

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CHICAGO MOTOR CAR CORP.,)	
PARIN SHAH, and FRANK SACCO,)	
)	
Plaintiffs,)	
)	
v.)	12-cv-8905
)	
DAVID BATES,)	Honorable John Z. Lee
)	Magistrate Daniel G. Martin
Defendant.)	

DEFENDANT’S CORRECTED MOTION FOR SANCTIONS

Defendant David Bates, by his undersigned counsel, pursuant to 28 USC §1927, and this Court’s inherent powers to retain the integrity of its proceedings, moves for this Court to (a) vacate its entry of a Temporary Restraining Order against Defendant; (b) strike with prejudice Plaintiffs’ prayer for injunctive relief; and (c) award Defendant attorneys’ fees and costs. In support of this Motion, Defendant states:

I. Introduction

1. Plaintiffs’ filed a materially inaccurate affidavit in order to obtain the TRO entered in this case and to have a hearing set to determine whether a preliminary injunction should enter. In their affidavit, Plaintiffs claimed that they have never been accused of or engaged in false advertising. They have since admitted that this affidavit testimony is inaccurate. Plaintiffs now admit that when they filed the affidavit they knew they had been accused of fraud and false advertising numerous times and have regularly engaged in deceptive advertising throughout the history of their business. *See infra* at pp. 4-8.

2. The TRO entered in this case should be vacated and Plaintiffs' prayer for injunctive relief should be stricken, with prejudice as sanctions for filing an untruthful TRO and preliminary injunction motion based on a materially inaccurate affidavit.

3. Entry of sanctions, under the Court's power to protect the integrity of proceedings before it, are appropriate when a party, as Plaintiffs have done here, obtains a TRO based on a materially inaccurate affidavit. *See Ridge Chrysler Jeep, LLC v. Daimler Chrysler Services N. Am., LLC*, 2006 WL 2808158, at *9-10 (N.D. Ill. Sept. 6, 2006) aff'd, 516 F.3d 623 (7th Cir. 2008). This Court surely would not have entered the TRO, even the narrow one it entered, or set this matter for a preliminary injunction hearing had it known the truth that Plaintiffs have a documented history of engaging in the very false advertising and used car fraud that Defendant's websites exposed. Defendant had a free speech right to truthfully state that Plaintiffs engage in false advertising. No prior restraint on this right would have entered but for Plaintiffs' materially inaccurate affidavit testimony.

II. Procedural History

4. Plaintiffs' Motion for a TRO and Preliminary Injunction is supported by affidavit. Exhibit 1. Plaintiffs attested that they have never engaged in false advertising or been sued for false advertising:

The Corporation has never been subject to any cause of action involving false advertising in federal or state court, or any consumer complaint or notice by any Illinois department with authority to regulate automobile dealerships involving any false or misleading advertising practices. We have not received consumer complaints in general regarding anything like what Bates has falsely accused us of.

Id. at ¶20.

5. On November 13, 2012, this Court entered a TRO against Defendant temporarily restraining his right to criticize Plaintiffs for engaging in false advertising. The Court found that

“based upon the current record,” Plaintiffs have a likelihood of success on the merits of the defamation, Lanham Act, and ACPA claims with regards to certain statements. Dkt. 17, pp. 3. In entering the TRO, the Court required Defendant to remove from his website and refrain from publishing the following statements while the TRO was in effect:

- “...who falsely advertise their cars.”
- “...will false[l]y advertise[] cars just for a sale.”
- “...falsely advertises,”
- “They falsely advertise features and services done to the car that are not there. Not to mention that they didn’t have the title or the keys!!”

Id. at 4.

6. In approving a narrowly-tailored prior restraint on Defendant’s speech (which was far less restrictive than the restraint sought by Plaintiffs), this Court relied on “the current record,” which included Paragraph 20 of Plaintiffs’ affidavit in which Plaintiffs untruthfully attested that they had never: (a) engaged in false advertising; (b) been the subject of a governmental action or investigation regarding false advertising; (c) been the subject of an individual consumer complaint similar to that of Defendant. Exhibit 1, ¶19-20.

III. The Inaccurate Affidavit

7. This Court relied on Plaintiffs’ materially inaccurate affidavit testimony when it temporarily restrained Defendant from criticizing and exposing Plaintiffs for having engaged in false advertising.

