PUBLIC CITIZEN LITIGATION GROUP
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BY EMAIL: mhigbee@higbeeassociates.com

November 6, 2019

Matthew Higbee, Esquire
Higbee & Associates
Suite 112
1505 Brookhollow Drive
Santa Ana, California 92705

Re: *Anderson v. Seliger and Hirsch*
Mockingbird Foundation v. Luong

Dear Mr. Higbee:

We appreciate that your November 1, 2019 email makes progress toward reducing the impact of the threats of litigation that you and your staff attorneys and staff paralegals directed to plaintiffs, and to one of the Mockingbird Foundation's officers. We do not, however, agree that your email eliminates the "case or controversy" between the plaintiffs and the defendants in these two cases. To the contrary, your email confirms that a live and concrete controversy remains.

Your email makes clear that each of your clients believes that he has a valid claim for infringement against the plaintiffs whenever a deeplink to one of their photographs has appeared on a forum that they host, and that such a claim can be made whenever such a deeplink occurs in the future. Whether you bring such a claim will depend, apparently, on whether such deeplinks have been removed upon demand, and whether a further investigation reveals a possibility of collecting a judgment from one or both plaintiffs.

The very fact that your email sets forth your clients' view that they have valid claims whenever a deeplink is posted to a forum, while issuing a very narrow license confined to particular photographs posted on particular dates on particular pages, puts in stark relief the controversy that remains between the parties. Moreover, the forums alleged in the complaint have hundreds of thousands or indeed millions of posts; the plaintiffs have no way of knowing which, if any, of the photographs or deeplinks posted by their forum users might involve one or more of your clients' photographs. The plaintiffs do not wish to be subject to claims in the future over such posts, and they want to be free to operate interactive web sites free of such threats of litigation.

Binding precedent makes clear that voluntary cessation in response to litigation does not moot the litigation, unless the party claiming mootness "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."

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Already, LLC v. Nike, Inc., 568 U.S. 85 (2013). But here, you pulled back only once challenged; this conduct is particularly problematic in light of your firm's practice of sending multiple threatening emails demanding payments even from alleged infringers who might well not have sufficient resources to pay a judgment. Although you have claimed that some internal communications from your client made the Luong claim a "closed file," you did nothing to inform Mockingbird, or Ellis Goddard personally, of that fact. If Mockingbird had sent you a check for $500 at that point, surely you would not have torn it up because you felt the Foundation was judgment-proof. To the contrary, if your firm's conduct in other cases is any guide, you would likely have demanded more

Already v. Nike shows the broad disclaimer of future claims that is needed to moot a previously-ripe controversy. If your clients are willing to grant our clients a broad license or covenant not to sue for all of their photographs, comparable to the broad covenant not to sue given by Nike, and as in the *Nike* case are willing to make their licenses permanent and irrevocable, then we would agree that the case had become moot. Otherwise, we do not intend to dismiss the complaints. Anderson might well accept a license that is limited to **past** postings to his forum, but Mockingbird needs a license that extends to future postings. I'd be glad to discuss these specifics with you if you desire to do so.

We do intend to amend the complaints, in light of your email, to set forth more precisely the nature of the actual controversy. Assuming that we cannot obtain such broad licenses, we will endeavor to amend the complaints promptly so that the fourteen-day period for you to respond to the amended complaints will kick in before the arrival of your current deadlines to respond.

In addition, we will need to meet and confer to begin the preparation of the scheduling orders in these two cases. Although we may well move for summary judgment in response to your motion to dismiss, evidence can be presented in support of or in opposition to a mootness claim, and there may well be discovery that could bear on the exercise of jurisdiction over plaintiffs' claims, relating to the pattern of trying to shake small payments from judgment-proof alleged infringers. For example, how many demand letters have you sent on behalf of these three photographers over the past four years, what amounts have been demanded, and how much have you collected in response to such letters? How are the resultant revenues divided? Is it a straight contingency, and if so, what is the percentage that the clients receive? Is the formula still the "half and half" approach that you described to Fast Company when they wrote about your work last year? Melendez, *Here Come The Copyright Bots For Hire, With Lawyers In Tow* (Feb. 21, 2018).

Sincerely yours,

Paul Alan Levy