

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Larry Joe Davis, Jr., an individual,
Plaintiff

v.

Case No: 8:10-CV-2352-T27 TBM

Avvo, Inc., a Washington corporation,
d/b/a Avvo.com, Defendant

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THIRD AMENDED COMPLAINT

Plaintiff files this Third Amended Complaint (so titled to avoid confusion in the record between the Second Amended Complaint stricken by Order of this Court and this proposed complaint) against Defendant and states:

1. This is an action for compensatory, exemplary and punitive damages in excess of \$15,000 excluding costs and attorney's fees.

2. Count I is based on Defendant's violation of Section 817.41, Florida Statutes (false advertising) and accrued in or around March, 2009.

3. Count II is based on Defendant's violation of Section 540.08, Florida Statutes (unauthorized use of likeness for commercial purpose) and accrued in or around March, 2009.

4. Count III is based on Defendant's violations of Section 501.204, Florida Statutes (the "Florida Deceptive and Unfair Trade Practices Act") and accrued in or around March, 2009.

5. This Court has jurisdiction over the parties and venue is proper in Pinellas County, Florida. All conditions precedent to this action have been met or otherwise are discharged.

6. Plaintiff is an individual and is licensed as an attorney in good standing by the Florida Bar since 1992. Plaintiff was Board Certified in Health Law by the Florida Bar in 1999 and he was recertified in Health Law by the Florida Bar in 2004 and in 2009. According to the Florida Bar's requirements for Board Certification, a Board Certified attorney must demonstrate to the Florida Bar "substantial involvement in the field of law for which certification is sought." The 34 areas of attorney Board Certification in Florida represent distinct practice areas.

7. Defendant is a Washington corporation doing business in Florida and particularly St. Petersburg, Florida, listing purportedly objective profiles of St. Petersburg, Florida lawyers on its website (that is, if the person performing the search has an IP address located in St. Petersburg, the Avvo.com search engine automatically searches only St. Petersburg lawyers). Avvo, Inc. conducts its business under the trade name Avvo.com.

8. Defendant purports to list over 90% of lawyers in the United States.

9. Avvo.com listed Plaintiff with an objectively incorrect "practice area," "100% Employment/Labor" law. Avvo.com listed other non-Avvo-member Board Certified Aviation lawyers, Board Certified Construction lawyers, Board Certified Civil Trial lawyers, Board Certified Appellate Practice lawyers, Board Certified State and Federal Government and Administrative Practice lawyers and Board Certified Health lawyers, with an objectively incorrect "practice area." Board Certification, by definition, defines a

lawyer's practice area. Hence, Defendant's errors in listing the "practice area" of Board Certified lawyers are objective falsehoods.

10. In addition to publishing erroneous "practice areas" for Board Certified lawyers, Defendant routinely publishes other factual errors including wrong addresses (as in Plaintiff's case), multiple listings of the same attorney, misstatements regarding licensure, and other material misstatements of fact regarding attorneys.

11. Over 65% of non-Avvo-member Board Certified Aviation lawyers are listed falsely by Defendants as practicing "100% Employment/Labor" law.

12. Over 55% of non-Avvo-member Board Certified Construction lawyers are listed falsely by Defendants as practicing "100% Employment/Labor" law.

13. Over 55% of non-Avvo-member Board Certified Health lawyers are listed falsely by Defendants as practicing "100% Employment/Labor" law.

14. Over 65% of non-Avvo-member Board Certified Civil Trial lawyers are listed falsely by Defendants as practicing "100% Civil Rights" law.

15. Over 55% of non-Avvo-member Board Certified Appellate Practice lawyers are listed falsely by Defendants as practicing "100% General Practice" law.

16. Over 65% of non-Avvo-member Board Certified State and Federal Government and Administrative Practice lawyers are listed falsely by Defendants as practicing "100% Privacy" law.

17. The number of Board Certified lawyers affected by Avvo.com's false statements regarding their "practice areas" exceeds 700 Board Certified lawyers. The number of all Florida lawyers affected by Avvo.com's false statements regarding their professional practices, on information and belief, is in the thousands.

18. On Defendant's listing pages of over 10% of these mislisted Board Certified lawyers, Defendant apparently has published an unauthorized photo of the lawyer in violation of Florida law, as was the case with Plaintiff's erroneous listing. Plaintiff estimates that Defendant has illegally published the likenesses, for commercial purposes, of more than 50 mislisted Board Certified lawyers in Florida. All of those pictures are placed so as to give the definite impression of endorsement of products and services appearing on the same Avvo.com pages as the unauthorized likenesses. There is no arguable creative or political use for the unauthorized likenesses at issue. Such unauthorized uses have the effect of making the offended party appear to endorse the deceptive mis-listings, particularly, the objectively false statements regarding practice area located in close proximity to the pictures (along with a graphic and objectively deceptive pie chart).

