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4 Mitchell M. Maynard
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5 Defendants in Pro Per

6
7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 SHURWEST PRODUCT CONNECTION, LLC dba)
The Annexus Group,)
10)
Plaintiff,)

11 vs.)

12)
PREMIUM PRODUCERS GROUP, LLC;)
13 MITCHELL M. MAYNARD and DORICE)
MAYNARD,)
14 Defendants.)

Case No.: CV2007-003021

MOTION TO DISMISS COMPLAINT

SUBMITTED WITHOUT ARGUMENT

15 Defendants respectfully request that the Court dismiss the plaintiff's
16 Complaint pursuant to 16 A.R.S. Rules of Civil Procedure, Rule 12(b)(2), (5)
17 and (6), for insufficient service of process, for lack of personal
18 jurisdiction (doctrine of forum non conveniens), and for Plaintiff's failure
19 to state a claim upon which relief can be granted.

20 The primary basis for this motion is that the service of the Summons to
21 the Defendants was deficient and improper, per 16 A.R.S. Rules of Civil
22 Procedure, Rule 4.2(c); but even if service was to be somehow ruled
23 sufficient, Defendants move that the Superior Court of Arizona should not
24 retain jurisdiction in this matter, as to do so would create a great hardship
25 for the Defendants, a married couple with a minor child and who both work and
26 reside solely in California.

1 The Maynards first became aware of the Complaint when a copy arrived in
2 the mail sometime early in the week of March 5, 2007. It arrived in a plain,
3 handwritten envelope without return address and had been addressed
4 incorrectly to an old residential address; the address subsequently corrected
5 by the post office and forwarded. Appearing to be a 'junk mail' solicitation,
6 the envelope sat unopened for several days. Another copy arrived shortly
7 thereafter (please see attached Exhibits D, E) and the incredulous Maynards
8 then verified the authenticity of the documents with the Arizona Superior
9 Court.

10 Arizona's statutes are very plain and clear on the matter of service of
11 a Summons and Complaint to an out of state party. Although personal service
12 is preferred (*McDonald v. Mabee*, 243 U.S. 90, 92 [1917]) and 16 A.R.S. Rules
13 of Civil Procedure, Rule 4(d), "when the whereabouts of a party outside the
14 state is known", service may be made through the post office "by any form of
15 mail requiring a *signed and returned receipt*." (*Id.* Rule 4.2(c), emphasis
16 added). Although Plaintiff knew from previous correspondence the Maynard's
17 residential address, they did not follow this procedure, and caused service
18 to be mailed, without any signature requirements, to an incorrect residential
19 address. The post office was able to correct the address and forward the
20 items to the Maynards, but not without significant delay. Without this action
21 on the part of the post office, the Maynards would not have known about the
22 Complaint, at all! The fact the documents miraculously arrived does not
23 excuse the Plaintiff from their requirement of service. The Maynards
24 therefore move that the Complaint be dismissed, for the specific violations
25 of due process noted below.

1 B. Deficient for service outside the State (entities)

2 Even if Plaintiff asserts that service to the Maynards as individuals
3 was incidental to service on their business Premium Producers Group ("PPG"),
4 service of a Summons was still not properly made. 16 A.R.S. Rules of Civil
5 Procedure, Rule 4.2(h) plainly requires that "In case of a corporation or
6 partnership or unincorporated association....service under this Rule shall be
7 made on one of the persons specified in Rule 4.1(k)." To the best of their
8 ability, the Maynards can not determine that any attempt at service at PPG's
9 business address was made in any form or in any manner. The business address
10 is a mail center, and is open weekdays from 9am to 6pm. This center routinely
11 receives and accepts items requiring signatures such as certified mail or
12 overnight mail, and they maintain a log of these items. When questioned, an
13 employee stated they did not have any record of any service of court papers
14 to PPG. Again, this deficiency on the part of the Plaintiff is suspicious,
15 because as demonstrated above, the Plaintiff is fully aware of PPG's business
16 address per previous correspondence and the address of the business is also
17 plainly posted on PPG's web site, <http://premiumproducersgroup.com>.

