PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

FOR COURT USE ONLY	
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:

Do not send Judge courtesy copy of Petition/Motion/Answer/Response. Status may be obtained online at http://courts.phila.gov

Control Number:

RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

NOVEMBER TERM, **2003**
Month *Year*

No. **00946**

Name of Filing Party: **Steven Friedman**

(check one) ☐ Plaintiff ■ Defendant
(check one) ■ Movant ☐ Respondent

NEVYAS, ET AL.

V.

MORGAN AND FRIEDMAN, ET AL.

☐ Petition *(Attach Rule to Show Cause)* ■ Motion
☐ Answer to Petition ☐ Response to Motion

Has another petition/motion been decided in this case? ■ Yes ☐ No
Is another petition/motion pending? ■ Yes ☐ No
If the answer to either question is yes, you must identify the judge(s):

TYPE OF PETITION/MOTION (see list on reverse side)
Amended Motion to Determine Preliminary Objections

PETITION/MOTION CODE (see list on reverse side)
DPROB

I. CASE STATUS
Is this case in the *(answer all questions)*:

A. COMMERCE PROGRAM
Name of Judicial Team Leader: ______
Applicable Motion Deadline: ______
Has Deadline been previously extended by Court?
☐ Yes ☐ No

B. DAY FORWARD/MAJOR JURY (Jury Demand & Fee Paid)
Name of Judicial Team Leader
Applicable Motion Deadline:
Has deadline been previously extended by the Court?
☐ Yes ☐ No

C. NON JURY PROGRAM
Date Listed: **TRIAL: March 21, 2005**

D. ARBITRATION PROGRAM
Arbitration Date: ______

E. ARBITRATION APPEAL PROGRAM
Listed on: ______

F. OTHER PROGRAM:
Date Listed: ______

II. PARTIES
(Name, address and ***telephone number*** of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

See attached sheet.

III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

(Attorney Signature/Unrepresented Party)	*(Date)*	Jeffrey B. Albert *(Print Name)*	09859 *(Attorney I.D. No.)*

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
No extension of the Answer/Response Date will be granted even if the parties so stipulate.

30-1061 (Rev 4/04)

Re: Nevyas v. Friedman
November Term 2003 No. 946
MOTION COURT COVER SHEET – PAGE TWO

OTHER MOTIONS FILED IN THIS CASE:

Nov. 18, 2003
Petition for TRO and Preliminary Injunction
Denied by the Honorable Esther R. Sylvester

March 31, 2004
Defendant Morgan's Petition to strike off plaintiff's discontinuance
Denied by the Honorable Matthew D. Carrafiello

April 1, 2004
Plaintiff's Motion for Summary Judgment
Denied by the Honorable Matthew D. Carrafiello

May 19, 2004
Plaintiff's Motion to reinstate complaint and for leave to amend complaint
Granted as to reinstating complaint, denied as to leave to amend by the Honorable Matthew Carrafiello

July 9, 2004
Plaintiff's Motion to add additional defendant
Granted by the Honorable Matthew D. Carrafiello

August 19, 2004
Petition of Steven Friedman, Esquire to withdraw as counsel
Granted with sixty day stay by the Honorable Mark Bernstein

August 19, 2004
Petition of plaintiff's for Extraordinary Relief to extend deadlines
Granted by the Honorable Mark Bernstein

August 26, 2004
Defendant Morgan's Motion for Judgment on the Pleadings
Denied by the Honorable Matthew D. Carrafiello

Sept. 28, 2004
Order revised as to Defendant Morgan's Motion for Judgment on the Pleadings
Motion Inoperable -- Complaint was Amended and Stay was Granted by the Hon. Matthew Carrafiello

October 21, 2004
Petition of Steven Friedman, Esquire to withdraw as counsel
Granted with thirty day stay by the Honorable Norman Ackerman

OTHER PENDING MOTIONS

December 28, 2004
Motion of Defendant Dominic Morgan to Determine Preliminary Objections

Re: Nevyas v. Friedman
November Term 2003 No. 946
MOTION COURT COVER SHEET – PAGE TWO

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HERBERT J. NEVYAS, M.D. ANITA NEVYAS-WALLACE, M.D., NEVYAS EYE ASSOCIATES, P.C. Plaintiffs, v. DOMINIC MORGAN and STEVEN FRIEDMAN Defendants.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY NOVEMBER TERM, 2003, No. 00946

ORDER

AND NOW, this day of , 2005, upon consideration of defendant Steven Friedman's Amended Preliminary Objections, and plaintiffs' response thereto,

IT IS ORDERED that the service of the complaint is hereby stricken and plaintiffs' Amended Complaint is hereby dismissed as to Defendant Friedman.

