

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

SMILEDIRECTCLUB, LLC,)
)
 Plaintiff,)
)
 v.) CASE NO. _____
)
 GIZMODO MEDIA GROUP, LLC D/B/A) JURY DEMAND
 LIFEHACKER AND LIFEHACKER.COM)
 and NICK DOUGLAS,)
)
 Defendants.)

COMPLAINT

Plaintiff SmileDirectClub, LLC (“Plaintiff” or “SmileDirectClub”), for its Complaint against Gizmodo Media Group, LLC d/b/a Lifehacker and Lifehacker.com (“Gizmodo”) and Nick Douglas (“Douglas” and collectively with Gizmodo, “Defendants”), states as follows:

I. THE PARTIES

1. Plaintiff is a limited liability company organized and existing under the laws of the State of Tennessee, with its principal place of business located at 414 Union Street, 8th Floor, Nashville, TN 37219.

2. Upon information and belief, Gizmodo is a Delaware limited liability company based in New York, New York. Gizmodo’s registered agent for service of process is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. Upon information and belief, Gizmodo is wholly-owned by Univision Communications, Inc. (“Univision”).

3. Upon information and belief, Douglas is a resident of New York, New York.

II. INTRODUCTION

4. This is an action for defamation and trade libel under Tennessee law.

5. On April 6, 2018, Gizmodo through its weblog called Lifestacker, which is located at www.lifestacker.com, published an article written by Douglas entitled “You Could Fuck Up Your Mouth With SmileDirectClub” (the “Untruthful Article”).

6. Through this outrageous, misleading and vulgar title, Gizmodo intended to lure the 24 million readers of Lifestacker to an article filled with unsubstantiated false statements and innuendo that attacks Plaintiff’s products and services.

7. Although Douglas readily admits in the Untruthful Article that he never used or even tried Plaintiff’s products and services, he proceeds with a hatchet job based upon a comparison to a failed company that is not comparable for purposes of his statements; citation to a message board that does not support his statements; and conclusions that Plaintiff’s products and services are “bad” and “cheap.”

8. All these false statements and the defamatory title are done under the guise of “journalism” without any disclaimer that the statements are allegedly his opinion.

9. Even when confronted with the falsity of their article and admitting that one of the citations does not support the statements in the article, Defendants refuse to remove the Untruthful Article.

10. They refuse to do so because it is how they make their money.

11. Douglas and Gizmodo made such statements and used the outrageous “You Could Fuck Up Your Mouth With SmileDirectClub” title to bait consumers into viewing the article so that they could obtain revenues from banner advertising.

12. This continues a pattern over a decade of defamatory shock-style “journalism” by Gawker Media and its progeny (such as Lifehacker), whose weblogs were bought out of bankruptcy and now are held by Gizmodo.

13. Douglas, as a former reporter for Gawker, also has ties to the now defunct Gawker Media.

14. Defendants willfully, intentionally, and maliciously created a false story to drive “clicks.”

15. Defendants have been successful in this regard as shown by moving up the Google.com search results such that anyone who searches for “smiledirectclub” on Google.com now sees

You Could Fuck Up Your Mouth With SmileDirectClub - Lifehacker

<https://lifehacker.com/you-could-fuck-up-your-mouth-with-smiledirectclub-1825045...> ▼

4 days ago - Until recently, if you wanted to straighten your teeth with braces or aligners, you needed to make several trips to an orthodontist, which would cost you about \$4000 or more. But for the past few years, companies like **SmileDirectClub** have offered an at-home aligner service for about half the cost, which ...

on the same results page as Plaintiff.

16. Upon information and belief, consumers conduct over 20,000 searches daily for “smiledirectclub” or variants thereof on Google.com.

17. Defendants’ Untruthful Article constitutes defamation and trade libel and should be enjoined, and compensatory and punitive damages assessed with the swiftest possible justice.

III. JURISDICTION AND VENUE

18. Upon information and belief, this Court has personal jurisdiction over Defendants because (a) the defamatory actions alleged herein focus on Plaintiff’s activities based in Tennessee; (b) Tennessee was the focal point of both the article at issue and the injuries and

harm suffered; (c) Defendants' unlawful actions impugn the reputation of Plaintiff who is a Tennessee limited liability company based in Nashville, Tennessee; and (d) the actions at issue were directed to over 311,000 unique devices in Tennessee that have viewed the lifehacker.com weblog.

