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| STATE OF INDIANA |) | IN THE MARION SUPERIOR COURT |
| |) | SS: |
| COUNTY OF MARION |) | CAUSE NO. 49D02-0508-CT-031726 |
| Geoffrey Nase, |) | |
| Nase Publications, Inc. |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Seedwiki.com, 8 th Fold, KENNETH |) | |
| TYLER, in his Official Capacity, |) | |
| LAURA THOMAS and John and/or |) | |
| Jane Doe |) | |
| |) | |
| Defendants. |) | |

**DEFENDANT’S BRIEF IN OPPOSITION TO
MOTION FOR INJUNCTIVE RELIEF**

On August 12, 2005, plaintiffs, Geoffrey Nase (“Nase”) and Nase Publications, Inc., filed a complaint in this case requesting an immediate preliminary injunction. On September 7, 2005, plaintiff filed a motion for Temporary Restraining Order. The Court set this matter for hearing on plaintiff’s motion for TRO on October 6, 2005, giving notice to defendants.

A temporary restraining order is, by definition, an order issued without a hearing or notice. *Indiana State Dept. of Welfare v. Stagner*, 410 N.E.2d 1348, n. 1 (Ind. Ct. App. 1980); *Szany v. City of Hammond*, 352 N.E.2d 866, n. 1 (Ind. Ct. App. 1976). Accordingly, the October 6 hearing, properly understood, is a preliminary injunction hearing.

Simultaneously with the filing of this brief, defendant Laura Thomas is filing a motion to advance and consolidate the final trial on the merits with the October 6 hearing on injunctive relief. Trial Rule 65(A)(2) authorizes such consolidation. For the reasons explained below and

based on the evidence that will be presented at the hearing, defendant submits that plaintiffs' claims are legally and factually groundless and should be resolved expeditiously.

Whether to allow this consolidation is a decision the Court may make after commencement of the hearing. T.R. 65(A)(2). If the Court decides to consolidate, notice should be given to the parties before concluding the hearing. *See Holman v. Koorsen Protection Services*, 580 N.E.2d 984 (Ind. Ct. App. 1991).

Factual Background

The case involves a dispute between Geoffrey Nase, Ph.D., a physiologist who is located in Indianapolis, and a group of people that started a website that has been critical of Nase. The group includes defendant Laura Thomas of Asheville, N.C. and Nicholas Soldo, M.D., an anesthesiologist in Scottsdale, AZ. With this lawsuit, Nase has asked the Court to use its power to close down the website--generally referred to as DebunkingNase.com.

Nase is the leading internet guru on the subject of rosacea, a progressive vascular disorder where facial veins swell and leak into the tissue. Most commonly it is seen with adults who have red-faced acne-like effects but in severe cases, it can lead to the skin turning scarlet or purple for days on end, grotesquely enlarged and misshapen noses, acute neurological pain, and even blindness. It is estimated that about 14 million people are affected by rosacea and many thousands of rosaceans have turned to internet health groups for support and advice.

Nase is a rosacea sufferer himself and until last year worked as a research physiologist at Indiana University. He wrote and self-published a popular book on the subject of rosacea. Over the past 6 or 7 years, Nase has spent thousands of hours on the net, giving free advice on all aspects of rosacea. He claims to sleep only 3 - 4 hours per night, and since leaving his job, he is often on the internet up to 20 hours per day. He says he has written 55,000 posts to internet

message boards to help rosacea sufferers and believes himself to be the world's greatest expert on rosacea.

Towards the end of 2004, Nase was a key player in the creation of a fund-raising group called the Rosacea Research Foundation (the RRF), but this effort collapsed at the end of April 2005, when a dispute arose between Nase and other principals in the RRF. The other principals began having doubts about Nase when he reported a series of medical crises that he was purportedly having during a five-week period from March 21 to April 25, 2005, including:

- 5 operations on his gastrointestinal tract (due to cancer)
- the loss of 45% of his blood
- 3 'deaths' from heart attacks
- 2 major brain surgeries (again due to cancer)
- 1 serious blood infection

Yet Nase was posting long and highly-detailed emails within hours of the last "extremely dangerous" brain surgery, despite having been told he had only a 1% chance of surviving the operation and being placed in the terminal ward.

