

Paul Alan Levy
 Gregory Beck
 Public Citizen Litigation Group
 1600 20th Street NW
 Washington, D.C. 20009
 (202) 588-7725 Telephone
 (202) 588-7795 Facsimile
 plevy@citizen.org
 gbeck@citizen.org

Bruce P. Keller
 Jeffrey P. Cunard
 DEBEVOISE & PLIMPTON LLP
 919 Third Avenue
 New York, New York 10022
 (212) 909-6000 Telephone
 (212) 909-6836 Facsimile
 bpkeller@debevoise.com
 jpcunard@debevoise.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

----- X
 ROBERT ALLEN LEE, individually :
 and on behalf of all others similarly situated, :

Plaintiffs,

v.

Civil Action No. 11 cv 8665 (PAC)
 ECF CASE

STACY MAKHNEVICH and ASTER DENTAL, :
 a/k/a CHRYSLER BUILDING DENTAL :
 ASSOCIATION, a/k/a NORTH EAST P.C., a/k/a :
 SOUTH EAST DENTAL SUITE, a/k/a LINCOLN :
 SQUARE DENTAL ARTS, a/k/a LINCOLN :
 SQUARE DENTAL ARTS OF MANHATTAN, :
 a/k/a CHRYSLER DENTAL, :

Defendants.

----- X

**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND INDIVIDUAL ACTION FOR DECLARATORY RELIEF AND DAMAGES**

NATURE OF THE ACTION

1. This case is a class action for declaratory and injunctive relief and an individual action for declaratory relief and to recover damages caused by defendants' wrongful conduct.

2. Defendants are a New York dentist and her practice. Defendants require, as a precondition to providing any dental services, that all patients, including plaintiff, regardless of any emergency need for treatment, sign a "Mutual Agreement to Maintain Privacy" (the "Agreement"). The Agreement states that the patient waives any right to comment publicly on or evaluate defendants' services. To further stifle any public criticism of defendants, the Agreement also states that the patient assigns to defendants all copyrights that may exist in written, after-the-fact criticisms or comments about defendants' services that the patient creates ("Patient Comments").

3. Plaintiff had a tooth filled by defendants in 2010. He was charged over \$4,000 for a procedure that should have cost \$200. Defendants then failed to furnish the records of plaintiff's treatment to his insurance company (or to plaintiff himself) so that he could seek reimbursement from his insurance provider.

4. Plaintiff posted public comments on Internet web sites informing others about his experience with defendants ("Lee's Commentary"). Defendants invoked their purported ownership in the copyright in Lee's Commentary, demanded that the web sites remove Lee's Commentary, sent plaintiff invoices purporting to charge \$100 per day for the posting of Lee's Commentary, and threatened to sue plaintiff for copyright infringement, breach of contract and defamation if his truthful commentary were not removed from the sites.

5. The purported consideration to support plaintiff's agreement to refrain from negative comments and his purported copyright assignment is defendants' promise to refrain from

marketing confidential patient information to third parties. Such marketing, however, is already prohibited by the federal Health Insurance Portability and Accountability Act (“HIPAA”). A promise to forswear illegal activity is illusory and cannot, as a matter of law, constitute valid consideration. The Agreement, including the assignment of future copyrights in any Patient Comments, is unconscionable and void for that reason as well.

6. The creation and posting of Patient Comments also is a classic fair use, protected by Section 107 of the Copyright Act, 17 U.S.C. § 107. Consequently, those acts are not copyright infringement. In fact, defendants’ attempt to squelch speech runs counter to the purpose of the Copyright Act—to promote the flow of information that is useful to the public. To the extent defendants possess any legitimate copyright interest in any Patient Comments, they cannot misuse that interest for a purpose wholly unrelated and antithetical to the fundamental precepts of copyright law.