19. This Court also has personal jurisdiction over Defendants because the advertisements shown next to the article at issue in this Complaint directly target specific consumers in Tennessee who view articles on the lifehacker.com weblog. Gizmodo directly and Douglas indirectly, as an employee of Gizmodo, financially benefit from the targeted advertising on the lifehacker.com weblog. According to at least one source, www.onlineincometeacher.com, the lifehacker.com weblog, one of several weblogs that are part of Gizmodo's enterprise, has a daily income of \$4,821 from advertising banners. A true and correct copy of <http://onlineincometeacher.com/money/top-earning-blogs/> is attached hereto as Exhibit 1.

20. In addition, this Court has personal jurisdiction over Gizmodo because, upon information and belief, it is wholly-owned by Univision. Univision offers "Channel 42" on Comcast and AT&T in and around Nashville, Tennessee, through at least its local affiliate WLLC-LP. Upon information and belief, WLLC-LP is owned by Solo Network, LLC, a Delaware limited liability company registered to do business in Tennessee and conducts business under the registered assumed name of "Channel 42."

21. Further, this Court has personal jurisdiction under Tennessee's long-arm statute, Tenn. Code Ann. § 20-2-201 *et seq.*, because, upon information and belief, (1) Defendants have transacted business in Tennessee; (2) the tortious acts or omissions occurred in Tennessee; (3) the damages occurred in Tennessee to a company with its principal place of business in

Tennessee; and (4) jurisdiction based on Defendants' contacts with Tennessee is not inconsistent with the Constitution of the State of Tennessee or the Constitution of the United States.

22. Venue is proper in this Court because (1) the cause of action arose in Nashville, Tennessee; (2) the harm and injury was and continues to be suffered in Nashville, Tennessee; and (3) upon information and belief, Defendants do business directly or indirectly and financially benefit from such business in Nashville, Tennessee.

IV. THE CONTROVERSY

A. Plaintiff's Services

23. Plaintiff offers licensed dentists and dental practices access to its web-based teledentistry platform and a comprehensive package of related non-clinical business and administrative services that permit those dentists to offer a more affordable option for orthodontic treatment of minor to mild cases of malocclusion with "invisible" corrective aligners.

24. "Malocclusion" is a misalignment or incorrect relation between the teeth and the two dental arches when they approach each other as the jaws close. More simply, "malocclusion" refers to having a poor bite or crooked teeth.

25. At the core of SmileDirectClub's business model is its innovative web-based teledentistry platform, which is designed around the SmileCheck® system. The SmileCheck® system is a proprietary system that connects patients with their treating dentist through a web-based portal. Through the SmileCheck® system, a dentist or orthodontist can view images and dental impressions of his or her patients, review and develop treatment plans, prescribe treatment, track the performance of the case through retention, and document communications with patients. Likewise, a patient can access the SmileCheck® system to upload images, view their recommended treatment plan and keep apprised of developments in their treatment.

26. Dentists and orthodontists who choose to engage the services of SmileDirectClub are licensed and qualified to practice dentistry in the state in which they treat patients.

27. SmileDirectClub has a nationwide network of over 225 state-licensed dentists and orthodontists with years of experience in invisible aligners.

B. Defendants' Intentional and Unlawful Conduct

28. Lifehacker.com ("Lifehacker") is the location of a weblog "about life hacks and software" which launched on or about January 31, 2005.

29. According to Fusion Media Group, Lifehacker reaches over 24 million people monthly, of which 15 million are in the United States. A true and correct copy of data from Fusion Media Group is attached hereto as Exhibit 2.

30. According to Fusion Media Group, Tennessee ranks 21st out of the U.S. States among "uniques" (defined as "The number of distinct devices that visit this property.") with around 311,600 distinct devices visiting Lifehacker. This means that approximately 311,600 separate devices in Tennessee have been used to visit Lifehacker. A true and correct copy of data from Fusion Media Group is attached hereto as Exhibit 3.

31. Lifehacker was originally part of the Gawker Media enterprise.

32. Gawker Media was an enterprise with a history of defamatory conduct.

33. Among other claims of defamation and filed lawsuits, Gawker Media was accused of publishing and then retracting an article attempting to "out" a married executive at Conde Nast over a gay porn star's alleged texts.

34. Gawker Media was also sued for defamation by The Daily Mail for attacking its journalistic standards and, upon information and belief, ultimately settled the case.

35. Gawker Media ultimately filed for bankruptcy after illegally publishing a sex video online involving Terrey Gene Bollea a/k/a "Hulk Hogan;" refusing to comply with a court

order to remove the video; and having a jury find in favor of Mr. Bollea in the amount of \$115 million in compensatory damages and \$25 million in punitive damages.

36. On September 21, 2016, Univision purchased certain of Gawker Media's assets including Lifestyler and moved those assets to Gizmodo. Univision did not purchase the Gawker weblog from Gawker Media.