(in the alternative)

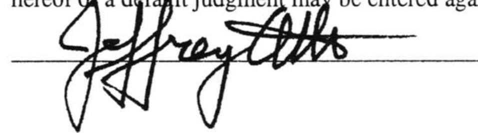
IT IS ORDERED that said Preliminary Objections are SUSTAINED and plaintiffs' Amended Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiffs shall pay to defendant Friedman his attorneys fees and costs. Defendant to provide a Statement of Costs within ten (10) days of the date of this Order.

BY THE COURT:

____
J.

TO: THE WITHIN PLAINTIFF(S)/CO-DEFENDANT(S)
You are hereby notified to plead to the within Plaintiffs within 20 days of service hereof or a default judgment may be entered against you.



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ATTORNEYS FOR DEFENDANT
Steven Friedman

HERBERT J. NEVYAS, M.D., ANITA NEVYAS-WALLACE, M.D., and NEVYAS EYE ASSOCIATES, P.C. Plaintiffs,	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	NOVEMBER TERM, 2003 No. 00946
DOMINIC MORGAN and STEVEN FRIEDMAN Defendants.	

DEFENDANT FRIEDMAN'S AMENDED PRELIMINARY OBJECTIONS TO PLAINTIFFS' AMENDED COMPLAINT

Defendant Steven Friedman, by his attorney, Jeffrey B. Albert, Esquire, enters the following amended preliminary objections to plaintiffs' Amended Complaint, in that the Amended Complaint was reinstated on January 10, 2005 and service of process was made on defendant Friedman on January 13, 2005. Plaintiff's Amended Complaint is attached hereto and marked Exhibit "A":

A. PRELIMINARY OBJECTIONS IN THE NATURE OF A MOTION TO STRIKE

1. Plaintiffs have failed to effect a transfer as required by 42 Pa C.S. § 5103.

2. On January 13, 2005, in response to preliminary objections filed by defendant Friedman, plaintiffs served an amended complaint.

3. In this case, plaintiffs have twice sought Pennsylvania state temporary restraining orders against Morgan, and were twice denied. In an effort to find a friendlier forum, plaintiffs discontinued this lawsuit in order to file in federal court. Because a counterclaim had already been filed, Morgan filed a petition to strike that discontinuance.

4. On February 3, 2004, plaintiffs then filed a federal lawsuit against Morgan and Friedman, asserting that Friedman was liable for Morgan's conduct under both the Lanham Trademark Act and Pennsylvania defamation law. That action was quickly dismissed on March 11, 2004, for lack of federal jurisdiction. Nevyas v. Morgan, 309 F. Supp.2d 673 (E.D. Pa. 2004).

5. Plaintiffs have not transfered the previously dismissed federal court action. Under section 5103(b) of the Judicial Code, 42 Pa. C.S. § 5103(b), plaintiffs are required to transfer the federal action to Common Pleas Court.

6. Additionally, the papers served upon defendant Friedman were not accompanied by the filing of the transcript of the federal action and pleadings which must accompany any such transfer. Kurz v. Lockhart, 656 A.2d 160 (Pa. Cmmw. 1995), appeal denied, 544 Pa. 649, 664 A.2d 977 (1995). Even partial compliance with the requirements of section 5103(b) will not suffice to permit a plaintiff whose federal court action was pursued without federal jurisdiction to file a subsequent state court action. Collins v. Greene County Mem. Hosp., 419 Pa. Super. 519, 615 A.2d 760 (1992), aff'd, 536 Pa. 475, 640 A.2d 379 (1994); Maxwell Downs, Inc. v. Philadelphia, 638 A.2d 473 (Pa. Cmmw. 1994); Kelly v. Hazleton Gen. Hosp., 837 A.2d 490 (Pa. Super. 2003).

7. As plaintiffs have not effected a transfer, they cannot serve the amended pleading on Friedman. Absent effective service upon Friedman, subsequent to the transfer, plaintiffs' Amended Complaint is "dead" as to him. *See* Township of Lycoming v. Shannon, 780 A.2d 835 (Pa. Cmwlth. 2001).

8. Accordingly, defendant Friedman renews his motion to strike filed on his original preliminary objections filed in advance of service.

WHEREFORE, defendant Steven Friedman demands that plaintiffs' Amended Complaint be dismissed for failure to effect a transfer in compliance with 42 Pa. C.S. § 5103.

B. PRELIMINARY OBJECTIONS IN THE NATURE OF A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

1. Plaintiffs' Amended Complaint attempts to set forth a defamation claim against defendant Friedman for the publication of matter concerning one or more of the plaintiffs.