18 II. Lack of personal jurisdiction

19 Since most of the Plaintiff's Complaint revolves around statements made in
20 an online news and information Blog written by the Maynards, it should be
21 noted that online journalists are protected by procedural rules giving extra
22 consideration to their constitutional rights in actions against them (see
23 *Banco Nacional de Mexico v. Narco News, Giordano, et al*). It is clear by the
24 "format and design" of the Blog that it is an online newsletter (see
25 <http://mcppremium.blogspot.com>) and meets the definition established in
26 *Lunney v. Prodigy Servc. Co.*, 94 NY2d 242, 249 (1999). The online Blog

1 comments in question were posted from a computer located in California. Add
2 to this the fact that neither the Maynard's nor PPG have sufficient ties with
3 the State of Arizona to justify requiring them to respond to this lawsuit so
4 far from their home venue of Orange County, California (e.g. they own no
5 property and maintain no offices in Arizona), and the forum non conveniens is
6 certainly a non-merits ground for dismissal. The fact that PPG may have sold
7 software programs to persons who live in the state of Arizona is irrelevant
8 when determining jurisdiction for this particular Complaint, since the
9 Plaintiff's charges are focused on internet libel and online defamation, not
10 software. However, in the unlikely event that subject-matter jurisdiction is
11 held proper in the Arizona Court for some reason, the test of personal
12 jurisdiction would still have to be met, (see *Panavision Int'l, L.P. v.*
13 *Toeppen*, 141 F.3d 1316, 1322-23 [9th Cir. 1998]; *Leroy v. Great Western United*
14 *Corp.*, 443 U.S. 173, 183-184 [1979]) to satisfy the constitutional
15 requirement of reasonableness further detailed below.

16 A. Constitutional requirement of reasonableness

17 A court's exercise of its jurisdiction must align with notions of fair
18 play and substantial justice. *Id.* at 1322. Indeed, "Any hardship to
19 individuals from internet-related litigation... should be minimized through
20 application of the doctrine of forum non conveniens." Stephen H Weiner, Forum
21 Non Conveniens, 64 Fordham L. Rev. 845, 845 (1995). There exists a great
22 inequity between the parties. Plaintiff is a large, multi-million dollar
23 company of substantial means, represented by an attorney, and would therefore
24 face minimal inconvenience at a change of jurisdiction. Mitchell and Dorice
25 Maynard on the other hand, are a small "mom and pop" business of very limited
26 means, living and working solely in the state of California. Unable to afford

1 counsel at this time, they will be defendants Pro Se - representing
2 themselves - and making a defense in the Arizona court places extreme
3 hardship on them. The Plaintiff was certainly aware of this when they filed
4 their Complaint in the jurisdiction of Arizona, giving further reason to
5 question their motivation. The Maynards are hereby requesting the doctrine of
6 forum non conveniens be applied, to avoid placing a burden on them that is
7 unconstitutional (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 -17
8 [1945]; *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm.*, 339
9 U.S. 643, 649 [1950]; *Shaffer v. Heitner*, 433 U.S. 186, 204 [1977]), and
10 believe that the jurisdiction of a court of Orange County, California where
11 they work and reside is the proper venue.

12 B. Additional mitigating circumstances

13 Notwithstanding the reasons above, the Maynards are also sole
14 caretakers of a minor child, and have no family in California. Defending
15 themselves in Arizona would mean pulling their child from school to accompany
16 them to Arizona. In addition, Mitchell Maynard suffers from an anxiety
17 disorder which makes work outside his home or travel away from home extremely
18 difficult, if not impossible. A letter from one of his doctors is attached as
19 Exhibit F. For these reasons we believe the Court should grant this motion
20 for dismissal based on forum non conviens.

21 III. Failure to state a claim upon which relief can be granted

22 Plaintiff promotes and markets in national advertising campaigns its
23 product, an equity indexed annuity known as the "Balance Plus Annuity" (or
24 simply "BPA") and maintains a web site promoting the product, which is sold
25 to consumers through thousands of agents licensed through its twelve
26 affiliated member firms. Equity indexed annuities have received much

1 attention in the last year, from regulators, consumer groups, and the media.
2 These facts clearly place Plaintiff in the category of a public figure and
3 thus a review of their product and sales activities is a matter of public
4 concern. See *Ithaca College v. Yale Daily News Pub. Co. Inc.*, 105 Misc2d 793,
5 796 (Sup. Ct., Tompkins County, 1980), affd 85 AD2d 817 (3d Dept 1981),
6 citing *Reliance Ins. Co. v. Barron's*, 442 F Supp 1341 (SD NY 1977).