37. Gizmodo, like its predecessor Gawker Media, continues to engage in defamatory conduct.

38. Douglas is currently writer for Lifestyler and formerly a writer for Gawker.

39. On the afternoon of April 6, 2018, Lifestyler published the Untruthful Article written by Douglas entitled "You Could Fuck Up Your Mouth With SmileDirectClub." A true and correct copy of the Untruthful Article as published by Lifestyler at www.lifestyler.com is attached hereto as Exhibit 4.

40. Defendants do not provide any evidence in the Untruthful Article to support the extreme statement in the title that use of Plaintiff's products and service will cause harm – especially in such a significant and vulgar manner. In fact, the only evidence to support any of the defamatory statements in the Untruthful Article is that Douglas went to an orthodontist to be treated with another company's aligner products and Douglas caused harm to himself because he did not follow the directions for use of the aligners as instructed by his orthodontist. None of the harm caused by Douglas to himself had anything to do with Plaintiff.

41. Per his admission in the Untruthful Article, Douglas did not purchase or have any experience with Plaintiff's products or services. The only experience he had was his improperly using retainers provided to him by his orthodontist.

42. In the Untruthful Article, Douglas made several unsupported and defamatory statements separately and in conjunction with the outrageous title regarding Plaintiff's products and services.

43. All the statements are underneath the defamatory and inflammatory title "You Could Fuck Up Your Mouth With SmileDirectClub."

44. The Untruthful Article does not contain a disclaimer that it constitutes opinion only or that the statements therein do not reflect the views of Gizmodo or Lifehacker.

45. In the Untruthful Article, Mr. Douglas acknowledged that he has never used Plaintiff's products and services.

46. Yet, he disparages Plaintiff by comparing its teledentistry services to the failed CrystalBraces company that had allegedly had a single dentist available.

47. If Douglas had conducted any reasonable research whatsoever, he would have quickly found that SmileDirectClub has a network of over 225 state-licensed dentists and orthodontists with years of experience in invisible aligners. A true and correct copy of publicly available information regarding Plaintiff's network of state-licensed dentists and orthodontists (available at <https://blog.smiledirectclub.com/doctors-behind-your-smile/?referrer=category-ask-the-doctor>) is attached hereto as Exhibit 5.

48. SmileDirectClub's service should not and cannot be compared to the failed CrystalBraces company's services.

49. Mr. Douglas implies in a hyperlink to "orthodontic forums" in the Untruthful Article that there are many stories regarding remote orthodontists' inability to "give adequate care and counsel."

50. He attempts to link those stories to Plaintiff.

51. In truth, the hyperlink simply goes to www.bracesforum.net.

52. The bracesform.net website is an online forum where people all over the world ask questions or complain about all types of braces or simply seek to communicate with others who may have braces.

53. A review of the first two pages of the bracesforum.com website does not reveal any complaints regarding remote orthodontists. In fact, there are neither any complaints of the nature in the Untruthful Article nor enough to justify the citation in the article and the implication that dental providers involved with Plaintiff's teledentistry program are unable to provide adequate care and counsel.

54. In fact, directly to the contrary, Plaintiff has been enormously successful with tens of thousands of happy customers who have used its teledentistry program.

55. Finally, Douglas makes the unsubstantiated statement that, if one cannot afford a traditional orthodontist, SmileDirectClub is a "bad" option.

56. He further refers to SmileDirectClub's products as "cheap" in connection with his allegation that the products are "bad."

57. Douglas's conclusion is not based on any factual evidence and is unsupported.

58. Melissa Kirsch is employed by Lifehacker as its editor-in-chief.

59. Upon information and belief, Kirsch is responsible as Lifehacker's editor-in-chief to ensure the journalistic standards of Lifehacker's reporters such as Douglas.

60. Upon information and belief, Kirsch saw and approved of Douglas's post and in so doing, gave Lifehacker's blessing to publish the Untruthful Article.

61. The number of “uniques” for the lifehacker.com website on April 6, 2018 was approximately 739,861 in the United States, which means there were at least that many visitors to the site on that date.

62. On April 8, 2018, counsel for Plaintiff emailed a letter to Gizmodo, Lifehacker, Douglas, and Kirsch in which Plaintiff demanded that Gizmodo and Douglas immediately remove the Untruthful Article. A true and correct copy of the April 8, 2018, letter is attached hereto as Exhibit 6.

63. On April 9, 2018, counsel for Plaintiff caused the letter to be hand delivered upon Gizmodo. Gizmodo acknowledged receipt as shown in the email from Gizmodo’s General Counsel. A true and correct copy of the email is attached hereto as Exhibit 7.