2. Plaintiffs admit that each of Friedman's acts were performed in his capacity as attorney for defendant Morgan.

3. Plaintiffs' actions are intended to impede Morgan's First Amendment rights to publish information concerning plaintiff doctors. First, plaintiffs went forum shopping and now seek to drive a wedge between Morgan and his attorney through frivolous allegations of an attorney's "publication" of a client's website. This use of the court as a means of retribution is the very type of conduct recently condemned by the Third Circuit in General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003); *see also* Kalikow v. Franklin Chalfont Assocs., 26 D.&C.4th 305, 319

(C.P. Bucks Cty. 1996) (discussing First Amendment interests opposing imposition of civil liability upon attorneys and their clients for pursuing remedies in civil proceedings as an element of right to petition government to remedy grievances), aff'd w/o pub. op., 698 A.2d 114 (Pa. Super. 1997), appeal denied, 550 Pa. 672, 703 A.2d 468 (1997).

4. There is no basis for any claim that any agreement between an attorney and a client alleged to deprive a third party of rights is actionable, when the attorney's conduct is rendered in the course of an attorney-client relationship. Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999) (no conspiracy claim under 42 U.S.C. § 1985); Bowdoin v. Oriel, 2000 U.S. Dist. LEXIS 888, at **5, 6, 12 (E.D. Pa., Jan. 28, 2000) (no civil conspiracy claim under Pennsylvania law); General Refractories Co. v. Fireman's Fund Ins. Co., 2002 U.S. Dist. LEXIS 25324, at **16-17 (E.D. Pa., Feb. 28, 2002) (no wrongful interference with contractual relations claim under Pennsylvania law), aff'd in part, rev'd in part, on other grounds, 337 F.3d 297 (3d Cir. 2003) (no appeal taken from dismissal of claim against attorney for wrongful interference with contractual relations).

5. Furthermore, an attorney's conduct in providing to a client a copy of a letter sent on the client's behalf is subject to absolute privilege and is not actionable.

6. Further, an attorney cannot be held liable for his client's actions in publishing attorney-client communication on the Internet.

7. Further, the content of an attorney's communication with a federal agency does not give rise to liability to those referenced in that communication.

8. There is no cause of action against an attorney for sending a complaint on his client's behalf to a government agency. *See* Milliner v. Enck, 709 A.2d 417, 419-20 (Pa. Super. 1998) (dictum; reviewing case law).

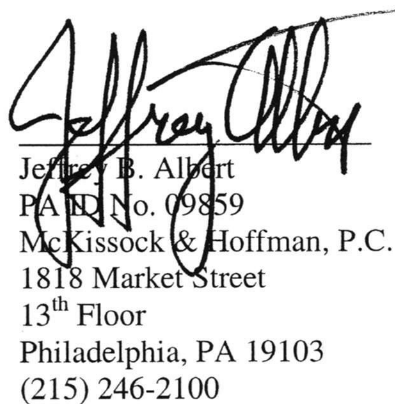
WHEREFORE, defendant Steven Friedman demands that plaintiffs' Amended Complaint against defendant Steven Friedman should be dismissed with prejudice.

C. PRELIMINARY OBJECTIONS IN THE NATURE OF A MOTION TO STRIKE FOR LACK OF SPECIFICITY OF PLEADING

9. An averment that an attorney "published" material posted by a client on a client's website requires a more specific statement of the factual basis for that conclusion.

10. Further, plaintiffs' Amended Complain refers to paragraphs 29 and 74 and subparts thereof and no such averments appear in the pleading.

WHEREFORE, defendant Steven Friedman demands that plaintiffs be required to file a more specific pleading.



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Dated: January 18, 2005

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HERBERT J. NEVYAS, M.D. ANITA NEVYAS-WALLACE, M.D., NEVYAS EYE ASSOCIATES, P.C. Plaintiffs, v. DOMINIC MORGAN and STEVEN FRIEDMAN Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY NOVEMBER TERM, 2003, No. 00946

DEFENDANT FRIEDMAN'S MEMORANDUM OF LAW IN SUPPORT OF AMENDED PRELIMINARY OBJECTIONS TO PLAINTIFFS' AMENDED COMPLAINT

Defendant Steven Friedman, by his attorney, Jeffrey B. Albert, Esquire, enters the following amended preliminary objections to plaintiffs' Amended Complaint, in that the Amended Complaint was reinstated on January 10, 2005 and service of process was made on defendant Friedman on January 13, 2005. Defendant Steven Friedman, is seeking determination of preliminary objections to plaintiffs' Amended Complaint to strike said complaint or, alternatively, to seek dismissal of the action with prejudice.

INTRODUCTION

This lawsuit involves an assertion that Dominic Morgan and his attorney, Steven Friedman, Esquire, are liable under Pennsylvania defamation law for Morgan's allegedly defamatory postings on the Internet. (Counts II and III of plaintiffs' Amended Complaint are directed solely to defendant Morgan.)

On January 13, 2005, in response to preliminary objections filed by defendant Friedman, plaintiffs served upon him the amended complaint.