7. Rather than allow defendants’ purported “invoices” to accumulate, plaintiff now asks the Court to declare, on his behalf and that of the class of similarly situated persons, that the Agreement and assignment are void, and, in the alternative, if defendants own any copyright interest, that Patient Comments are a non-infringing fair use, that defendants’ acquisition and assertion of copyright constitute breaches of fiduciary duty and violations of dental ethics, and that any actions for injunctive relief brought by defendants would be subject to the equitable defenses of unclean hands and copyright misuse. Plaintiff individually also seeks a declaration that Lee’s Commentary is truthful and not defamatory and that its posting is fair use, and asserts claims for breach of contract, seeking damages that have resulted from defendants’ unlawful failure to provide his records.

PARTIES

8. Plaintiff Robert Allen Lee is a resident of Huntingtown, Maryland, and was a patient of Dr. Makhnevich when he lived in New York City in 2010.

9. Dr. Stacy Makhnevich is a dentist who practices in the Chrysler Building, and, on information and belief, resides in Brooklyn, New York.

10. Defendants Aster Dental, Chrysler Building Dental Association, North East PC, South East Dental Suite, Lincoln Square Dental Arts, Lincoln Square Dental Arts of Manhattan, and Chrysler Dental are various names for Dr. Makhnevich's New York dental practice. They have their principal places of business on the 69th floor of the Chrysler Building, on Lexington Avenue and 42nd Street in Manhattan.

JURISDICTION AND VENUE

11. A definite, substantial and concrete controversy exists within this Court's jurisdiction between the parties concerning plaintiff's rights and defendants' obligations under the Copyright Act, 17 U.S.C. §§ 101 et seq., New York General Business Law § 349(a) and the common law. Defendants, through their actions and statements, described below, have expressed an intention to commence litigation against plaintiff over the continued dissemination of Lee's Commentary.

12. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338 and under 15 U.S.C. § 1121 because, among other things, there is a definite, substantial and concrete controversy over plaintiff's and defendants' rights and obligations under the Copyright Act, 17 U.S.C. §§ 101 et seq. The Court has ancillary jurisdiction over the pendent state-law claims pursuant to 28 U.S.C. § 1367.

13. The Court also has subject matter jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1332 because plaintiff is a citizen of Maryland, defendants are citizens of New York and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

14. This Court has personal jurisdiction over the defendants because they reside and do business in this state and district, and because the Agreement was executed in this state.

15. Venue in this Court is proper under 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to the claim occurred in this district.

FACTS COMMON TO ALL CLAIMS

16. In late October, 2010, plaintiff experienced a severe toothache, and went to a local hospital where he secured pain medication. On November 4, 2010, he went to defendants' office for treatment. He selected defendants, in part, because they were preferred providers accepted by his insurance company, Delta Dental.

17. Defendants told plaintiff that he would have to pay defendants directly. Defendants, however, promised to submit papers about his treatment so that his payments could be reimbursed by his insurance company.

18. Before he could be treated, plaintiff was handed forms to sign. Among those documents was one entitled "Mutual Agreement to Maintain Privacy" (the "Agreement"), a copy of which is attached as Exhibit A.

19. The Agreement falsely recites that the privacy provisions of the Health Insurance Portability and Accountability Act ("HIPAA") contain "loopholes" that could allow dentists to permit third parties to perform marketing through the use of protected health information without the information ever being in the possession of those third parties. Defendants stated in the Agreement that they would promise not to use any such loopholes in return for plaintiff agreeing:

- a. “to refrain from . . . publishing or airing commentary upon Dentist and his practice”;
- b. to “exclusively assign[] all Intellectual Property rights, including copyrights, to Dentist for any written, pictorial and/or electronic commentary. This assignment is in further consideration for additional privacy protections provided by Dentist”;
- c. “not [to] denigrate, defame, disparage, or cast aspersions upon the Dentist”; and
- d. to “work to prevent the publishing or airing of commentary about [the dentist] from being accessed via Internet, blogs, or other electronic, print or broadcast media without prior written consent.”

20. Plaintiff did not want to give up his right to publish commentary regarding defendants’ services. He did not know whether or not HIPAA contained loopholes that could allow dentists to permit third parties to perform marketing through the use of protected health information. He was, however, in severe pain and was told that signing the Agreement was a precondition to treatment. Because any further delay would only have risked exacerbating the already severe pain he was experiencing, he felt that he was left with no choice but to sign the Agreement.

