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November 25, 2013

Via Email and U.S. Mail

Stephen Gutman
KlearGear.com Legal Department
2885 Sanford Ave SW, Suite #19886
Grandville, MI 49418
legal@kleargear.com

Re: Potential liability of KlearGear.com to John Palmer

Dear Mr. Gutman,

I represent John Palmer and his wife Jen of Layton, Utah. I am writing to outline the legal claims that the Palmers will bring against KlearGear.com unless we can agree on a mutually acceptable resolution. I am also writing to propose a set of remedies that would satisfy the Palmers if you wish to avoid litigation and come to an amicable resolution.

Mr. Palmer attempted to make a purchase on your website in December 2008. When KlearGear.com did not deliver what Mr. Palmer had ordered and KlearGear.com cancelled the transaction, his wife Jen wrote an unflattering review about KlearGear.com on RipoffReport.com.

In 2012, you contacted Mr. Palmer and demanded \$3500 pursuant to a non-disparagement clause that, you stated, KlearGear.com included in its Terms of Use when Mr. Palmer used the website in 2008. In fact, the clause was not included in the Terms of Use at that time. Even if it had been, the purchaser Mr. Palmer did not write the critical review; rather, his wife Jen wrote it. More generally, the non-disparagement clause is substantively and procedurally unconscionable because it constitutes unfair surprise in a take-it-or-leave-it contract, and the terms themselves — prohibiting “any action that negatively impacts KlearGear.com [or] its reputation” — are so one-sided in their broad, restrictive impact as to oppress an innocent party. *See, e.g., Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 402-03 (Utah 1998). Any attempt to enforce such a clause in court would, moreover, violate the First Amendment because of the absence of a voluntary, knowing, and intelligent waiver of a constitutional right. *See, e.g., Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *Gonzalez v. Hidalgo Cnty.*, 489 F.2d 1043, 1046 (5th Cir. 1973). For all of these reasons, the clause was not a legitimate basis for your demand of \$3500 from Mr. Palmer.

Nonetheless, when the Palmers refused to pay, KlearGear.com reported John Palmer’s supposed “debt” to one or more credit reporting agencies. Moreover, when the Palmers disputed that debt with several credit reporting agencies, KlearGear.com continued to maintain that the

debt was owed and also demanded payment of a \$50 “Dispute Fee” because the Palmers attempted to dispute the debt.

As a result of KlearGear.com’s negative report about Mr. Palmer’s credit and KlearGear.com’s insistence that the debt was valid after the Palmers disputed it with the credit reporting agencies in late summer of 2012, the Palmers suffered injuries, including but not limited to:

- The denial of credit to pay for a new furnace when their old one broke, as a result of which denial the Palmers and their three-year-old son were left without heat in their home during three cold weeks in October 2013;
- The delay of their car loan in December 2012 when, despite having been pre-approved, they had difficulty securing a lender because of the negative report on Mr. Palmer’s credit;
- The denial of a credit card;
- Instances in which the negative report on Mr. Palmer’s credit deterred the Palmers from seeking to refinance their home or secure a home equity loan for important roof and window repairs;
- The present and ongoing inability to sell their home and purchase a new one;
- Injury to reputation, fear, frustration, humiliation associated with being denied credit and treated as if they were irresponsible, and other emotional distress; and
- Loss of numerous hours spent trying to clear up Mr. Palmer’s credit.

By reporting to one or more credit agencies that Mr. Palmer owed a debt that he did not in fact owe, KlearGear.com committed the torts of defamation, *see West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994), intentional interference with economic relations, *see St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194, 200-01 (Utah 1991), and intentional infliction of emotional distress, *see Retherford v. AT&T Commc’ns of Mountain States, Inc.*, 844 P.2d 949, 967 (Utah 1992). To the extent that you may argue that the law of Texas (where KlearGear.com was located in 2008) applies, these torts are recognized in that state as well, and KlearGear.com would also be liable for violating the Texas Deceptive Trade Practices Act by “tak[ing] advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.” Tex. Bus. & Com. Code § 17.45(5); *see id.* § 17.50(a)(3) (enforcement provision). Subsequently, by failing to conduct a reasonable investigation and correct the mistaken information about Mr. Palmer in response to the request by one or more credit reporting agencies investigating Mr. Palmer’s dispute, KlearGear.com violated the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681s-2(b), a provision that is enforceable by compensatory, statutory, and punitive damages, and under which the Palmers would be entitled to recovery of attorneys’ fees, *see id.* § 1681n(a).

A federal appeals court recently catalogued compensatory damage awards in FCRA cases and noted that awards generally range between \$20,000 and \$75,000. *See Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 505 (4th Cir. 2007). Courts have awarded even more in some cases. *See, e.g., id.* at 507 (damage award of \$150,000 based on “emotional distress, mental anguish, and humiliation,” as well as “the protracted length of time during which [the defendant] failed to correct [the plaintiff’s] credit file”); *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 145 (4th Cir. 2008) (upholding \$1000 statutory and \$80,000 punitive damage award); *Bach v. First Union Nat’l Bank*, 149 F. App’x 354, 358 (6th Cir. 2005) (upholding jury award for \$400,000 compensatory damages); *Fisher v. Wells Fargo Bank*, 2009 WL 2772887, at *1 (Cal. Ct. App. Sept. 2, 2009) (punitive damages of \$150,000 and compensatory damages of \$15,000).

The Palmers wish to settle this matter quickly and amicably, on terms that clear up Mr. Palmer’s credit, provide the Palmers with compensation for the hardships and distress they have endured over the past 18 months because of KlearGear.com’s unlawful conduct, and ensure that other consumers do not experience those same hardships in the future.

The Palmers therefore ask that KlearGear.com:

- (1) Immediately contact TransUnion, Experian, and Equifax, as well as any third-party debt collector KlearGear.com has engaged in this matter, to inform them that any debts KlearGear.com reported concerning John Palmer were “in error” (not merely “paid” or “charged off” or any other notation suggesting the debt was ever valid);
- (2) Compensate the Palmers in the amount of \$75,000; and
- (3) Agree, going forward, not to include in its Terms of Use a “non-disparagement” clause of the kind KlearGear.com accused John Palmer of violating.

Whether or not these terms are acceptable to you as a whole, I strongly advise KlearGear.com immediately to clear up John Palmer’s credit to mitigate the damages that the Palmers are suffering on an ongoing basis.

Please contact me at the number above at your earliest convenience so that we can resolve this matter. Please also feel free to let me know of any other relevant facts or legal authorities that might change our view of the situation.

If I have not heard from you by December 16, 2013, we will assume you are not interested in an amicable resolution and will thereafter file suit. If we must litigate, KlearGear.com’s exposure will be significantly greater, as we will seek attorneys’ fees and punitive damages, in addition to the remedies listed above.

Sincerely,



Scott Michelman

Counsel for the Palmers