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August 21, 2015

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Libby Baney  
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John Horton  
President  
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Re: Libelous Statements against PharmacyChecker.com

Dear Ms. Evans, Ms. Baney and Mr. Horton:

We represent PharmacyChecker.com LLC (“PharmacyChecker”). On August 18, 2015 ECI issued a joint press release of the Alliance for Safe Online Pharmacies (“ASOP”), LegitScript, and the US Chamber of Commerce (the “Release”) containing libelous statements regarding PharmacyChecker in relation to a recent Department of Justice indictment in which PharmacyChecker was neither named, nor a party thereto. Some of the actionable statements were attributed to Ms. Baney.

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Among the libelous assertions are statements including the following:

“For years millions of patients and physicians have relied upon PharmacyChecker.com and CanadaDrugs.com, believing they are getting genuine drugs from a real Canadian pharmacy,” said Alliance for Safe Online Pharmacies Founder and Executive Director Libby Baney, J.D. “The DOJ indictment evidences that these entities have been touting myths, giving U.S. physicians and consumers a false – and consequently dangerous – sense of confidence.”

In fact, the DOJ indictment provides no “evidence” supporting the statement that PharmacyChecker has been “touting myths”. Nor does it provide evidence that PharmacyChecker has been “giving U.S. physicians and consumers a false - and consequently, dangerous-sense of confidence”. Furthermore, the Release misrepresents the DOJ indictment, in which the charges focus on the wholesale operations of Canada Drugs to physicians and to physicians’ offices, as opposed to the retail operations of CanadaDrugs.com, which serves consumers and is verified in PharmacyChecker’s verification program.

Relying on the Release, a recognized publication, Medical Marketing & Media, published an incorrect article about the indictment on August 19 which stated, “Among the entities indicted are CanadaDrugs and PharmacyChecker.com.” After being contacted by PharmacyChecker, the publisher immediately apologized, stating in an email, “It looks like the incorrect information was pulled from this news release [the “Release”] so I want to make sure we have accurate information for the update.” The corrected article on Medical Marketing & Media included the following: “CORRECTION: An earlier version of this story incorrectly listed PharmacyChecker.com as a defendant. PharmacyChecker.com is not a defendant in the case.”

LegitScript is a competitor of PharmacyChecker in the area of online pharmacy verification and providing related information to consumers and others. The mischaracterization of the DOJ indictment and defamatory abuse of PharmacyChecker in the Release represents commercial disparagement and unfair competition. Notably, the Release includes directions “What CONSUMERS CAN DO TO STAY SAFE, “Consumers should visit... LegitScript...to determine whether an online pharmacy is legitimate”.

It is black letter law that a false accusation of unlawful conduct constitutes libel per se. Nor can the publishers of the Release hide behind any cloak of “opinion.” While you are obviously free to debate PharmacyChecker’s activities, you crossed the line in attributing your criticism of Canada Drugs to PharmacyChecker. “Accusations of criminal activity, even in the form of opinion, are not constitutionally protected.” *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 63 (2d Cir. 1980), quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382 (1977). Here, a reasonable factfinder could conclude that your statements imply a factual assertion that PharmacyChecker had engaged in criminal activities. *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) (statements implying that Milkovich perjured himself are not protected speech). “When an ‘opinion’ is something more than a derogatory remark but is laden with factual content, such as charging the commission of serious crimes, the First Amendment confers

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no absolute immunity.” *Cianci*, 639 F.2d at 63; see also *Rinaldi*, 42 N.Y. 2d at 382 (“there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime . . . . No First Amendment protection enfolds false charges of criminal behavior.”); *Suarez v. Angelet*, 90 A.D.3d 906, 907 (2d Dep’t 2011) (email that plaintiff is “a thief as far as I can concerned” could constitute actionable defamation since it “does not appear to be intended as a juvenile attempt to achieve humor”).

Our client will be forced to consider all its legal options against ECI, ASOP, LegitScript and the individuals involved, unless the Release and posts based thereon are immediately and permanently taken down and an appropriate public apology is made to the same audiences. Further, my client expects that you will refrain from making statements of the same or similar nature in the future and will take all necessary steps to correct all current instances of their appearance. Such statements would include any that assert that the recent indictment includes evidence that PharmacyChecker have been touting myths and give U.S. physicians and consumers false and dangerous information.

The public apology which you post and distribute should include the following statement:

“Our August 2015 press release inaccurately asserted that a recent indictment evidenced unlawful conduct by PharmacyChecker. That was untrue and we apologize for the error.”

We look forward to hearing from you and trust that you will take appropriate actions to correct the harm to PharmacyChecker’s reputation from your false and deliberately harmful remarks.

This letter is not meant to be a full recitation of PharmacyChecker’s rights, remedies and defenses, all of which are explicitly reserved.

Sincerely,

Davis Wright Tremaine LLP

  
Victor A. Kovner

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