They did not simultaneously transfer the previously dismissed federal court action. Under section 5103 of the Judicial Code, 42 Pa. C.S. § 5103, plaintiffs were required to transfer the federal action to Common Pleas Court.

§5103. TRANSFER OF ERRONEOUSLY FILED MATTERS.

> (a) General rule. – If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court of magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where is shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.
>
> (b) Federal cases. –
> (1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserved a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any Untied States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a district justice of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (s).

> (2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the Untied States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or district justice may require that they be amended to conform to practice in this Commonwealth. Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection.

42 Pa. C.S.A. § 5103(a) & (b) (1 & (2).

Plaintiffs have not effected a transfer and, therefore, cannot file an amended pleading against Friedman.

Accordingly, defendant Friedman renews his motion to strike filed on his original preliminary objections filed in advance of service.

II. STATEMENT OF QUESTIONS PRESENTED

1. Was service of an amended complaint unaccompanied by a transfer of the prior erroneously filed federal court action effective to maintain this action?

   ANSWER: No.

2. Was a cause of action stated against an attorney when his client published attorney communications on the client's Internet website protected under the immunity provisions of the federal Communications Decency Act?

   ANSWER: No

3. Was a cause of action stated against an attorney when his client published on the client's website the attorney's communications protected by the right to petition government under the Pennsylvania and United States Constitutions?

   ANSWER: No.

4. May plaintiffs may merely assert that an attorney published a website without providing any factual basis for that claim, in view of the invasion on attorney-client relations caused by that allegation, and the significance of Pennsylvania's Uniform Single Publication Act upon the attorney's alleged liability for defamation?

ANSWER: No.

III. FACTUAL BACKGROUND

Morgan has a website, "laskicsucks4u.com", part of which is critical of professional care rendered by plaintiffs in performing LASIK eye surgery, and violations of FDA-mandated protocol for use of plaintiffs' investigational LASIK device.

In this litigation, Nevyas seeks to impose liability upon defendant and his attorney, Friedman, for publishing information on a website maintained by Morgan. Originally, Morgan filed a medical malpractice suit against Nevyas alleging that Dr. Nevyas, an ophthalmologist, was negligent in a LASIK procedure. That lawsuit was eventually arbitrated, and the arbitrator entered an adverse verdict against Morgan.

Thereafter, Morgan began to post on the Internet a series of articles and commentaries critical of Nevyas. Nevyas then filed this suit, alleging that some of the content was defamatory and seeking injunctive relief against the continued publication of that material. An agreement was reached as to the posting of material.

Dissatisfied with Morgan's compliance with that agreement, Nevyas discontinued this lawsuit and filed a federal lawsuit against both Morgan and Friedman, alleging that both had violated the Lanham Act, a federal statute barring deceptive use of copyrighted material, joined with a common law defamation count. In response to defendants' motions to dismiss, Judge

Joyner dismissed the federal count, while refusing to exercise jurisdiction over the state law claim.

Then, Nevyas sought and was eventually granted leave to reinstate this action and to join Friedman as a defendant.

In the federal court action, although not in the Amended Complaint in this case, plaintiff asserted that the December 2, 2003 correspondence with the FDA was a ruse to cover the publication of the correspondence on the website, alleging that the FDA did not have the authority to prosecute a physician for non-compliance with the federal Food and Drug Act, as that authority rested with the United States Department of Justice.

Seeking to sever Friedman's pro bono representation of Morgan, plaintiffs joined Friedman, citing correspondence between Friedman and the FDA which Morgan posted on Morgan's website. Plaintiffs developed an entirely new theory to support their allegation: they alleged that since Friedman gave copies of his attorney letters to the FDA to Morgan, and Morgan posted them on Morgan's website, Friedman was a publisher of the website.

In fulfillment of his ethical duty to keep his client informed, Friedman had sent copies of communications with the FDA to his client who, in turn, independently published them on the internet. According to plaintiffs, this attorney-client relationship made Friedman a publisher of the website. Plaintiffs' Amended Complaint ¶¶ 73, 83.

IV. STATEMENT OF PROCEDURAL HISTORY

In this case, plaintiffs have twice sought Pennsylvania state temporary restraining orders against Morgan, and were twice denied. In an effort to find a friendlier forum, plaintiffs discontinued this lawsuit in order to file in federal court. Because a counterclaim had already been filed, Morgan filed a petition to strike that discontinuance.

Plaintiffs then filed a federal lawsuit against Morgan and Friedman, asserting that Friedman was liable for Morgan's conduct under both the Lanham Trademark Act and Pennsylvania defamation law. That action was quickly dismissed for lack of federal jurisdiction. Nevyas v. Morgan, 309 F. Supp.2d 673 (E.D. Pa. 2004) (decided on March 11, 2004, 41 days after complaint was filed).