Nase refused to divulge to his friends where he was being treated for these allegedly life-threatening episodes. Concerned that he might have died, these friends called several hospitals and could not find him anywhere. Nase later stated that he had not used his real name for these hospitalizations. Nase also stated that during one of these crises, he had been in a coma from March 29 to April 3, 2005. Later, Nase claimed to have entered into a contract on April 1, 2005, apparently forgetting about his alleged coma that at the time.

Believing that Nase had not been truthful about these medical conditions, some of the RRF principals along with other interested persons began investigating other statements that Nase had made and found many that were not true. For example:

- Nase wrote on June 7, 2005: "I have never ever made a single penny for anything relating to rosacea." "As God is my witness, not one cent from any doctor, source or product." In fact,

at the time, Nase was on the payroll of an Oregon doctor, receiving \$6,000 per month, for making referrals. Without revealing his financial interest, Nase posted favorably on the internet about the Oregon doctor's treatment of rosacea patients.

- Nase claimed: "After detailed interviews and evaluation, the Medical Licensing Board of Indiana has granted Dr. Geoffrey Nase full privileges to offer in-depth consultations to rosacea sufferers." The Indiana Medical Licensing Board has denied granting any such "privileges."
- Nase claimed that pursuant to an "award" from "the Indiana Affiliate of the American Medical Association," I am allowed to refer to myself as a "rosacea Specialist," to consult with rosacea patients over the internet, to dispense medical advice and to recommend treatments. The Indiana State Medical Association denies making any such award to Nase.

Although Nase reports that he is considered a "medical doctor" and claims to treat patients, he has never received an M.D. degree or been licensed as a physician in any state. He is currently under investigation by the Indiana Attorney General's Office for practicing medicine without a license.

Since the collapse of the RRF in April, the rosacea internet message boards have been angry and chaotic places, where Nase has ruthlessly attacked virtually anyone who disagrees with him, including some people like Laura Thomas and Dr. Soldo who were previously supporters. In response, a coalition of Nase's victims and their sympathizers created a website at <http://www.seedwiki.com/wiki/debunkingnase>. The website has addressed many facts that they believe Nase has lied about on the rosacea boards and treatment recommendations Nase has made that they believe to be unwarranted or dangerous. Nase's critics believe that his abusive attacks on anyone who expresses a view at odds with his own, inhibits the free exchange of information on the internet that would be helpful to rosacea sufferers. By this lawsuit, Nase is asking the Court to impermissibly use the power of the State to silence the defendants' speech.

Argument

Nase is not entitled to a preliminary injunction. In order to receive a preliminary injunction, Nase has the burden of demonstrating: (1) his remedies at law are inadequate; (2) he has a reasonable likelihood of success at trial; (3) his threatened injury outweighs the harm the defendants would receive if an injunction were granted; and, (4) public interest would not be disserved. Primecare Home Health v. Angels of Mercy Home Health Care, 824 N.E.2d 376, 380 (Ind. Ct. App. 2005) (citing Roberts Hair Designers, Inc. v. Pearson, 780 N.E.2d 858, 863 (Ind. Ct. App. 2002)). If a movant fails to prove all of these elements, it is an abuse of discretion to grant a preliminary injunction. Ind. Family and Soc. Serv. Admin., et al v. Walgreen Co., 769 N.E.2d 158, 161 (Ind. 2002) (citing Boatright v. Celebration Fireworks, Inc., 677 N.E.2d 1094, 1096 (Ind. Ct. App. 1997)). Nase will not be able to establish any—much less all—of these mandatory elements. Furthermore, because the defendants’ speech triggers First Amendment protections, there are additional insurmountable legal obstacles that preclude issuance of the requested preliminary injunction. See Mishler v. MAC Sys., Inc., 771 N.E.2d 92, 96 (Ind. Ct. App. 2002).

I. The Adequacy of Remedies at Law

A plaintiff seeking a preliminary injunction must first demonstrate his “remedies at law [are] inadequate, thus causing irreparable harm pending resolution of the substantive action.” Walgreen, 769 N.E.2d at 162 (quoting Tilley v. Roberson, 725 N.E.2d 150, 153-154 (Ind. Ct. App. 2000)). If an adequate remedy at law exists, injunctive relief should not be granted. Id. A party suffering mere economic injury is not entitled to injunctive relief. Id. (citing Xantech Corp. v. Ramco Indus., Inc., 643 N.E.2d 918, 921022 (Ind. Ct. App. 1994)).