64. On April 10, 2018, counsel for Plaintiff received an email from Gizmodo in response to Plaintiff’s April 8, 2018 email and April 9, 2018 letter. A true and correct copy of the response email is attached hereto as Exhibit 8.

65. Gizmodo asserts in its email that “Mr. Douglas meant to link to an additional discussion forum about aligners, and he will update the article to do so.”

66. Thus, Gizmodo admits that the Untruthful Article’s link to www.bracesforum.net is misleading but refuses to take the Untruthful Article down.

67. Gizmodo also asserts in its email that “we do not believe that the article is inaccurate or defamatory,” “it also indicates that many people have been pleased with SmileDirectClub,” and the author “repeatedly stresses the benefit of SmileDirectClub,” but does not at all address how the title of the Untruthful Article, “You Could Fuck Up Your Mouth with SmileDirectClub,” is not misleading in light of these statements.

68. In fact, the statements in Gizmodo's response letter confirm that the title of the Untruthful Article is misleading.

69. Despite Plaintiff's demand and the admissions in the Gizmodo email, Gizmodo and Douglas have not removed the Untruthful Article.

70. At the date and time of the filing of this Complaint, the Untruthful Article remains available at <https://lifehacker.com/you-could-fuck-up-your-mouth-with-smiledirectclub-1825045372>.

71. Lifehacker, through its villainous lineage and Gawker Media parentage, continues the bad conduct of Gawker Media.

72. At best, Lifehacker's Untruthful Article shows a reckless indifference for the truth, which is consistent with Gizmodo's pattern of conduct going back to its origins with Gawker Media.

73. Gizmodo and Douglas have an obligation to exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of a statement in an article before publishing it.

74. Gizmodo, Kirsch, and Douglas failed to exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of the statements in and the title of the Untruthful Article and were negligent in failing to ascertain the truth or falsity of the title and statements when they could have easily done so through internet research or a call to Plaintiff.

75. The words of the Untruthful Article, including its title, taken at their plain and natural import, are intended to tarnish or destroy Plaintiff's reputation among the consuming public and discourage consumers from purchasing Plaintiff's products and services.

76. Given the outrageous title of the Untruthful Article, the falsity of the statements, and the direct attack, it is reasonable to believe that the statements were made intentionally, willfully, wantonly, and maliciously.

77. It also is reasonable to believe that the article itself was intended to gain a financial benefit through click-through revenues and shock-value publicity.

78. As evidenced, for example, by the publication of the Hulk Hogan video, Defendants and their related companies are known for attempting to create controversy to drive up click-through revenues.

79. Indeed, the vulgar and inflammatory title of the Untruthful Article is intended to catch the consumer's attention and draw the reader to open the article and see the click-through advertisements next to the Untruthful Article. In so doing, Defendants seek to profit from the defamatory and inflammatory article including without limitation the title and statements in the Untruthful Article.

C. Plaintiff's Harm from Defendant's Actions

80. Defendants have caused significant harm to SmileDirectClub.

81. Defendants' Untruthful Article was published to potentially over 24 million people, of which 15 million are in the United States and of those, over 300,000 are in Tennessee.

82. Defendants' Untruthful Article was intended to deter consumers not just in Tennessee, but nationwide, from purchasing Plaintiff's products and services.

83. Even if a very small percentage of the readers of the Untruthful Article decide not to purchase products or services from Plaintiff or cease purchasing products or services from Plaintiff, it would result in millions of dollars of lost revenue to Plaintiff.

84. Further, the proliferation of the Untruthful Article has harmed and will continue to harm Plaintiff's reputation and may be cited by other authors such that the harm to Plaintiff's reputation is exponentially increased.

85. Attached hereto as Exhibit 9 is a screen capture of the results of an April 10, 2018 Google search for "smile direct club". The Untruthful Article is listed just under the listings for Plaintiff's website and Plaintiff's twitter feed. The vulgar and misleading title of the Untruthful Article is prominently displayed in the listing.

86. Attached hereto as Exhibit 10 is a screen capture of the results of an April 10, 2018 Google search for "smiledirectclub". The Untruthful Article is listed just a few listings under the listing for Plaintiff's website. The vulgar and misleading title of the Untruthful Article is prominently displayed in the listing.

87. Exhibit 9 and Exhibit 10 further demonstrate the substantial and irreparable harm being caused by Gizmodo's publication of the Untruthful Article.