Thirteen days after dismissal of the federal action, plaintiffs moved to reinstate this state action and amend their complaint to add Friedman. Reinstatement was granted. Leave to amend was denied but leave to seek joinder under Rule 2232 was granted.

Three months after dismissal of the federal action, plaintiffs applied under Rule 2232 to join Friedman as a defendant in this case. On July 7, 2004, that motion was granted, and the Amended Complaint naming Friedman was filed on July 13, 2004.

However, plaintiffs never made service upon Friedman or filed a return of service.

On November 19, 2004, plaintiffs mailed a ten-day notice pursuant to Pa. R.C.P. 237.4, notifying Friedman of their intention to take a default against him. To protect himself against entry of default, Friedman filed these preliminary objections endorsed with a notice to plead, asserting both a failure to effect proper service and a motion to dismiss for failure to state a cause of action. Plaintiffs have filed no response to the factual allegations of the preliminary objections, but, on January 10, 2005, plaintiffs reinstated their amended complaint and, on January 13, 2005, caused it to be served upon defendant Friedman by deputized service. The amended complaint was unaccompanied by a transfer of the federal action.

V. ARGUMENT

A. Plaintiffs Have Failed to Effect Proper Service Against Friedman as They Were Required to Transfer the Erroneously Filed Federal Action.

The Pennsylvania Rules of Civil Procedure set forth, in the Rule 400 series, the rules governing service of process. They are to be strictly followed. City of Philadelphia v. Berman, 2004 Pa. Cmmw. LEXIS 917, at *9 (Pa. Commw. Ct., Dec. 14, 2004), citing Sharp v. Valley Forge Med. Ctr. and Heart Hospital, Inc., 422 Pa. 124, 221 A.2d 185 (1966); Neff v. Tribune Printing Co., 421 Pa. 122, 218 A.2d 756 (1966). *See also* Santarelli v. Procaccini, 42 D.&C.4th 84, 85-86 (C.P. Phila. Cty. 1998) (Gordon, J.).

If the rules are not observed, the court lacks personal jurisdiction over the defendant, and service of process will be stricken in response to preliminary objections filed pursuant to Pa. R.C.P. 1028(a)(1). Hydrair, Inc. v. National Environmental Balancing Bureau, 52 D.&C.4th 57, 63-64 (C.P. Phila. Cty. 2001) (Herron, J.) (absent proper serviced, court cannot proceed with merits of case), aff'd w/o pub. op., 858 A.2d 1287 (Pa. Super. 2004), appeal denied, 2004 Pa. LEXIS 3095 (Pa., Dec. 9, 2004); Passalacqua v. Passalacqua, 56 D.&C.4th 38, 38 n.1 (C.P. Carbon Cty. 2002). Here, as conceded by plaintiffs in failing to respond to the facts as plead in defendant Friedman's preliminary objections (Hydrair, at 62), no service had been made until the amended complaint was reinstated, and service was effected on January 13, 2005. Although no return of service has been filed as of this date, it is assumed that such a return will be filed forthwith[1]

[1] As Judge Sheppard noted in Philadelphia School Dist. v. Tri-County Associates Bldrs., Inc., May Term, 2001, No. 2183, slip op. at 11-13 (C.P. Phila. Cty., Aug. 16, 2001), the service rules require that a return of service be filed "forthwith." Pa. R.C.P. 405. Accordingly, a plaintiff cannot postpone filing any purported return so as to impede a defendant's ability to challenge effective service, requiring that defective service be stricken. *Id.* at 13. citing Azzarrelli v. City of Scranton, 655 A.2d 648, 650-52 (Pa. Cmwlth. 1995).

However, in order for an action erroneously filed in federal court to be refiled in state court, it is required that the unsuccessful plaintiffs promptly transfer the action to state court, strictly following the procedures specified by Section 5103(b) of the Judicial Code.
42 Pa. C.S. § 5103(b).

There was no such action taken here, and the service upon defendant Friedman were not preceded by any such transfer. Kurz v. Lockhart, 656 A.2d 160 (Pa. Cmwth. 1995) (delay in transfer barred plaintiff's action), appeal denied, 544 Pa. 649, 664 A.2d 977 (1995). Even partial compliance with the requirements of section 5103(b) will not suffice to permit a plaintiff whose federal court action was pursued without federal jurisdiction to file a subsequent state court action. Collins v. Greene County Mem. Hosp., 419 Pa. Super. 519, 615 A.2d 760 (1992), aff'd, 536 Pa. 475, 640 A.2d 379 (1994), cert. denied, 513 U.S. 943 (199); Maxwell Downs, Inc. v. Philadelphia, 638 A.2d 473 (Pa. Cmwth. 1994). Thus, in Kelly v. Hazleton Gen. Hosp., 837 A.2d 490 (Pa. Super. 2003) the Superior Court held that, even thought the plaintiff there had filed a complaint in state court within sixteen days of dismissal of the federal court action, the fact that praecipe to transmit federal court order and opinion to the Common Pleas Court did not occur until eight months after dismissal was fatal to further prosecution of plaintiff's claim. Kelly, supra. Therefore, absent effective timely service upon Friedman following transfer, plaintiffs' Amended Complaint is "dead" as to him. *See* Township of Lycoming v. Shannon, 780 A.2d 835 (Pa. Cmwlth. 2001). The required service of amended complaints upon new parties provides no exception to this statutory requirement. *See* City of Philadelphia v. Berman, supra, at *10 n.9.