Nase claims monetary damages to his “business opportunities and book sales lost.” *Complaint* at 4. Because this claim amounts to an economic injury, Nase has an adequate

remedy at law and is not entitled to a preliminary injunction. See Daugherty v. Allen, 729 N.E.2d 228, 235-36 (Ind. Ct. App. 2000) (“Damages as a result of injury to [business] reputation and credibility are properly recoverable in a tort action” rendering a preliminary injunction improper); St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996) (“Doctors assert . . . their reputations were damaged and their ability to produce income was harmed. These ramifications are insufficient, however, to justify a [preliminary injunction]. The Doctors’ remedy . . . is one at law.”).

II. Reasonable Probability of Success at Trial

Nase’s original complaint asserts causes of action for defamation and copyright infringement. On September 7, 2005, Nase moved to amend his complaint to add a third cause of action for tortious interference with business relationships, and on September 23, 2005, Nase moved to file a second amended complaint to assert a claim for tortious interference with business relationships against Nicholas Soldo, M.D. Plaintiff’s September 7 and September 23 motions have not yet been ruled upon by the Court. For the reasons set forth below, Nase is unlikely to succeed on any of these claims.

A. Defamation

To establish defamation, a plaintiff must prove: (1) communication; (2) with a defamatory imputation; (3) malice; (4) publication; and, (5) damages. Glasscock v. Corliss, 823 N.E.2d 748, 753 (Ind. Ct. App. 2005) (citing Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992), trans. denied). Furthermore, truth “of the communication at issue is a complete defense to defamation.” Gatto v. St. Richard Sch., Ins., 744 N.E.2d 914, 924 (Ind. Ct. App. 2002) (citing Assoc. Corp. of N. Am. v. Smethley, 621 N.E.2d 1116, 1119 (Ind. Ct. App. 2003)).

1. The “Actual Malice Standard”

When communication alleged to be defamatory concerns “a statement of public interest,” Indiana requires proof of “actual malice.” Journal-Gazette Co. v. Bandido’s, Inc., 712 N.E.2d 446, 451 (Ind. 1999), cert. denied (citing Aafco Heating & Air Cond. Co. v. N’west Publ. Co., Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied). “Actual malice” is present when a defendant publishes a defamatory statement “with knowledge that [the statement is] false or with reckless disregard to whether it [is] false.” Id. at 456. Actual malice must be proven by clear and convincing evidence. Id.

The defendants’ communications at issue clearly involve a matter of public interest and thus, require Nase to establish actual malice. Numerous members of the public suffer from rosacea. An unlicensed individual rendering medical advice, claiming fraudulently-manufactured credentials, taking money for internet referrals without disclosure, and using false claims of illness to evoke sympathy not only constitutes a public issue but constitutes a risk to public safety. The defendants believe Nase’s representations constitute a danger to the public because rosacea sufferers’ desperation to ameliorate their condition renders them particularly vulnerable to deception

Defendant will further prove that they have not recklessly disregarded the truth in exercising their right of free speech on the website. Many of Nase’s misrepresentations are revealed through discrepancies contained in Nase’s own statements. Others were identified through sources like the Indiana Medical Licensing Board that defendants reasonably believed to be credible. The only person who has recklessly disregarded the truth in this case is the plaintiff, Geoffrey Nase. Accordingly, Nase will not be able meet his burden under the law to demonstrate by clear and convincing evidence that the defendants were reckless as to the truth or had knowledge that their statements about Nase were false.

2. Truth as a Complete Defense

Aside from Nase's inability to establish actual malice, the truth of the defendants' statements is a complete bar to their liability. Defendants expect to prove that all pertinent statements on the website are true.

B. Copyright Violation

Nase also claims the defendants committed a copyright violation when they quoted his work while exposing his errors and misrepresentations. However, "reproduction . . . for purposes such as criticism . . . is not an infringement of copyright." 17 U.S.C. § 107. Because the defendants quote Nase's work for the purpose of criticism, there can be no copyright violation and Nase's copyright infringement cause of action cannot succeed on the merits.

C. Tortious Interference with business relationships

Defendants do not expect that Nase will be able to prove that the website had any effect on his business relationships. The only business relationship specifically mentioned in the complaint concerns Dr. Jerrold Darm but Nase acknowledged in an email that this relationship was over before the DebunkingNase website was up. The relationship ended, not because of the website, but because Dr. Darm had been suspended from practicing medicine in two states and had lied to Nase about the incident that led to these suspensions.