8. Contrary to Plaintiffs’ affidavit, Plaintiffs have been sued a number of times for false advertising, failing to honor their contracts, or fraud and have received many consumer complaints regarding false advertising. Defendant has already uncovered the following suits involving Plaintiff Chicago Motor Cars (“CMC”) at this preliminary stage of discovery:

- Customer sued CMC for falsely advertising that a Hummer H2 had no known accidents, and all original paint. *See Exhibit 2.*
- Customer sued CMC for grossly understating the mileage of a Honda Civic, and failing to disclose in the advertisements that the Civic had an engine from a salvage title vehicle. *See Exhibit 3.*
- Customer sued CMC for falsely advertising that a Porsche had 600 horse power and a dual ignition system, when it actually had only 460 horse power and a single ignition system. *See Exhibit 4.*
- CMC found liable for refusing to return \$50,000 deposit on a Lamborghini to a customer even though no contract allowed it to keep that money. The Court found that the testimony CMC submitted to support its meritless position completely lacked credibility. *See Exhibit 5.*
- CMC sued for allegedly engaging in car financing fraud. *See Exhibit 6.*

9. At Plaintiffs' corporate representative deposition, Defendant's counsel asked:

Q: How many times has your company been sued, Mr. Sacco, in an arbitration or a lawsuit?

A: Over how many years, total?

Q: Yes, total?

A: Four or five, if I had to guess.

...

Q: And you knew about all these lawsuits when you filled out your Affidavit, didn't you, Mr. Sacco?

A: Yes.

...

Q: Sir, were you aware when you filed this Affidavit that your company had been sued, regarding the Porsche, the Hummer and the Civic, for false advertising?

A: Yes.

Exhibit 8, pp. 122:8-124:21, 198:15-19; *see also* Exhibit 9, pp. 126:6-8; 145:15-17; 163:9-13.¹

10. Likewise, numerous court or arbitration judgments have been entered against Plaintiffs finding that they engaged in false advertising. The judgments that Defendant currently

¹ Defendant attached the entire corporate representative deposition transcript as Exhibit 7 so that the record is complete. For the convenience of the court, Defendant also provides separate exhibits with relevant excerpts of the testimony.

knows about are attached hereto as Exhibit 10 (arbitration judgment for misrepresenting Porsche entered against CMC in the amount of \$35,000, and arbitration fees) and Exhibit 11 (court entered judgment against Plaintiffs for false advertising in the amount of \$31,289). Additionally, Plaintiffs have received a number of complaints (either directly or to the Better Business Bureau (“BBB”) or the Attorney General’s Office) relating to false advertising. The consumer complaints against Plaintiffs submitted to the Attorney General or the Better Business Bureau relating to false advertising are attached hereto as Group Exhibit 12.

10. Plaintiffs admitted that they knew about these consumer complaints and judgments against them for false advertising when signing Plaintiffs’ affidavit under penalty of perjury. When questioned about the obvious inaccuracy of the affidavit, Plaintiffs admitted it was materially inaccurate:

Q: Let’s look at the Affidavit again.
So Mr. Sacco, that statement is not true;
“We have not received consumer complaints in general regarding anything like what Bates has falsely accused us of.” You have. Regarding his complaints about the Mercedes, you’ve had similar complaints by other customers who have sued you, correct?

A: Correct.

...

Q: Well, here [in the affidavit] you said it never happened, right?
Here you said it never happened, that you had never been accused of falsely advertising a car, right?

A: Well, it’s a misprint, a mistake.

Exhibit 13, pp. 209:6-210:22; *see also* Exhibit 14, pp. 335:16-336:8.

11. In Paragraph 19 of Plaintiffs’ affidavit, Plaintiffs attested that Defendant’s statements that they engage in false advertising are untrue. Exhibit 1, ¶19. However, Plaintiffs admitted that they in fact have falsely advertised between 10 and 100 vehicles, including the Mercedes Benz SL600 that Defendant and his girlfriend attempted to purchase from Plaintiffs. Exhibit 15,

pp. 183:12-184:9; *see also* Exhibit 16, pp. 30:6-20, 137:21-138:8, 312:19-313:2, 323:15-324:6.

In fact, Plaintiffs admitted that they may have falsely advertised more than 100 vehicles and could not prove otherwise. Exhibit 17, pp. 211:8-214:14, 334:16-335:9. When questioned about this false advertising, Parin Shah, one of Plaintiffs' corporate representatives, testified:

Q: But the fact that you falsely advertise cars,
That's true, being Chicago Motor Cars and Parin Shah?

A: We have falsely advertised cars in the past,
yes, we have.

Exhibit 18, pp. 328:20-321:1; *see also* Exhibits 15 and 16.