As the Superior Court held in Kelly, any assertion by plaintiffs of their good faith or alleged lack of prejudice to defendant Friedman is also immaterial. *See also* Teamann v. Zafris,

811 A.2d 52 (Pa. Cmwlth. 2002), appeals denied sub nom. Baker v. Zafris, 574 Pa. 755, 830 A.2d 976 and 574 Pa. 761, 831 A.2d 600 (Pa. 2003); Beglin v. Stratton, 816 A.2d 370 (Pa. Cmwlth. 2003).[2]

Therefore, as Judge Herron held in Hydrair, supra, the following issues, addressing the merits, need be addressed only if the Court determines that plaintiffs have properly effected service.

B. Plaintiffs Have Failed to State a Claim Against Defendant Friedman Based Upon His Activities in Providing Legal Services to His Client.

1. Federal Law Immunizes Friedman for Any Claim Against Him as Publisher for the Posting by Morgan of Allegedly Defamatory Material on Morgan's Website.

Publishers of websites publishing material provided by others are immune from liability under state law. Section 320 of the Communications Decency Act, 47 U.S.C. § 230(e)(3), confers absolute immunity on an "interactive computer service" provider or user who publishes statements made by third parties.[3] In this instance, since the material was provided by attorney Friedman to Morgan in Morgan's capacity as client, Friedman did not publish it, but Morgan did publish it To hold Friedman liable as a joint publisher with Morgan due to Morgan's maintenance of a website would place Friedman in Morgan's shoes, thereby rendering Friedman an "interactive computer service" provider or user.

Websites are an "interactive computer service" within the section's immunity granting provision. Carafano v. Metrosplash.com. Inc., 339 F.3d 1119 (9th Cir. 2003); *but see* Barrett v.

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[2] Any consideration of the ability of plaintiffs to proceed in view of the statute of limitations is premature unless and until proper service is made. Hydrair at 63-64.

[3] The Communications Decency Act is better known for its provisions attempting to protect against dissemination of pornographic materials to children. Although those provisions have been struck down in successive decisions of the United States Supreme Court, its provisions granting immunity to those who provide or use an interactive computer service are immunized for publishing third party remain intact.

Rosenthal, 114 Cal. App.4th 1379, 9 Cal. Rptr.3d 142 (2004) (holding the immunity under Act extends to websites, but does not extend to communications which are republished with knowledge of falsity), petition for review granted and depublished by 87 P.3d 797 (Cal. 2004) (determining whether Communications Decency Act bars state common law defamation claim if web site operator is active rather than passive).; *see also* Grace v. eBayInc., 120 Cal. App.4th 984. 16 Cal. Rptr.2d 192 (Cal. Superior Ct. 2004) (distinguishing liability of publisher, which it held to be immune, from a distributor or transmitter of information, which it held not be to immune), petition for review granted, 99 P.3d 2, 19 Cal. App.3d 824 (2004).

If, however, a person is an "information content provider," the person is not immunized from state law liability arising from publication of that content, if it is otherwise actionable. MCW, Inc v. Badbusinessbureau, L.L.C., 2004-1 Trade Cas. (CCH) ¶ 74,391 (N.D. Tex. 2004). Under the act, one court has held that an otherwise exempt "interactive computer service" provider could be jointly liable for the development or creation of information disseminated by it as such an act would also constitute it an information content provider." Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998). Such an interpretation would undermine the pruposes of the immunity provisions of the act.

The issue presented here is whether the attorney for a person who posts a website may be both a publisher (thereby potentially rendering him liable under state law for publication of defamatory matter but otherwise immune from liability under the CDA) and an "information content provider" when he acts on behalf of his client in communicating with a governmental agency and then transmits the document to the client in fulfillment of his duty to keep his client informed, and the client then posts the correspondence on the client's site.

There is nothing in the act's history which suggests that an attorney is, by reason of his conduct in communicating with a governmental agency on his client's behalf and providing a copy of that communication to his client, an "information content provider" within the reach of the act.

C. An Attorney Cannot be Held Liable for Publication of a Letter on the Internet as a Result of Providing a Client With a Copy of a Document Sent on the Client's Behalf to a Federal Government Agency.

1. An Attorney's Conduct in Providing to his Client a Copy of a Letter Sent on the Client's Behalf is Protected Communication Not Subject to Liability for Defamation.