19. Avvo.com publishes these mis-listings and unauthorized likenesses without the offended attorneys' knowledge, input or approval. Avvo.com did this to Plaintiff as well. Avvo.com advertises that its listings are based on public information from the Florida Bar. In the case of Plaintiff and the other mislisted Board Certified attorneys, Defendant's advertised statement regarding the source of its listing information is false and misleading to the public. On information and belief, Defendant generated the aforementioned false listings automatically via a computer program, without regard to the public information available. Defendant's choice of "practice area" for the aforementioned lawyers was performed recklessly and apparently the program used by Defendant to mine public information has not been "debugged."

20. The public information Avvo.com relies upon according to a representative of Avvo.com is the state bar's information, in this case, the Florida Bar. The Florida Bar website, floridabar.org, lists Plaintiff's basic information on one screen, and a "screen shot" of Plaintiff's public information is attached as Exhibit B to the original Complaint filed in this action (doc. 2). Avvo.com misrepresented and erroneously listed the public information available on the Florida Bar's website regarding the Plaintiff. The misrepresentations include an erroneous business address (despite that Avvo.com asserts it provides the business address "of record" with the Florida Bar) as well as an objectively inexplicable practice area (presented as a graphical pie-chart stating "100% employment/labor law" and situated just below the unauthorized photograph of Plaintiff).

21. On or around August 17, 2010, Plaintiff was first made aware of his Avvo.com listing. A potential client had cold-called Plaintiff looking for an employment lawyer who could handle a "hostile work environment" case. Plaintiff, mysteriously to Plaintiff at the time, had received numerous calls over the past year from prospective clients with hostile work environment cases. The calls consisted of injured plaintiffs who had contingency-type Title VII cases which Plaintiff does not take as a health lawyer and which typically are pursued by firms such as Morgan & Morgan. None of the callers including the caller on August 19, 2010 were physicians or health-care providers, i.e. Plaintiff's client base.

22. After the August 17 call was nearing an end and after Plaintiff gave basic advice to the caller for free and determined that he was not the right lawyer for the case in any event, Plaintiff inquired of the caller as to how she found his name. She responded that she had found the name on Avvo.com and that Plaintiff was listed (in a pie-chart at the very top of the screen) as "100% employment law." This representation was blatantly false

and misleading and was not based on the public information available regarding Plaintiff anywhere. Plaintiff's likeness appeared on the same page as the pie chart, as did other advertising and promotional material designed to increase traffic and interaction (read: monetary value) on the site.

23. Plaintiff also discovered that Avvo.com had somehow posted on its website an unauthorized likeness of Plaintiff, from davishealthlaw.com, and such posting was obviously for Avvo.com's commercial gain (on the same page as the picture/listing and rating of Plaintiff were paid/sponsored advertisements for other apparently competing lawyers).

24. Plaintiff informed the August 17 caller that not only was he NOT a low-ranking lawyer, but he was Board Certified in Health Law by the Florida Bar, a certification that has been achieved by approximately 120 lawyers out of approximately 75,000 licensed Florida attorneys (about 1/8 of 1% of licensed Florida attorneys). Plaintiff explained that his normal client base is either a health facility or licensed healthcare provider, that he has a boutique practice that is highly specialized and that he is capable of doing work of the highest complexity in the healthcare law field. The caller responded: "I knew it. I knew it," and acknowledged that the information posted in front of her on the Avvo.com website was "not right." Plaintiff is versed in employer-side human resources compliance, as noted on his own web site, and is capable of consulting on "hostile work environment" claims and compliance.

25. Plaintiff spent a number of minutes convincing this one person that he was not at all what Avvo.com had represented.

26. Immediately following this phone conversation, Plaintiff visited the Avvo.com site and proceeded in somewhat of a panic to enter the site, designate a password, log on to his profile page and attempt to correct the misinformation, which included an incorrect business address and blatantly incorrect practice area. Plaintiff asserts that the Terms of Use are unenforceable under these circumstances, either due to duress, mistake, procurement of contract by illegality, fraud in the inducement, unconscionability, unclean hands, or other theories; however, in any event, Plaintiff is not relying on events which occurred after he logged-in to the Avvo.com site. Pursuant to the well-pleaded complaint rule, Plaintiff specifically disavows, at this time, reliance on any fact which occurred after Plaintiff logged on to the Avvo.com site (August 17, 2010). All claims in this action accrued prior to this arguable “start date” of the Terms of Use. As such, the Terms of Use are not applicable to any aspect of this action.