V. CAUSES OF ACTION

COUNT I

DEFAMATION

88. Plaintiff incorporates the preceding paragraphs as though fully set forth herein.

89. Defendants published the Untruthful Article on April 6, 2018 via the lifehacker.com weblog.

90. The Untruthful Article remains available to the public generally and on display at the lifehacker.com weblog.

91. In the Untruthful Article, Defendants made the false statements and an untruthful and misleading title as referenced above with knowledge that the title and statements were false

and defaming to Plaintiff, or with reckless disregard for the truth of the statements and title, or with negligence in failing to ascertain the truth of the statements and title.

92. Defendants had an obligation to exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of a statement and title in the Untruthful Article before publishing it.

93. Defendants failed to comply with their obligation to exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of a statement in the Untruthful Article before publishing it

94. Defendants' false statements in the Untruthful Article and its title have caused Plaintiff damages.

95. Defendants made the false statements and titled the Untruthful Article intentionally, willfully, wantonly, and maliciously.

96. Defendants have a long-history and practice of making false and defamatory statements yet persist in doing so.

97. Plaintiff is entitled to an award of compensatory and punitive damages against Defendants, jointly and severally.

98. Plaintiff is entitled to a temporary restraining order and temporary and permanent injunctive relief against Defendants to stop display, reproduction, and/or publication of the Untruthful Article.

COUNT II

TRADE LIABLE/PRODUCT DISPARAGEMENT

99. Plaintiff incorporates the preceding paragraphs as though fully set forth herein.

100. Defendants published the Untruthful Article on April 6, 2018 via the lifehacker.com weblog.

101. The Untruthful Article remains available to the public generally and on display at the lifehacker.com weblog.

102. Defendants have made, and continue to make, in the Untruthful Article, including in its title, at least the false and defamatory statements identified above.

103. Defendants' false statements in the Untruthful Article and its title are direct attacks on the quality of Plaintiff's products and services.

104. Defendants made the false statements and titled the Untruthful Article with knowledge that the statements and title were false, or with reckless disregard for the truth or falsity of the statements and title.

105. Defendants' false statements, including the title, were published to potentially over 24 million people, of which 15 million are in the United States, and of those, over 300,000 are in Tennessee.

106. Defendants intended for publication of the false statements in the Untruthful Article and its title to result in harm to the interests of Plaintiff and recognized or should have recognized that the false statements were likely to cause harm.

107. Defendants' false statements in the Untruthful Article and its title have caused Plaintiff damages.

108. Defendants made the false statements and titled the Untruthful Article intentionally, willfully, wantonly, and maliciously.

109. Plaintiff is entitled to an award of compensatory and punitive damages against Defendants, jointly and severally.

110. Plaintiff is entitled to a temporary restraining order and temporary and permanent injunctive relief against Defendants to stop display, reproduction, and/or publication of the Untruthful Article.

VI. ENTITLEMENT TO INJUNCTIVE RELIEF

111. Plaintiff incorporates the preceding paragraphs as though fully set forth herein.

112. By reason of Defendants' acts alleged herein, Plaintiff has and will suffer immeasurable, and thus irreparable, damage to its business, reputation, and goodwill.

113. Upon information and belief, Defendants intend to continue to do the acts complained of herein unless restrained and enjoined.

114. Plaintiff's remedy at law is inadequate.

115. Plaintiff is entitled to a temporary restraining order, and temporary and permanent injunctions prohibiting Defendants, and their affiliates, agents, and employees, and anyone acting with his authority or on his behalf, from directly or indirectly displaying, reproducing, or otherwise publishing the Untruthful Article.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

A. The Court enter a judgment in favor of Plaintiff and against Defendants as to all causes of action alleged herein;

B. That this Court issue a temporary restraining order and temporary and permanent injunctions pursuant to Tennessee law, and equity, enjoining and restraining Defendants, and their affiliates, agents, and employees, or anyone acting with its authority or on their behalf, from directly or indirectly displaying, reproducing, or otherwise publishing the Untruthful Article;

C. That, within five (5) days of issuance of a temporary restraining order, preliminary and/or permanent injunctions, the Court order Defendants to file a sworn statement

under oath and subject to penalty of perjury that they have fully complied with the terms of the restraining order and injunctions;

D. That Defendants be liable to Plaintiff for any award of monetary damages, treble damages, punitive damages, costs, and/or attorney fees;

E. That pre-judgment and post-judgment interest be awarded to Plaintiff; and

F. That this Court grant such other and further relief as it shall deem just.

DEMAND FOR JURY TRIAL

Trial by jury is hereby demanded for all issues so triable.

Respectfully submitted,

BAHOU MILLER PLLC

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