Plaintiffs' actions are intended to impede Morgan's First Amendment rights to publish information concerning plaintiff doctors. First, plaintiffs went forum shopping and now seek to drive a wedge between Morgan and his attorney through frivolous allegations of an attorney's "publication" of a client's website. This use of the court as a means of retribution is the very type of conduct recently condemned by the Third Circuit in General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003); *see also* Kalikow v. Franklin Chalfont Assocs., 26 D.&C.4th 305, 319 (C.P. Bucks Cty. 1996) (discussing First Amendment interests opposing imposition of civil liability upon attorneys and their clients for pursuing remedies in civil proceedings as an element of right to petition government to remedy grievances), aff'd w/o pub. op., 698 A.2d 114 (Pa. Super. 1997), appeal denied, 550 Pa. 672, 703 A.2d 468 (1997).

There is no basis for any claim that any agreement between an attorney and a client alleged to deprive a third party of rights is actionable, when the attorney's conduct is rendered in the course of an attorney-client relationship. Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999) (no conspiracy claim under 42 U.S.C. § 1985); Bowdoin v. Oriel, 2000 U.S. Dist. LEXIS

888, at **5, 6, 12 (E.D. Pa., Jan. 28, 2000) (no civil conspiracy claim under Pennsylvania law); General Refractories Co. v. Fireman's Fund Ins. Co., 2002 U.S. Dist. LEXIS 25324, at **16-17 (E.D. Pa., Feb. 28, 2002) (no wrongful interference with contractual relations claim under Pennsylvania law), aff'd in part, rev'd in part, on other grounds, 337 F.3d 297 (3d Cir. 2003) (no appeal taken from dismissal of claim against attorney for wrongful interference with contractual relations).

This case is unlike Bochetto v. Gibson, 860 A.2d 67 (2004), and Tucker v. Fischbein, 237 F.3d 275, 284-85 (3d Cir. 2001), cert. denied, 534 U.S. 815 and 816 (2001), where the attorneys communicated with the press.

2. The Content of An Attorney's Communication With a Federal Agency May Not Give Rise to Liability.

There is no cause of action against an attorney for sending a complaint on his client's behalf to a government agency. *See* Milliner v. Enck, 709 A.2d 417, 419-20 (Pa. Super. 1998) (dictum; reviewing case law).

In fact, case law extends absolute privilege to communications with the FDA. Young v. Pharmacia & Upjohn Co., 1998 U.S. Dist. LEXIS 22194 (D. Md., Dec. 4, 1998) (FDA criminal investigations division), aff'd w/o op., 175 F.3d 1018 (4th Cir. 1999); *see also* Denoble v. Dupont Merck Pharmaceutical Co., 1997 Del. Super. LEXIS 203, at **13-14 (Del. Super., April 11, 1997) (communication concerning drug company employee to unemployment board was privileged), aff'd w/o op., 703 A.2d 643 (Del. 1997). As these cases reflect, an attorney's motivations in communicating on behalf of a client are not subject to review.

D. An Averment That an Attorney "Published" Material Posted by a Client on the Client's Website Requires a More Specific Statement of its Factual Basis Than the Mere Allegation That the Attorney had "Published" the Material.

Other than a generalized allegation that he encouraged Morgan to publish documents on his website (see Plaintiffs' Amended Complaint ¶¶ 66, 70-85), the sole basis for plaintiffs' claims against Friedman is that his December 4, 2003 letter to the FDA asserting a complaint on behalf of his client, Morgan, was published on his client's website. (Id. ¶ 66)

In their Amended Complaint, plaintiffs assert that a letter sent by Friedman to the Federal Food and Drug Administration on December 4, 2003, and filed with this Court in defendant Morgan's Answer to the original complaint, was "published" by Friedman on Morgan's website. The Amended Complaint provides no details as to how this publication occurred other than by Friedman sending his client a copy of the correspondence in fulfillment of his duty to keep his client informed.

In this respect, this case is similar to litigation by Amway against Proctor & Gamble. Amway Corp. v. Procter & Gamble Co., 2001 U.S. Dist. LEXIS 14455, at *9 (W.D. Mich., Sept. 14, 2001) ("Amway's only allegations [of tortious interference] against P&G" and Dinsmore [P&G's law firm] are that they gave documents to Schwartz [a non-testifying consultant retained by Dinsmore on P&G's behalf] which Schwartz posted on his internet website.) aff'd 346 F.3d 180 (6th Cir. 2003).[4]

This fact is also of critical importance because, under the Uniform Single Publication Act, 42 Pa. C.S.A. §§ 8341 et seq., the date on which the item was first "published" on the Internet controls the one-year statute of limitations. Although in Pennsylvania only a federal

[4] As stated in note 5 to and at *14 of the District Court opinion [2001 U.S. Dist. LEXIS 14455, at *10], all of the documents allegedly given by P&G and Dinsmore to Schwartz were either court filings in other litigation between Amway and P&G, or transcripts of tapes provided by Schwartz to Dinsmore.