And when questioned specifically about Defendant's statements, Plaintiffs admitted:

Q: So when David Bates has said on his websites
that you falsely advertise cars, that's actually true,
correct?

A: In particular to the [Mercedes Benz] SL[600] and the other cars,
yes.

...

Q: [Bates' statement that] "This company falsely advertises." That's
true, right? You have falsely advertised?

A: We have, yeah.

Exhibit 19, pp. 326:9-334:15; *see also* Exhibit 20, pp. 245:6-9, 317:19-318:10.

12. In similar fashion, Plaintiffs admitted to making false statements online in order to sell a vehicle. Exhibit 21, pp. 222:12-225:22.

13. Plaintiffs even gave testimony that establishes that their false advertising continues to this day. Plaintiffs advertise their vehicles online as "pristine" and of "quality... [that] exceeds retail." Exhibit 22, pp. 83:7-85:1, 95:17-20. These statements are misleading because, despite advertising all vehicles as being in "pristine condition" and of "quality... [that] exceeds retail," Plaintiffs admittedly only inspect 10% of the vehicles they sell for body damage or bodily integrity. Exhibit 23, pp. 85:2-86:15, 91:15-18-93:1. Yet, Plaintiffs never reveal to the public that they inspect only a small percentage of their vehicles to ensure they meet the advertised condi-

tion of being “pristine” and of a quality that exceeds other used vehicles. Exhibit 24, pp. 102:12-105:11.²

14. Plaintiffs sought a TRO against Defendant for stating that Plaintiffs falsely advertise vehicles. Now they admit not only that they falsely advertise vehicles but that they falsely advertised the Mercedes Benz SL600 that Defendant attempted to purchase with his girlfriend. *See* Exhibits 15-20. The advertisement for the Mercedes Benz SL600 that Defendant and his girlfriend contracted to purchase from Plaintiffs was untruthful and misleading because it falsely described the vehicle’s condition as pristine, falsely described the vehicles as having an AMG Sports Package, and falsely described the vehicle as having two sets of master keys. Exhibit 26. Shah also represented to Defendant that the vehicle was in perfect condition and had never been in an accident. Exhibit 27, ¶4. These representations about the vehicle were misleading because in reality the vehicle did not have an AMG Sports Package, had a cracked wheel, had bald tires, only had one key, and had substantial body work. Exhibit 28 (noting bald tires); Exhibit 29, pp. 245:6-9, 321:4-6, 89:9-11, 90:10-18, 318:4-10. The tires on the vehicle were so bald, in fact, that it violated Illinois law to deliver the vehicle to Defendant and his girlfriend in such condition.³

15. Even after Bates returned the vehicle and Plaintiffs knew of the vehicle’s problems, Plaintiffs did nothing to repair the vehicle but simply sold it to another dealership without disclosing the vehicle’s problems:

² Sacco went as far as to declare that any fault for false advertising lies with the customer for not discovering the falsity of the advertisement. Exhibit 25, pp. 84:21-85:9. This position is contrary to Illinois law. *See Totz v. Continental Du Page Acura*, 236 Ill. App. 3d 891, 903-04, 602 N.E.2d 1374, 1381-1382 (Ill. App. 1992) (holding that used car dealer was obligated under the ICFA to disclose car was in an accident and could not blame consumer for failing to uncover dealer’s omission of material fact before purchasing the car).

³ Mercedes of Naperville noted a tread depth of 1/32 of an inch. Illinois law prohibits a dealership from permitting a vehicle to be driven with tires containing a tread depth of less than 2/32 of an inch. 625 ILCS 5/12-405(c), (d)(5).

Q: And did you disclose to Oak Lawn Mazda that there was body work on the car?

A: No.

Q: Did you fix the cracked rim on the wheel?

A: I didn't do anything to the car, other than change the oil.

Q: So you didn't fix the cracked rim?

A: I didn't see a cracked rim. All I did was change the oil, and I sold it to them.

...

Q: There was a photograph of [the cracked rim], too. Did you go look at wheel to see if it was cracked?

A: No. All I did was change the oil and sell the car.

Q: So you didn't tell Oak Lawn Mazda that the wheel was cracked, right, or that Mr. Bates said that?

A: I didn't say anything.

...

Q: So for all we know, the wheel is still cracked because they never fixed it?

A: Maybe so.

Q: Does that bother you that this Mr. Daniels [the subsequent owner] might be driving around a car with a cracked wheel because you didn't disclose that?

A: Does it bother me?

Q: Yeah.

