IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JB & ASSOCIATES, INC., et al., **Plaintiffs,** **vs.** **NEBRASKA CANCER COALITION, INC., et al.,** **Defendants.**	)	**Case No.CI 15-6370** **Reply Brief in Support of Defendants' Motion to Dismiss**

Defendants Nebraska Cancer Coalition, Inc. ("NC2"), Dr. Alan G. Thorson, M.D., and Dr. J. David Watts, M.D. (collectively, "defendants") submit the following reply brief in support of their Motion to Dismiss filed September 14, 2015. Although this brief replies specifically to only two of the arguments plaintiffs make in their brief, defendants' motion to dismiss relies on all of the arguments made in their opening brief.

I. The statements made on NC2's website are about the relationship between UV radiation/tanning and cancer, not about the plaintiffs or their businesses.

Both parties' briefs quote the 18 statements plaintiffs are suing over. Not one of them makes any statement about the corporations that bring this suit, their owners, or the business names they use when they sell their services to the public.

Plaintiffs are corporations and LLCs, which allege that they own a majority of "the known tanning salons in the Lincoln and Omaha market areas," Complaint ¶ 8, and thus conclude that any statement about the relationship between UV radiation and skin cancer necessarily is about them. The vast majority of the statements subject to this suit, however, are alleged to be made on www.thebedisdead.org, a website available for viewing by any of the billions of people in the world with a computer. The internet knows no geographical boundaries, and nothing on the defendants' website conveys their anti-cancer message solely to people in

Lincoln or Omaha, Nebraska. The owner of a tanning bed in Scottsbluff, Nebraska, or Seattle, Washington, or Paris, France, for that matter, could make exactly the same claim as plaintiffs. The precise size of the group comprising all owners of tanning beds in the world is unknown, but is indisputably large.

Plaintiffs quote from a century-old Iowa case holding that, to be actionable as a libel, a statement "must refer to an ascertainable person …," and argue that they will at some point attempt to offer evidence that the defendants intended their statements about cancer to refer specifically to Plaintiffs and that their message was so understood by others. Plaintiffs' brief at 15. When one reads Wisner v. Nichols, 165 Iowa 15, 143 N.W. 1020 (1913) though, one learns that the "group" at issue there consisted of two, perhaps three, people living in a particular area of Iowa. That fact pattern is nothing like this case.

Defendants' opening brief discussed the treatment of the group libel issue contained in the Restatement (Second) of Torts. Id. at 8-9. The principles cited there are not unique. See, e.g., Chau v. Lewis, 771 F.3d 118, 129 (2d Cir. 2014) (statements about CDO managers in the bond industry are not of and concerning the plaintiff, who was a CDO manager); Shuster v. U.S. News & World Report, 602 F.2d 850, 854 (8th Cir. 1979) ("Vague and general references to a comparatively large group, without mentioning the plaintiffs, do not constitute an actionable libel"); Reeder v. Carroll, 759 F.Supp.2d 1064, 1083-84 (N.D. Iowa 2010) (As a matter of law, statement in email about a medical group was not of and concerning plaintiff, who was a founder and owner of the medical group).

The statements in this suit are about tanning and its link to cancer, not about any tanning bed owner. To the extent those statements can be understood to be about a group rather than about tanning and cancer generally, that group consists of every tanning bed owner everywhere, and that group is too large and indistinct to allow these particular plaintiffs to sue for libel.

II. The statements sued upon are not defamatory per se and the plaintiffs failed to make a retraction request pursuant to Section 25-840.01. Their inability to plead special damages is therefore fatal to their libel claim.

Plaintiffs do not allege special damages. Thus, unless the statements they complain about constitute libel per se, the complaint fails to state a claim for libel.

Relying on one portion of the definition our Supreme Court has established for libel per se, plaintiffs contend that all of the statements they attack "prejudice Plaintiffs in their profession and trade." Plaintiffs' brief at 18. This position intentionally ignores the very nature of a per se libel. Moats v. Republican Party of Neb., 281 Neb. 411, 796 N.W.2d 584 (2011), affirming the district court's grant of a motion to dismiss, is instructive.

There, the Republican Party said of attorney Moats, among other bad things, that he "cost Nebraskans their jobs and left unpaid promises to hundreds of thousands of vehicle buyers," that Moats "supports using your tax dollars to fund abortions," and that Moats "made misleading statements in an affidavit." Id. at 415, 796 N.W.2d at 589-90. Those statements were held by the Nebraska Supreme Court not to qualify as libel per se.

> There are two types of libel: words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and the existence of special damages. Whether a communication is libelous per se is a threshold question of law for the court.

Id. at 422, 796 N.W.2d at 594. Here, plaintiffs' 37-page complaint contains roughly 30 pages of "innuendo," or allegations about the defamatory meaning of the words used. In essence, the complaint identifies a statement made by NC2 and then pleads various theories, some based on the same scientific sources used on the website and some based on sources plaintiffs prefer, to contend that such statement is subject to a defamatory meaning. That is the very definition of a per quod libel claim. None of the statements subject to this suit are defamatory "in themselves," or without explanation.

Plaintiffs' complaint prays for "general damages as provided by law." Complaint, p. 37. Curiously, plaintiffs' brief retracts even the request for general damages: "Plaintiffs are not seeking monetary damages, but rather injunctive relief preventing Defendants from continuing to publish the false statements …." Plaintiffs' brief at 2.

However, our Supreme Court has been quite clear on this point: "'One of the unwaivering precepts of the American law of remedies has long been the axiom that equity will not enjoin a libel.'" Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 251 Neb. 722, 730, 559 N.W.2d 740, 746 (1997) (quoting R. Smolla, Law of Defamation § 9.13(a) at 9-36 (1996)). That is so for several reasons, including in the libel context that "damages are an adequate remedy at law …." Id.

Plaintiffs effectively concede that they cannot plead or prove special damages, and that they made no retraction demand. Plaintiffs' brief at 19. Thus, unless the statements they complain of constitute libel per se, their complaint fails to state a claim for libel. Moats, supra at 423, 796 N.W.2d at 594-95; Whitcomb v. Neb. State Educ. Ass'n., 184 Neb. 31, 35, 165 N.W.2d 99, 101 (1969) (Neb. Rev. Stat. § 25-840.01 "limits recovery to special damages as therein defined unless correction is requested as set out above therein."). None of the statements targeted by plaintiffs are actionable per se, and the plaintiffs made no retraction demand that complies with the requirements of Section 25-840.01. The complaint therefore fails to state a libel claim.

Respectfully submitted this 20th day of October, 2015.

NEBRASKA CANCER COALITION, INC., DR. ALAN G. THORSON, M.D., and DR. DAVID WATTS, M.D.,

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