by posting false, defamatory claims about how LM operates its business and its products. Doe sought to interfere by encouraging potential clients to “Avoid this company” in his review. The improper means by which Doe sought to interfere with LM’s potential economic relations was defamation, as discussed above. The injury caused by Doe’s interference can be shown in LM’s drop in both sales rates and total sales, resulting in more than \$400,000 worth of damages. The statute of

limitations for TIEBI is two years and so, in either case, LM has a very strong likelihood of prevailing on the merits of this claim.

CONCLUSION

For the foregoing reasons LM respectfully requests a Temporary Restraining Order and/or Preliminary Injunction against Doe, requiring the withdrawal of the defamatory review on ROR and wherever else it has been posted or published.

DATED: May 27, 2014.

Respectfully submitted,

Legally Mine, LLC

/s/ _____
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