21. Once plaintiff signed the Agreement, Dr. Makhnevich drained plaintiff’s infection. On November 10, plaintiff returned to Dr. Makhnevich’s office and she filled the tooth. Defendants billed plaintiff nearly \$800 for the work done on November 4, and billed him nearly \$4,000 for the work done on November 10.

22. At the end of November, plaintiff paid defendants’ dental bill in the amount of \$4766.

23. Despite defendants' representation that they would forward the necessary paperwork to plaintiff's insurance company, they did not do so. Although defendants' staff represented to plaintiff that they had submitted the claim and that it had been rejected, in fact they had submitted the claim to the wrong insurance company. Despite plaintiff's repeated telephone messages and conversations with defendants' staff, at no time did defendants submit the papers to plaintiff's insurance company.

24. Plaintiff next asked Dr. Makhnevich to send his dental records to him, along with a statement of his charges, so that he could submit the claim to his insurance company himself. Instead of providing the records, Dr. Makhnevich referred plaintiff to a third party that demanded a flat five percent of the amount of the bill for copying, a number exceeding \$200. At no time before this demand was plaintiff told that he would have to pay to obtain a copy of his own dental records.

25. After moving to Maryland, plaintiff discussed his experience with Dr. Makhnevich with a local dentist, who told him that a reasonable fee for the work Dr. Makhnevich performed on November 10 was about \$200, much less than what he was charged.

26. On August 24, 2011, plaintiff posted Lee's Commentary on several web sites used by consumers to comment about local businesses, including Yelp and DoctorBase, criticizing Dr. Makhnevich for overcharging him, for refusing to submit the claim to his insurance company, and for refusing to provide him with his own dental records. On August 25, 2011, defendants' staff responded to plaintiff's criticism on Yelp, and plaintiff replied to that response. A copy of Lee's Commentary on Yelp and a copy of defendants' response is attached as Exhibit B, and a copy of Lee's Commentary on DoctorBase is attached as Exhibit C.

27. On August 25, 2011, writing as "North East PC," defendants' staff warned plaintiff that he had violated the Agreement by publishing comments on Yelp and DoctorBase that

“included damaging inferences, denigrating, defaming and casting aspersions upon the dental office.” The letter, which was signed “Sincerely, Corporate Practice,” enclosed a draft complaint to be filed against plaintiff in the name of “South East Dental, Chrysler Building Dental Assn, North East,” alleging claims for breach of contract, defamation and copyright infringement. The letter and complaint are attached as Exhibit D.

28. In September, 2011, on the letterhead of Aster Dental, a member of Dr. Makhnevich’s staff sent takedown letters under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c)(3), to Yelp and to DoctorBase, asserting that Dr. Makhnevich owned the copyright in Lee’s Commentary pursuant to the Agreement. Defendants warned Yelp and DoctorBase that, if they did not remove the posts immediately, they would lose the immunity that the DMCA otherwise provides Internet Service Providers against monetary liability for copyright infringement. In violation of HIPAA, these takedown notices disclosed plaintiff’s height, weight and birth date, as well as his picture and his home address. Copies of the takedown notices, redacted to exclude plaintiff’s personal information, are attached as Exhibit E.

29. On September 12 and October 5, 2011, defendants’ staff, using the name Southern Management, issued invoices to plaintiff purporting to charge him \$100 per day for copyright infringement. Copies of the purported invoices are attached as Exhibit F.

30. On October 24, 2011, defendants’ attorney, Angelo R. Picerno, sent plaintiff a letter dated October 17, 2011, threatening to pursue “all legal actions” against him pursuant to the Agreement. A copy of Mr. Picerno’s letter is attached as Exhibit G.

