

December 11, 2019

VIA FIRST CLASS MAIL AND EMAIL

Kathleen W. Bradish, Esq.
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037-3229

Re: Massachusetts Dental Society

Dear Ms. Bradish:

On behalf of the Massachusetts Dental Society, I am responding to your letter dated December 6, 2019 addressed to Dr. Moriarty as President of MDS.

Your letter threatens legal action relating to three communications, none of which mention your client, SmileDirectClub: a June 15, 2019 letter from MDS's then-President, Dr. Zolot, to the Board of Registration in Dentistry ("BORID"), the public authority responsible for enforcing the statutory regime that governs the practice of dentistry in Massachusetts; an August 1, 2019 letter from Dr. Moriarty to the Attorney General's Office, the public authority responsible for enforcing consumer protection laws in Massachusetts; and a YouTube video, "DIY Dentistry: Online Orthodontics," featuring interviews with two practicing dentists in Massachusetts. Your letter suggests these communications are defamatory and raise concerns under antitrust and other unfair competition laws. MDS, of course, strongly disagrees.

At the outset, let me express MDS's disappointment that your letter threatening litigation should be the first communication received by MDS from your client. By letter dated January 17, 2018, MDS conveyed its concerns to SDC about its model of orthodontic treatment and invited a response to these concerns. SDC offered none. Now, two years later, it condemns MDS for presenting these unresolved concerns to BORID and the Attorney General. Thus, rather than constructively engage with MDS, SDC has resorted to legal intimidation to pressure MDS into renouncing its concerns and remaining silent. These concerns are not going away under threats or intimidation.

Moving to the substance of your letter, its depiction of the three communications at issue isolates and mischaracterizes the statements made therein. These statements need to be returned to their context and the communications need to be considered in their totality, as the law of defamation requires. *See Downey v. Chutehall Const. Co.*, 86 Mass. App. Ct. 660, 664 (2014).

Dr. Zolot's June 5, 2019 letter to BORID communicated MDS's growing concerns with the practice of remote orthodontics, informed by the firsthand experience of dentists seeing and treating patients harmed thereby. SDC is not named. The letter sets forth a sound view of what the standard of orthodontic care in Massachusetts requires, how the model of remote care does not appear to meet that standard, and the risks posed by this disconnect. It also situated itself within a larger context of concern and scrutiny directed at remote orthodontics, referring to the Georgia Board of Dentistry lawsuit, a New York Post report, and the American Dental Association's FDA petition, which SDC, and now your letter, have mischaracterized as "rejected." It thus contains professional judgment and statements of historical fact concerning matters of public importance addressed to the regulatory authority charged with vetting them. On all scores, the letter is unactionable. Professional opinions are not defamatory. *See Downy*, 86 Mass. App. Ct. at 663. SDC simply registers its own disagreement with these professional opinions as defamation, a contention no less absurd than registering disagreement over the standard of care in other contexts as evidence of defamation. Statements of historical fact are not defamatory (and the record critical of remote orthodontics has only grown and reinforced itself since the June 5 letter, *see, e.g., SmileDirectClub: Moving Fast and Breaking Things in People's Mouths*). And statements concerning matters of public concern are entitled to heightened protection under federal and state defamation laws. *See, e.g., Shaari v. Harvard Student Agencies Inc.*, 427 Mass. 129, 132 (1998). Finally, this letter manifests nothing more than a "party's exercise of its right of petition" encouraging "consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding." M.G.L. c. 231, § 59H. This exercise is protected by Massachusetts Anti-SLAPP law. This petitioning activity is also exempted from antitrust scrutiny under the Noerr-Pennington Doctrine. Calling this letter a "baseless" petition does not make it so.

Dr. Moriarty's August 1, 2019 letter to the Attorney General communicates the same matters of public concern, informed by the same professional judgment and mounting evidence of patient harm and dissatisfaction. SDC is not named. The letter does not violate defamation or antitrust laws for the same reasons discussed in the preceding paragraph.

The three-minute YouTube video features interviews with two practicing dentists. The dentists explain remote orthodontics, the complexity inherent in moving teeth, the importance of X-rays, and the potential risks of remote orthodontics as seen firsthand in their own patients. SDC is not named. There is nothing defamatory about the professional opinions expressed in this video.

