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July 9, 2009

Kirk D. Yake
WARD & HAGEN LLP
440 Stevens Avenue, Suite 350
Salono Beach, California 92075
VIA CERTIFIED U.S. MAIL & FAX 858.847.0105

Re: **July 1, 2009 Demand Letter to Cease and Desist in Statements Regarding Kathy Lynch**

Dear Mr. Yake:

I am writing to you on behalf of my client, The Calguns Foundation, Inc. I am responding to your demand letter on behalf of Kathy Lynch and dated July 1, 2009. Your letter seeks retractions and apologies for allegedly false statements written about Ms. Lynch by The Calguns Foundation, Inc., and published on the weblog "forum" of the Calguns Foundation, Inc.

The Calguns Foundation, Inc. does not own, control, or operate a "weblog forum." Nevertheless, if you have copies of the alleged statements, please send samples to the fax to the number above, so that we can more properly address your concerns.

Regarding my client Calguns Foundation, Inc., I find it difficult to understand how a foundation can be liable because one of its Board Members' exercised his First Amendment Right to make personal statements about someone engaged in making public policy on a public website owned and operated by a third party. Should litigation against my client be filed, we would vigorously defend using all available legal remedies, including but not limited to a motion to strike against what is obviously a Strategic Lawsuit Against Public Participation. Please see California Code of Civil Procedure § 425.16. The losing party in such an action must pay the attorney fees and costs to the successful party.

Your client, Kathy Lynch, has no cause of action for defamation or any other state law torts. The Supreme Court has consistently held that "this country has a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Should your client desire to engage in a debate consistent with this principle she can take advantage of the uninhibited, robust and wide-open, discussion on the Calguns.net forum that is available to her and the general public.

Though not my clients, Calguns.net, is protected under Section 230 of the Communications Decency Act ("Section 230"), which provides that online service providers are neither responsible nor liable for the speech of third parties on their sites. Section 230 of the CDA provides:

> TREATMENT OF PUBLISHER OR SPEAKER. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. 47 U.S.C. §230.

Simply put, this section means that Calguns.net and The Calguns Foundation, Inc. (assuming they're a proper party) cannot be held liable for third party statements such as those about which your client complains. "By its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of that service." *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997). Courts across the country have upheld Section 230 immunity and its policy of regulatory forbearance in a variety of factual contests. *See e.g. Batzel v. Smith*, 333 F3d 1018 (9th Cir. 2003) (Website operator immune for distributing email to listserv); *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119 (9th Cir. 2003) (Internet dating service provider was entitled to Section 230 immunity from liability stemming from third party's submission of false profile); *Ben Ezra, Weinstein & Co. v. America Online,* 206 F.3d 980, 984-985 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (no liability for posting incorrect stock information).

Courts also agree that Section 230 immunity applies to persons that provide the canvas upon which a third party places materials. *Gentry v. eBay, Inc.*, 99 Cal.App.4th at 833-34 (eBay not liable despite highly structured Feedback Forum); *see also Carafano*, 339 F.3d at 1124-25 (Internet dating service immune even though it "contributes much more structure and content than eBay by asking 62 detailed questions and providing a menu of 'pre-prepared responses.'") *Prickett v. InfoUSA, Inc.* 2006 WL 887431 (E.D. Tex. 2006) (Immunity even though system prompts uses "to select subcategories. . . . The fact that some of the content was formulated in response to the defendant's prompts does not alter the Defendant's status."). Thus, even if the statements you have identified were libelous, your client would have no viable cause of action against my client.

All of this is academic because the statements you have identified are *not* libelous. Your client is not a private individual in her capacities as a registered lobbyist with the state of California. She states on her own website that she "helps client [sic] achieve their *public policy objectives."* As such, she is a limited purpose public figure, as defined in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). See also *Gertz v. Robert Welsh, Inc.* 418 U.S. 323, 351 (1974). Public comment regarding her work product as a lobbyist is protected by the First Amendment, including comments related to her motivation and capabilities. As such, *New York Times Co. v. Sullivan,*

376 U.S. 254 (1964) and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) set the standard by which your action will be adjudicated - a standard that cannot be met under the facts alleged.

Finally, the personal public speech of a member of the Board of Directors of the Foundation in a forum the Foundation does not control when he is not speaking on the Foundation's behalf, does not attach any liability to The Calguns Foundation, Inc. As a non-profit, The Calguns Foundation does not take positions on candidates for public office or pending legislation. Their Board Members, however, retain their ability to engage in speech protected by the First Amendment and to take those positions as members of the firearms community when they do not speak on behalf of The Calguns Foundation, Inc. As you'll note, Mr. Wiese and Mr. Gene Hoffman (referenced in your letter) both have specific statements on *every* post they make on Calguns.net. The pertinent part of Mr. Wiese's postings are: "No postings of mine here, unless otherwise specifically noted, are to be construed as formal or informal positions of the Calguns.net ownership, The Calguns Foundation, Inc. ("CGF"), the NRA, or my employer. " All of Mr. Hoffman's posts contain the following disclaimer, "opinions posted in this account are my own and not the approved position of any organization."

In light of the foregoing, your offer to have my client cease and desist activities, publish retractions and apologies and alter content of some third-party website is rejected.

It is unfortunate that your client, without first communicating with my client, resorts to threats of litigation against The Calguns Foundation, Inc. The Foundation's function is to further the Second Amendment rights of California residents – a goal which your client also claims to seek. To the extent that this issue can be facilitated through communication and not litigation, we are open to meeting with your client. The last thing the Second Amendment movement needs at this time of progress is to have the focus of the movement diverted away from the goal of expanding and enhancing firearms rights and towards internecine conflict.

Considering your assertion that litigation will follow should your demands be denied, please take all reasonably prudent steps to preserve all potential discovery materials, including but not limited to all writings as defined in Evidence Code section 250, which includes e-mails, text messages, chat logs, hard-disk root directory data, meta-data, phone logs, and regulatory filings.

Sincerely,

DAVIS & ASSOCIATES

JASON DAVIS