31. The web site of the New York State Dental Association (“NYSDA”) identifies Dr. Makhnevich as one of its members. The relevant page from the NYSDA web site is attached as Exhibit H. The NYSDA requires its members to abide by the Principles of Ethics and Code of

Professional Conduct of the American Dental Association (“ADA Code”) and the Principles of Ethics and Code of Professional Conduct of the NYSDA (“NYSDA Code”), copies of which are attached as Exhibits I and J. *See* NYSDA Code Preamble. Based on the dental profession’s “special position of trust within society” and “the obligations arising from the implied contract between the dental profession and society,” ADA Code Introduction, the aspirational principles and ethical requirements in the ADA and NYSDA Codes require dentists, among other things, to

- a. respect patients’ rights to confidentiality, refrain from harming patients, promote patients’ welfare, treat patients fairly and communicate with patients truthfully, ADA Code Principles of Patient Autonomy, Nonmaleficence, Beneficence, Justice, and Veracity;
- b. safeguard and maintain the confidentiality of patient records, ADA Code § 1.B, Patient Records; NYSDA Code § 1-B, Patient Records; and
- c. provide patients with copies of patient records, NYSDA Code § 1-B, Patient Records.

CLASS ACTION ALLEGATIONS

32. Plaintiff realleges all previous paragraphs as if fully set forth here.

33. Plaintiff brings this class action on behalf of himself and all others similarly situated, for declaratory and injunctive relief, pursuant to all applicable provisions of Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

34. The proposed Class which plaintiff seeks to represent is composed of:

All persons who received dental services from defendants and who signed the “Mutual Agreement to Maintain Privacy,” or any similar document, as a precondition to receiving dental services (the “Class”).

35. Plaintiff specifically excludes from the Class defendants and any related entities and any and all of defendants' employees, affiliates, legal representatives, heirs, successors or assignees.

36. Plaintiff also specifically excludes from the Class the Judge and Magistrate Judge assigned to this case and any member of their immediate families.

37. As shown below, this class action satisfies all requirements under Rule 23(a) of the Federal Rules of Civil Procedure, including but not limited to the elements commonly referred to as numerosity, commonality, typicality and adequacy.

a. **Numerosity.** Consistent with Rule 23(a)(1) of the Federal Rules of Civil Procedure, the proposed Class "is so numerous that joinder of all members is impracticable." Defendants have reported that they require all of their patients to sign the Agreement as a condition of receiving their services. On information and belief, and based on investigation of counsel, dentists typically have hundreds of patients at any given time.

b. **Commonality.** Consistent with Rule 23(a)(2) of the Federal Rules of Civil Procedure, the proposed Class shares "common questions of law or fact." Defendants have engaged in a common course of misconduct toward Plaintiff and members of the proposed Class, raising common issues of law or fact, including but not limited to:

(i) whether the creation and posting of Patient Comments is a protected fair use under the Copyright Act;

(ii) whether defendants' purported acquisition and assertion of copyrights in Patient Comments constitute breaches of their fiduciary duty and violations of dental ethics, and whether the equitable defenses of unclean hands and copyright misuse would

bar defendants from obtaining injunctive relief to suppress truthful commentary about defendants and matters of public concern;

(iii) whether the Agreement, including the purported assignment of copyright, is supported by consideration;

(iv) whether the Agreement is an unconscionable contract; and

(v) whether conditioning the provision of services upon execution of the Agreement is a deceptive practice under section 349(a) of New York's General Business Law.

c. **Typicality.** Consistent with Rule 23(a)(3) of the Federal Rules of Civil Procedure, the claims of plaintiff, as the proposed class representative, are "typical of the claims . . . of the class." Apart from the issues of defamation and breach of contract, on which no class action treatment is sought, the factual and legal claims arise out of the same uniform misconduct perpetrated by defendants in the same manner against both plaintiff and members of the Class. Thus, the evidence and legal theories underlying plaintiff's claims are identical to those underlying the claims of all members of the putative Class.

d. **Adequacy.** Consistent with Rule 23(a)(4) of the Federal Rules of Civil Procedure, plaintiffs will "fairly and adequately protect the interests of the class." Plaintiff has no adverse or conflicting interests to the members of the proposed Class. Plaintiff's attorneys are competent counsel, experienced in complex, class action litigation and possess the necessary financial resources to adequately and vigorously litigate this class action.