7 In order to recover damages in a defamation lawsuit, a plaintiff who is a
8 "public figure" (see *New York Times v. Sullivan*, 376 U.S. 254, 84 S Ct. 710,
9 11 L. Ed. 2d 686 [1964]) or where the defamation involves a "matter of public
10 concern" (see *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 [1968]) must
11 prove "actual malice" - that the statements made were done so with the
12 knowledge they were false or with reckless disregard for whether they were
13 false. A.R.S. Title 12, Ch. 6, Article 6.1, § 12-653.01 makes it clear that
14 "... good faith belief on the part of the defendant in the truth of the
15 libelous publication... shall not constitute actual malice." The Maynards have
16 maintained all along (and still maintain) that their statements are
17 materially correct and true. Plaintiff offers no specific or actual proofs
18 that the Maynard's statements are false.

19 Given that the above standards must be applied, Plaintiff further fails
20 to state how the Maynard's statements actually harmed or actually disrupted
21 their business. Nothing in the Complaint offers any specific instances, for
22 example, of harm (*Jurlique Inc. v. Austral Biolab Pty. Ltd.*, 187 AD2d 637,
23 638 [2d Dept 1992]) or any specific instances of interference with a business
24 relationship (*Business Networks of New York v Complete Network Solutions*
25 *Inc.*, 265 AD2d, 194, 195 [1st Dept. 1999]). Rather, throughout the Complaint
26 they rely on vague assertions of damages alone. Moreover, in published

1 articles and advertisements in August of 2006, Plaintiff crows about
2 "exceeding expectations" of BPA sales "by tenfold" (see attached Exhibit G).
3 They cannot have it both ways! Admittedly, the equity indexed annuity
4 industry has suffered a recent downturn overall, as reported by industry data
5 gatherers such as Beacon Research and The Advantage Group. The Plaintiff may
6 be trying to scapegoat the Maynards for any reduction in sales, by filing the
7 Complaint at this particular time.

8 CONCLUSION

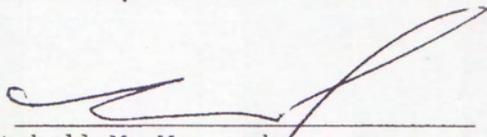
9 Arizona Rules of Civil Procedure are very clear as to what constitutes
10 proper service, and the Plaintiff did not adhere to them. Furthermore, it
11 appears that the Plaintiff's, having seen a press release of January 2007
12 regarding a judgment against the Maynards for a completely unrelated matter,
13 are using the filing of the Complaint (nearly a year after the statements
14 were made by the Maynards) in an opportunistic attempt to secure a default
15 judgment at a time when Defendants are financially and emotionally
16 vulnerable.

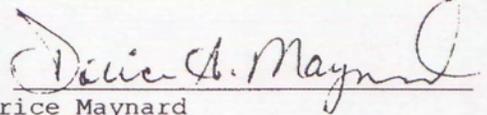
17 Nevertheless, it would cause an undue hardship on the defendants to
18 have to defend themselves in an Arizona court; an Orange County, California
19 court is clearly the proper jurisdiction for this action. Also, the First
20 Amendment guarantees the rights of free speech to the Media, and this
21 protection extends to authors of internet Blogs. Unflattering reviews or
22 comments on public figures or matters of public interest, where factually
23 correct, are also protected and in these cases the burden is on the plaintiff
24 to prove them false. Equity indexed annuities are on the forefront of public
25 interest from regulators, agents and consumers, and independent sources of
26 information about them are vital and certainly deserve First Amendment

1 protection. Finally, the Plaintiff is so vague regarding any claim of actual
2 damages it does not meet the burden of proving actual loss.

3 For these reasons, the Plaintiff's Complaint should be dismissed.

4 Respectfully submitted this 17th day of March, 2007.

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20 Defendants in Pro Per

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