27. During the next several days during the week of August 17, 2010, Plaintiff removed from his Avvo.com listing; 1) the incorrect practice area; 2) the unauthorized image and 3) the incorrect business address.

28. Plaintiff's logging-on to the Avvo.com website to attempt to correct his information did not release liability for Defendant's past transgressions. But for Defendant's actionable and illegal activities, Plaintiff never would have logged on to the Avvo.com website.

29. On information and belief, Defendant benefits economically by publishing outdated and inaccurate information regarding lawyers via a join-us-and-fix-it-or-else strategy. For Defendant to benefit from such practices, while at the same time harming the

reputations of lawyers and misleading consumers is an actionable trade practice in Florida. Avvo.com's use of these tactics amounts to an actionable trick and trap scheme.

30. As noted below, Plaintiff believes that his initial erroneous listing on Avvo.com persisted for approximately one year and six months. Plaintiff now suspects that the multiple mysterious hostile work environment cold calls were the result of Avvo.com's erroneous and incomplete listing regarding Plaintiff. Avvo.com continues this practice with respect to the other Board Certified lawyers mentioned above without amelioration.

31. Plaintiff submits that Avvo.com's publication of a purportedly complete profile of an attorney is in itself unfair if the attorney is coerced or tricked into joining Avvo.com to edit the profile, complete the profile and correct the profile (or to remove an unauthorized photograph).

32. Avvo.com apparently takes the position that it is incumbent on lawyers, particularly Board Certified lawyers, to spend their time performing Avvo.com's advertised function--that is, to accurately list the public record.

33. Plaintiff submits that it is incumbent on Avvo.com to correct its mistakes and omissions, not consumers.

34. Avvo.com never notified Plaintiff that it was listing him. On information and belief, the same is true for the purportedly 90% of U.S. attorneys that Avvo.com says publicly that it has listed. Avvo.com never gave Plaintiff the opportunity to edit the information prior to the automated listing; and continues to attempt to force Plaintiff to participate in Avvo.com, as stated above.

35. Avvo.com has not corrected the falsely listed practice areas of the fore-referenced Board Certified lawyers. The mislisted Florida Board Certified lawyers are

probably unaware of the continuing business disparagement of their names and the unauthorized uses of many of their likenesses.

36. Nowhere does the Florida Bar or any other public information list Plaintiff as a 100% employment/labor lawyer. Neither does the available public information support Defendant's designation of practice areas for the other mislisted Board Certified Florida lawyers.

37. Avvo.com provides a link to Plaintiff's law firm web site, which is called davishealthlaw.com. Apparently because no actual human was reviewing what Avvo.com was doing, Defendant failed to look at the web site it linked in order to discover what Plaintiff actually does for a living.

38. Plaintiff suspects that Avvo.com's computer program was not designed properly, and in a rush to list and rate "90% of lawyers in the United States" allowed the program to run rampant making reckless mistakes, as was the case here and with the other Board Certified lawyers mentioned herein. Plaintiff submits that Avvo.com should recategorize Florida as a "Beta Directory" state, that is, Avvo.com should be ordered by this Court to "re-do" its listings for Florida and change its programs to cease violating Florida law. Without such an order, Avvo.com's activities apparently will continue indefinitely absent intervention by the individuals being harmed.

39. According to the Avvo.com website, Plaintiff's incorrect and misleading Avvo.com information as of August 17, 2010 had not been updated since March of 2009, which in itself is a recipe for business disparagement and constitutes an unfair and reckless trade practice. On information and belief, Avvo.com publishes stale and outdated

information on all Florida lawyers in a potential effort to coerce their participation on Avvo.com.

40. Avvo.com for an undetermined amount of time, but perhaps as long as 18 months, misappropriated a likeness of Plaintiff from plaintiff's personal practice web site, davishealthlaw.com, in violation of Section 540.08, Florida Statutes. Plaintiff did not authorize the use. Such a placement of Plaintiff's proprietary and copyrighted image, besides being illegal under Florida law, gives the false impression to any viewers of that page that Avvo.com's listing, advertisements and website in general is somehow endorsed by Plaintiff. Avvo.com's practice of automatically publishing unauthorized images of attorneys is an actionable trade practice as well as a violation of the specific Florida law governing use of likeness and advertising.