38. The Class also satisfies the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure, because, as set forth herein, defendants have acted or refused to act on grounds that apply generally to plaintiff and members of the Class, thereby warranting appropriate injunctive and/or declaratory relief respecting the Class as a whole.

CAUSES OF ACTION ASSERTED INDIVIDUALLY AND ON BEHALF OF CLASS

FIRST CAUSE OF ACTION

DECLARATION THAT POSTING OF PATIENT COMMENTS TO INTERNET WEB SITES IS A PROTECTED FAIR USE UNDER SECTION 107 OF THE COPYRIGHT ACT

39. Plaintiff realleges all previous paragraphs as if fully set forth here.

40. A justiciable and actual controversy exists before this Court with respect to whether the posting of Patient Comments to Internet web sites used to comment about local businesses is a protected fair use of copyrighted material.

41. The non-commercial use of copyrighted materials for criticism and comment is a paradigmatic fair use that is not infringing. Patient Comments report on facts (dental services). The posting of Patient Comments for these purposes can have no effect on their potential market or value because no such value exists. For these reasons, plaintiff seeks a declaration, on behalf of himself and the Class, that posting Patient Comments to Internet web sites used to comment about local businesses is not infringement pursuant to Section 107 of the Copyright Act.

SECOND CAUSE OF ACTION

DECLARATION THAT EXACTING NO-CRITICISM PROMISES AND AN ASSIGNMENT AS WELL AS THE ASSERTION OF COPYRIGHTS CONSTITUTE BREACHES OF FIDUCIARY DUTY AND VIOLATIONS OF DENTAL ETHICS AND TRIGGER THE EQUITABLE DEFENSES OF UNCLEAN HANDS AND COPYRIGHT MISUSE

42. Plaintiff realleges all previous paragraphs as if fully set forth here.

43. A justiciable and actual controversy exists before this Court with respect to whether defendants' insistence on the Agreement's promise not to publish criticism of defendants, the purported assignment of copyrights and the assertion of copyright claims for the express purpose of preventing the dissemination of truthful Patient Comments that address matters of public concern

constitute breaches of fiduciary duty and violations of dental ethics and are subject to the equitable defenses of unclean hands and copyright misuse.

44. Plaintiff seeks a declaration, on behalf of himself and the Class, that defendants' insistence on the Agreement's promise not to publish criticisms of defendants, the purported acquisition of copyrights in Patient Comments and the assertion of copyright claims, all for the express purpose of preventing the dissemination of truthful Patient Comments that address matters of public concern:

- a. constitute breaches of fiduciary duty because defendants have not placed their patients' interests above their own interest in suppressing truthful patient commentary about their services;
- b. constitute violations of the ethical standards to which Dr. Makhnevich, as a member of the NYSDA, purports to adhere; and
- c. constitute unclean hands and, with respect to such purported acquisition and assertion, constitute copyright misuse in light of the means by which defendants purportedly acquire the copyrights and because the purpose of such acquisition and assertion of copyright is to suppress truthful commentary concerning defendants and matters of public concern.

THIRD CAUSE OF ACTION

DECLARATION THAT THE NO-CRITICISM PROMISES AND ASSIGNMENT ARE VOID FOR LACK OF CONSIDERATION UNDER NEW YORK COMMON LAW

45. Plaintiff realleges all previous paragraphs as if fully set forth here.

46. A justiciable and actual controversy exists before this Court with respect to whether the Agreement's promise not to publish criticism of defendants and the purported assignment of copyright are void for lack of consideration under New York common law.