A: I don't really have any feelings.

Exhibit 30, pp. 119:5-121:2.

16. In sum, Plaintiffs filed an affidavit under penalty of perjury in which they denied that they have falsely advertised vehicles and denied that they have ever been sued for false advertising or fraud or received consumer complaints of such conduct. Based upon those representations, this Court entered a TRO restraining Defendant's speech. Plaintiffs have since admitted: (1) they have and do falsely advertise vehicles, including the vehicle Defendant attempted to purchase; (2) they have been sued on a number of occasions for fraud and false advertising; (3) they have received numerous complaints relating to false advertising, between 10-100; and (4) Defendant's statements that they engage in false advertising are true. Plaintiffs have gone further

and expressly admitted that their affidavit contains material inaccuracies and that they knew about these inaccuracies before filing the affidavit. On this new, more-fully-developed record, it becomes apparent that Plaintiffs' basis for seeking a TRO was predicated on material misstatements. The appropriate response to Plaintiffs' actions include dissolving the TRO; striking Plaintiffs' request for injunctive relief in this case; and awarding Defendant's fees and costs associated with uncovering Plaintiffs' misstatements, defending against a motion for TRO and preliminary injunction supported by this materially inaccurate affidavit, and pursuing this motion.

IV. Entry of the Requested Sanctions is Appropriate

18. Plaintiffs filed an affidavit with this Court that they knew to be materially inaccurate and relied upon that inaccurate record to have a TRO entered against Defendant. Not only should Plaintiffs have not filed a materially inaccurate affidavit but Plaintiffs' counsel should have uncovered the inaccuracies in the course of their pre-filing investigation as is required by Rule 11. They could have discovered the affidavit's inaccuracies simply by watching Defendant's allegedly defamatory YouTube videos, the links for which are set forth in Plaintiffs' Complaint. In one video cited in the Complaint (www.youtube.com/watch?v=oxlUjeQ8ZDE), Defendant summarizes the two DuPage County lawsuits alleging that Plaintiffs engaged in false advertising (at approximately the 15:35 mark in the video)—claims that Plaintiffs readily admitted at their deposition were true and required them to pay damages to the victims. Exhibit 31, pp. 142:11-14, 323:15-324:6.

19. In light of Plaintiffs' repeated admissions that Paragraphs 19 and 20 of their affidavit is untrue, there can be no doubt that Plaintiffs deserve the requested sanctions. *See, e.g., Salamon v. Messina*, 111 F.3d 133 (7th Cir. 1997) (affirming award of sanctions for filing materially inaccurate affidavit); *Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 888 F. Supp.

1427, 1450 (N.D. Ill. 1995) aff'd, 134 F.3d 374 (7th Cir. 1998) (awarding sanctions for filing materially inaccurate affidavit).

20. The requested sanctions are the least severe sanctions that will adequately and appropriately serve the two fundamental functions of sanctions: punishment and deterrence. The requested sanctions will punish Plaintiffs for filing a materially inaccurate affidavit making repeated misrepresentations to this Court in an effort to secure a TRO and preliminary injunction against Defendant. These sanctions will also deter these and other plaintiffs in the future from presenting untruthful testimony in order to restrain important free speech rights. *See Ridge Chrysler Jeep, LLC*, 2006 WL 2808158, at *11-12 (stating that sanctions for filing false affidavit should serve to punish the offending party and to deter similar misconduct in the future).

21. Because the basis for entry of the TRO has been shown to be materially inaccurate, this Court should immediately dissolve the TRO that restrains Defendant from making admittedly true statements about the Plaintiffs. This Court should also strike the prayer for injunctive relief. Ordering a prior restraint on Defendants' free speech rights, as Plaintiffs obtained and now seek to continue in force with a preliminary and permanent injunction, is an extraordinary remedy that courts should rarely, if ever, grant. Such an injunction certainly should not have been granted based on a materially inaccurate affidavit. Injunctions against speech "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994). Justice Scalia has explained that "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797 (Scalia, J. Concurring in part, dissenting in part).

WHEREFORE Defendant David Bates requests, pursuant to 28 USC §1927, and this Court's inherent powers to protect the integrity of its proceedings, that this Court vacate the

TRO, strike Plaintiffs' prayer for a preliminary and permanent injunction; award Defendant attorneys' fees and costs relating to uncovering Plaintiffs' misstatements, defending against a motion for TRO and preliminary injunction supported by a materially inaccurate affidavit, and pursuing this motion; and enter such other sanctions as it deems appropriate.

DAVID BATES

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