In addition, as a matter of law, Nase may not sidestep the above-cited First Amendment protections by characterizing his cause of action as tortious interference with a business relationship. See Near E. Side Comm. Org. v. Hair, 555 N.E.2d 1324, 1333-1334 (Ind. Ct. App. 1990) (applying First Amendment protections to tortious interference with contract); see also Barlow v. Sipes, 744 N.E.2d 1, 10 (Ind. Ct. App. 2001) (applying First Amendment analysis to tortious interference with contract but concluding the speech at issue concerned a private matter).

Indeed, it would be very problematic not to apply First Amendment protection to the speech at issue. If the public were not free to criticize or call into question medically-related matters for fear of tortiously interfering with a contract, asbestos linings, radon watches, and salt dehydration pills might still adorn American society.

Furthermore, even in the absence of First Amendment protection, tortious interference with contract requires a plaintiff to prove the “absence of justification” of the defendant’s interference. Bilimoria Computer Sys., LLC v. Am. Online, Inc., 829 N.E.2d 150, 156 (Ind. Ct. App. 2005) (citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1234 (Ind. 1994)). The act of alerting rosacea sufferers of Nase’s misrepresentations so that they may make a more informed decision as to whether to take his advice more than justifies any interference with any alleged—or ill-gotten—business relationships that Nase may have developed.

III. The Harm to the Defendants

It is equally implausible for Nase to assert the harm of interfering with the Defendants’ right to free speech is outweighed by the harm of requiring him to demonstrate a remedy at law. Free speech is a fundamental right of every American citizen. Requiring Nase to establish a remedy at law, as is required of virtually every other plaintiff that files a cause of action in Indiana, can hardly be described as a harm that outweighs curtailment of the constitutionally-guaranteed privilege of free speech. As such, Nase is not entitled to a preliminary injunction.

IV. The Harm to the Public

The issuance of a preliminary injunction would also constitute a substantial harm to the public. The purpose of First Amendment protections is to preserve the “marketplace of ideas” wherein the “truth will always prevail.” Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969). Issuing a preliminary injunction in the case at bar would deprive the public of the marketplace of

ideas in two meaningful manners: (1) it would hinder the public's ability to learn of the truth in order to evaluate Nase's public statements and (2) it would discourage other citizens from exposing harmful behavior. Inhibiting the marketplace of ideas constitutes a fundamental deprivation of the public's interest and forecloses Nase's ability to obtain a preliminary injunction.

V. Additional First Amendment Protections: No Prior Restraints on Speech

In addition to the "actual malice" test associated with defamation and tortious interference with contract, First Amendment protections provide independent obstacles to the issuance of a preliminary injunction restraining speech concerning a public matter.

Preliminary injunctions that forbid future speech activities "are classic examples of prior restraints." Mishler, 771 N.E.2d at 95 (citing Alexander v. U.S., 509 U.S. 544, 550 (1993)). The vice of a prior restraint is that "communications will be suppressed either directly or by inducing excessive caution in the speaker before an adequate determination that it is unprotected by the First Amendment." Id. (citing Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376 (1973)). A prior restraint is clothed with a "heavy presumption" against constitutional validity. Id. (citing Austin v. Keefe, 402 U.S. 415 (1971)). "Certain areas subject to prior restraints include war-related information, obscene material, and statements which in and of themselves provoke violence." Ho, 663 N.E.2d at 1223 (citing Near v. Minnesota, 283 U.S. 697, 716 (1931)). "A prior restraint is not permissible for either a publication *or a republication* of a statement of public interest." Id. (citing Am. Broad. Co., Inc. v. Smith Cabinet Man. Co., Inc., 160 Ind. App. 367, 312 N.E.2d 85 (1974)) (emphasis added).

As stated above, the Defendants' exposure of Nase's danger to rosacea sufferers clearly constitutes a "statement of public interest." Because the Defendants' speech is not war-related, obscene, or prone to provoking violence, Nase may not receive a preliminary injunction.

Conclusion

Nase cannot establish any of the mandatory elements necessary to grant a preliminary injunction, and First Amendment prohibitions against prior restraints preclude the issuance of a preliminary injunction. As such, Nase's Motion must be denied.

In addition, based on the law as outlined above and the evidence that will be submitted at the hearing, it will become clear at the hearing that Nase's claims are factually and legally groundless. Under these circumstances, the Court should grant defendant's motion to consolidate the trial on the merits with this hearing and render a final judgment in favor of defendants and against plaintiffs.

Respectfully submitted,

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