47. The only purported consideration supporting the promise and the assignment is defendants' promise not to avail themselves of "loopholes" in HIPAA that defendants claim would allow them to disseminate patient information to be used by third party marketers. HIPAA, however, already forbids defendants from disseminating patient information for any marketing purpose. 42 C.F.R. §§ 164.501, 164.508(a)(3); HITECH Act, § 13405(d), 42 U.S.C. § 17935(d); *see also* U.S. Dep't of Health & Human Servs., Private Practice Ceases Conditioning of Compliance with the Privacy Rule, Health Information Privacy, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case29> (visited Nov. 19, 2011) ("A covered entity's obligation to comply with all requirements of the Privacy Rule cannot be conditioned on the patient's silence."). The purported "loopholes" do not exist. The marketing activities in which defendants promised not to engage would themselves be a violation of HIPAA. Moreover, because defendants have a pre-existing obligation under HIPAA not to disseminate patient information for any marketing purpose, defendants' promise to perform their statutory obligation was entirely valueless and did not constitute valid consideration. According to the United States Department of Health & Human Services, which enforces HIPAA, "A patient's rights under the Privacy Rule are not contingent on the patient's agreement with a covered entity." <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case29>.

48. Because, among other reasons, an agreement to forswear illegal activity cannot, as a matter of law, be valid consideration, plaintiff seeks a declaration, on behalf of himself and the Class, that the Agreement's promise not to publish criticism of defendants and the assignment are null and void for lack of consideration.

FOURTH CAUSE OF ACTION

DECLARATION THAT THE AGREEMENT IS UNCONSCIONABLE AND VOID UNDER NEW YORK COMMON LAW

49. Plaintiff realleges all previous paragraphs as if fully set forth here.

50. A justiciable and actual controversy exists before this Court with respect to whether the Agreement, including the purported assignment of copyright, is void for unconscionability under New York common law.

51. Defendants condition the provision of dental services upon execution of the Agreement, enjoy a superior bargaining position vis-à-vis plaintiff and the Class members, possess a more sophisticated legal understanding than plaintiff and the Class members, and employ false and deceptive language in the Agreement that misrepresents their clear obligation under HIPAA to not disclose patient information by claiming the existence of “loopholes” permitting the dissemination of patient information under certain circumstances. Moreover, the Agreement purports to impose grossly unreasonable, unfair and outrageous terms on plaintiff and the Class—terms to which the average consumer, if accurately informed of his health information privacy rights, would never assent. Consequently, plaintiff seeks a declaration, on behalf of himself and all others similarly situated, that the Agreement, including the purported assignment contained in it, is null and void for unconscionability.

FIFTH CAUSE OF ACTION

DECLARATION THAT THE AGREEMENT VIOLATES SECTION 349(a) OF THE NEW YORK GENERAL BUSINESS LAW

52. Plaintiff realleges all previous paragraphs as if fully set forth here.

53. A justiciable and actual controversy exists before this Court with respect to whether the Agreement violates Section 349(a) of the New York General Business Law.

54. Defendants falsely claim, in connection with the promotion of their dental services, that HIPAA has “loopholes” permitting the dissemination of patient information under certain circumstances. That false claim is material, because it induces patients to execute the Agreement under false pretenses, depriving them of protected speech and copyright rights. Moreover, by forcing patients to agree to refrain from making negative public statements about defendants, and to agree to assign copyrights, which defendants intend to exercise for the sole purpose of removing from public discourse any comment that they do not like, defendants create a false public record about themselves that distorts their reputation and prevents would-be patients from making sound choices about whether to use defendants’ services. That false image is material, because it conceals reasons why patients might prefer to patronize other dentists. Plaintiff has been injured by these acts. Plaintiff seeks a declaration, on behalf of himself and all others similarly situated, that the Agreement is a deceptive act or practice in violation of Section 349(a) of the New York General Business Law.

CAUSES OF ACTION ASSERTED INDIVIDUALLY

SIXTH CAUSE OF ACTION

DECLARATION THAT LEE’S COMMENTARY IS TRUTHFUL AND NON-DEFAMATORY

55. Plaintiff realleges all previous paragraphs as if fully set forth here.

56. A justiciable and actual controversy exists before this Court with respect to whether Lee’s Commentary is defamatory under New York common law.