41. Avvo.com's "Contact Us" page presents a form for an email and fails to disclose a phone number to call a live person (despite that Avvo.com publicly states that one can "just call" to correct listing mistakes). The only viable choice Avvo.com leaves to mislisted lawyers who are immediately concerned with their mislisted information is to log-in and correct a mislisting immediately. Attempting to coerce lawyers by illegal and tortious conduct, on an epidemic scale, to correct mislistings is an actionable trade practice. Requiring lawyers to surf the internet, in general, looking for mislistings on websites such as Avvo.com, is simply not the intent of Florida law and public policy. Avvo.com owns the onus to avoid rampant defamation of lawyers and misleading of the public by its alleged posting of "publicly available" information.

Count I: Violation of Section 817.41, Florida Statutes, False Advertising.

42. Plaintiff reincorporates paragraphs 1-41 as if fully set forth herein.

43. Defendant, in or around March, 2009, and persisting for approximately 1.5 years, disseminated before the general public of Florida a misleading advertisement regarding Plaintiff. In addition to falsely stating Plaintiff's practice area and address of record with the Florida Bar, the advertisement contained an unauthorized image of Plaintiff and gave the false impression that Plaintiff had somehow endorsed Defendant's advertisement of Plaintiff. The false impression was given that Plaintiff endorsed the Avvo.com website in general; that Plaintiff endorsed his false listing; that Plaintiff endorsed advertisements and services placed on his listing page next to his listing and picture; and that Plaintiff participated on the Avvo.com site. Plaintiff's listing was deceptive to the public, to consumers, to other lawyers, and specifically to the potential client referenced herein, who actually relied on the false advertisement and called Plaintiff as a result.

44. Such dissemination of misleading advertising is fraudulent and unlawful, and was designed to obtain money or property.

45. Plaintiff was damaged by Defendant's actions and asserts a civil action for violation of Section 817.41, Florida Statutes.

WHEREFORE Plaintiff requests that the Court enter judgment for Plaintiff, including costs, attorney's fees and, upon leave of court, punitive damages, in addition to actual damages, and grant any other relief, including equitable relief, as deemed appropriate and just.

Count II: Violation of Section 540.08, Florida Statutes (unauthorized use of likeness for commercial purpose).

46. Plaintiff reincorporates paragraphs 1-45 as if fully set forth herein.

47. Defendant, in or around March, 2009, and persisting for approximately 1.5 years, published, printed, displayed and publicly used for purposes of trade and commercial and advertising purposes the photograph and likeness of Plaintiff without the express written or oral consent to such use given by Plaintiff or any other person in writing authorized by Plaintiff to license the commercial use of Plaintiff's likeness. Such publication was made recklessly and knowingly to increase the value of Defendant's commercial website business venture.

48. Plaintiff asserts a cause of action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

WHEREFORE Plaintiff requests that the Court enter judgment for Plaintiff, including costs, and issue any other relief deemed appropriate, including entering an injunction against Defendant pursuant to Florida law, and awarding Plaintiff actual, punitive and exemplary damages pursuant to s.540.08, F.S.

Count III: Violation of Section 501.204, Florida Statutes

49. Plaintiff reincorporates paragraphs 1-48 as if fully set forth herein.

50. Defendant has conducted its business in such a way as to constitute one or more unlawful practices pursuant to Section 501.204, Florida Statutes (Unlawful acts and practices), including unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of a trade or commerce.

51. Defendant's actions have damaged Plaintiff individually, as well as many other lawyers in Florida, and Defendant's actions have misled consumers in Florida.

52. Plaintiff asserts a cause of action for the remedies described in Section 501.211, Florida Statutes.

WHEREFORE Plaintiff requests that the Court enter judgment for Plaintiff, including costs and attorney's fees, and issue any other relief deemed appropriate, including issuance of a declaratory judgment that Defendant's practices violate the law; issuance of an injunction against Defendant ordering it to cease violating the law; and awarding Plaintiff actual damages.

PLAINTIFF REQUESTS TRIAL BY JURY ON ALL COUNTS SO TRIABLE

Certificate of Service

I hereby certify that a true and correct copy of the foregoing is being electronically filed on this 25th day of April and will be furnished via CM/ECF to counsel for Defendant, Greg D. Thomas, Esq., Susan Tillotson Bunch, Esq. and Paul R. McAdoo, 400 N. Ashley Drive, Suite 1100, Tampa, Florida 33602.

Respectfully Submitted Pro Se:

s/ Larry Joe Davis, Jr.

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