The specific examples offered in your letter are not actionable. The first bullet concerns professional opinions (what does the standard of care require; what do the ethical and professional obligations of those rendering orthodontic care entail) SDC's disagreement with which does not constitute defamation. Your letter also takes these statements out of context. For example, the full statement is "every licensed dentist has an ethical and professional obligation to prevent injury whenever possible" and then establishes that this particular obligation is not obviously met when patients exhibit the harm catalogued in the paragraphs that follow.

The second bullet takes issue with the term “Do-It-Yourself,” a term the American Dental Association has used in past policies and resolutions. SDC bills its model as one that empowers patients to accomplish teeth-moving “from the comfort of your home” without the “hassle of in-person monthly visits.” It has used words such as “remote healthcare” and “teledentistry” in its own SEC filings. If the “DIY” aspect of this model is not explicit, it is implied, marketed, and leveraged. This is semantics, not defamation.

The third bullet merely repeats SDC’s disagreement over what the standard of care requires for ensuring patient safety. Dr. Zolot’s letter did not call out CVS or make any definitive statement. Rather, it stated that the expansion of the teledentistry platform through retail locations “raised *serious concerns* among our membership that it will promote a standard of care that, *as these services are described in the announcement, appears to lack appropriate safeguards to ensure patient safety.*” This is a statement of professional judgment based on SDC’s own published materials. Your letter offers no evidence that these professional concerns are misplaced. SDC has had two years to offer this evidence and has not done so.

The final bullet point wrongly suggests that the FDA had “rejected” the ADA’s citizen’s petition at the time of the June 5 and August 1 letters. SDC has ventured this misstatement before in an October 4, 2019 news release. The FDA did not reject the petition. In its letter, the FDA explained that it appreciated the information provided by the ADA and would “evaluate this matter to determine what follow-up action is appropriate.” In fact, the public comment period was left open through October 23, 2019, registering some 87 comments.

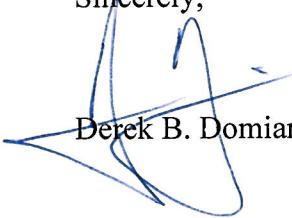
These examples demonstrate how misguided a defamation claim would be. SDC would have to do what your letter has not attempted to do: establish the falsity of a factual statement through actual evidence. Moreover, SDC would have to demonstrate harm. There is none. To date, neither BORID nor the Attorney General has taken any adverse action against SDC. SDC does not seek recourse. It seeks to muzzle MDS, as it has sought to do with other critics and regulators. MDS will not be intimidated into silence or inaction when confronted with matters of public health. It will vigorously defend any lawsuit commenced by SDC. This will include vindication of its petitioning rights under M.G.L. c. 231, § 59H through a special motion to dismiss and request for attorney’s fees. If the case survives a special motion to dismiss, MDS will seek full-fledged discovery into SDC’s business practices to test the representations made in your letter – and by SDC to consumers and shareholders – that “SDC’s affiliated-dentists control each patient’s care,” “patients are at all times under the supervision of a dentist during evaluation, diagnosis and treatment,” and “state-licensed dentists are 100% responsible for the clinical care of their patients during treatment using the SDC teledentistry platform” through records and depositions. You will appreciate that MDS is not obligated to accept SDC’s marketing slogans. A defamation lawsuit would put front and center the intensity and frequency of the real-life involvement of licensed dentists in all aspects of a patient’s treatment under SDC’s low-cost, high-volume model as well as the real-life results experienced by patients. Subject to discovery would be the number of licensed dentists affiliated with SDC in Massachusetts, the number of cases they handle on average per day, their geographic territories of responsibility, the company’s approval

processes, the use of sales or approval quotas, the total time spent overseeing patient treatment, patient complaints, etc.

While MDS does not invite litigation, it will not shy away from its mandate to promote oral health. It certainly will not bend to any effort to chill its petitioning and free speech rights. There is a rising chorus of concern around SDC's treatment model and business. Picking a fight with MDS will not abate this chorus, will not deliver SDC any meaningful relief, and will not set the table for any type of constructive relationship with a non-profit that represents 80% of dentists in Massachusetts.

I have instructed MDS to preserve evidence relating to SDC. Please instruct your client to do the same and preserve all evidence relating to the content of your letter.

Sincerely,



Derek B. Domian