57. Because Lee’s Commentary about defendants and their services is true or substantially true, constitutes non-actionable opinions concerning defendants and/or their services, and plaintiff had good reason to believe the truth of the criticisms, plaintiff seeks a declaration that Lee’s Commentary is not actionable defamation under New York common law.

SEVENTH CAUSE OF ACTION

DECLARATION THAT POSTING OF LEE'S COMMENTARY TO INTERNET WEB SITES IS A PROTECTED FAIR USE UNDER SECTION 107 OF THE COPYRIGHT ACT

58. Plaintiff realleges all previous paragraphs as if fully set forth here.

59. A justiciable and actual controversy exists before this Court with respect to whether the posting of Lee's Commentary to Internet web sites used to comment about local businesses is a protected fair use of copyrighted material.

60. The non-commercial use of copyrighted materials for criticism and comment is a prototypical fair use that is not infringing. Lee's Commentary reports facts about dental services. The posting of Lee's Commentary for these purposes will have no effect on its potential market or value (there is none). For these reasons, plaintiff seeks a declaration that the posting of Lee's Commentary to Internet web sites used to comment about local businesses is not infringement pursuant to Section 107 of the Copyright Act.

EIGHTH CAUSE OF ACTION

BREACH OF CONTRACT

61. Plaintiff realleges all previous paragraphs as if fully set forth here.

62. In exchange for valuable consideration in the form of fees paid by plaintiff, defendants, among other things, promised to provide plaintiff's records to plaintiff's insurance company for reimbursement.

63. Defendants breached their obligation to plaintiff by failing to provide plaintiff's records to his insurance company as promised.

64. As a direct and proximate result of defendants' breach, plaintiff has been damaged in the amount of \$4,766.00.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, on behalf of himself and all others similarly situated, prays for relief against defendants as follows:

- A. Certify a class action on behalf of the Class;
- B. Appoint representative plaintiff Robert Allen Lee as representative on behalf of the Class;
- C. Appoint Paul Alan Levy of Public Citizen Litigation Group as Class counsel;
- D. Declare that the posting of Patient Comments to Internet web sites used for comment about local businesses is a non-infringing fair use pursuant to Section 107 of the Copyright Act;
- E. Declare that the Agreement's promise not to publish criticism of defendants, the purported assignment of copyrights and the assertion of copyright claims for the express purpose of preventing the dissemination of truthful Patient Comments that address matters of public concern constitute breaches of fiduciary duty and violations of dental ethics and are subject to the equitable defenses of unclean hands, and, as to such assignment and assertion, constitute copyright misuse;
- F. Declare that the Agreement's assignment and promise not to publish criticisms of defendants are null and void for lack of consideration;
- G. Declare that the Agreement's assignment and promise not to publish criticisms of defendants are null and void for unconscionability;
- H. Declare that the Agreement is a deceptive act or practice in violation of Section 349(a) of the New York General Business Law;
- I. Order defendants to notify all members of the Class that the Agreement has been declared null and void;
- J. Enjoin defendants from requiring patients to sign the Agreement, or any similar document, as a precondition to receiving dental services;

K. Grant such other or further relief as allowed by law and that the Court deems appropriate;

and, as to plaintiff individually,

L. Declare that Lee's Commentary is not actionable defamation under New York common law;

M. Declare that the posting of Lee's Commentary to Internet web sites used for comment about local businesses is a non-infringing fair use under 17 U.S.C. § 107;

N. Award damages to plaintiff for breach of contract;

and, as to plaintiff both individually and as representative of the Class,

O. Award plaintiff's costs and attorneys' fees against defendants as allowed by law; and

P. Grant such other or further relief as allowed by law and that the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on his damages claims.

Respectfully submitted,

/s/ Bruce P. Keller
Bruce P. Keller
Jeffrey P. Cunard

DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
bpkeller@debevoise.com
jpcunard@debevoise.com

Paul Alan Levy
Gregory Beck

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org
gbeck@citizen.org

Attorneys for Plaintiffs

November 29, 2011