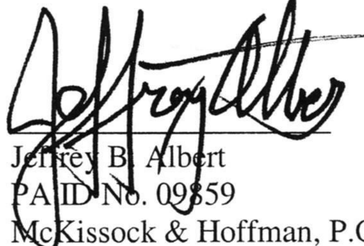
court has addressed this issue, Barrett v. Catacombs Press, 64 F. Supp.2d 440 (E.D. Pa. 1999) (finding that statute of limitations accrued in a case involving both Internet and traditional publishing when dissemination occurred regardless of date on which plaintiff discovered statement) courts throughout the United States have adopted the identical approach.[5]

Because the critical fact, i.e. the publication of allegedly defamatory material by Friedman, is plead in conclusory, non-factual terms, a more specific pleading is required.

VI. CONCLUSION

Inasmuch as plaintiffs' claims against Friedman are totally without foundation, and Friedman has not even been served, he requests not only that this Court dismiss this action prejudice as to Friedman, and impose attorneys fees upon plaintiffs and their counsel for pursuing this frivolous claim against him.

Respectfully submitted,



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Dated: January 18, 2005

[5] States have uniformly applied their jurisdiction's uniform single publications act in determining the applicable statute of limitations for Internet communications, including websites. Van Buskirk v. New York Times Co., 2000 U.S. Dist. LEXIS 12150 (S.D.N.Y., Aug. 24, 2000); Firth v. State of New York, 98 N.Y.2d 365, 775 N.E.2d 463 (N.Y. 2002); Long v. Strang Communication Co., 297 F. Supp.2d 897, 900 (N.D. Miss. 2003); Mitan v. Davis, 243 F. Supp.2d 719, 724 (W.D. Ky. 2003); Abate v. Maine Antique Digest, 2004 Mass. Super. LEXIS 31 (Mass. Super., Jan. 26, 2004); McCandless v. Cox Enterprises, 265 Ga. App. 377, 593 S.E.2d 856 (Ga. Ct. App. 2004); Long v. Walt Disney Co., 116 Cal. App.4th 868, 10 Cal. Rptr.3d 836 (2004); Traditional Cat Ass'n, Inc. v. Gilbreath, 118 Cal. App. 4th 392, 13 Cal. Rptr.3d 353 (2004); Rudloe v. Karl, 2004 Fla. App. LEXIS 16610 (Fla. Ct. App., Nov. 5, 2004).

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HERBERT J. NEVYAS, M.D., ANITA NEVYAS-WALLACE, M.D., and NEVYAS EYE ASSOCIATES, P.C., Plaintiffs vs. DOMINIC MORGAN, and STEVEN FRIEDMAN, 850 WEST CHESTER PIKE, HAVERTOWN, PA 19083, Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY NOVEMBER TERM, 2003 NO.: 946

AMENDED CIVIL ACTION COMPLAINT

PARTIES

1. Plaintiff Herbert Nevyas, M.D., a citizen of Pennsylvania, is medical doctor specializing in ophthalmology with an office located at 1528 Walnut Street, Philadelphia, PA. Plaintiff also has professional offices in New Jersey. Defendants' tortuous conduct is calculated to cause harm to Plaintiff in both Philadelphia and New Jersey, where the Plaintiff has professional offices.

2. Plaintiff Anita Nevyas-Wallace, M.D., a citizen of Pennsylvania, is a medical doctor specializing in ophthalmology with an office located at 1528 Walnut Street, Philadelphia, PA. Plaintiff also has professional offices in New Jersey. Defendants' tortuous conduct is calculated to cause harm to Plaintiff in both Philadelphia and New Jersey, where the Plaintiff has professional offices.

3. Plaintiff Nevyas Eye Associates, P.C. ("NEA") is a Pennsylvania corporation involved in providing ophthalmological services to patients across the Delaware Valley. NEA has an office located at 1528 Walnut Street, Philadelphia, PA. Defendants' tortuous conduct is calculated to cause harm to Plaintiff in Philadelphia where the Plaintiff has professional offices.

4. Defendant Dominic Morgan ("Morgan"), a citizen of Pennsylvania, is an individual residing at 3360 Chichester Avenue, #M-11, Boothwyn, PA which is located in the Eastern District of Pennsylvania. Upon information and belief, Defendant's tortuous conduct originates in or around Boothwyn, PA.

5. Defendant Steven Friedman ("Friedman"), a citizen of Pennsylvania, is an individual and a practicing attorney and doctor, with his principal place of business at 850 West Chester Pike, Havertown, PA 19083, which is located in the Eastern District of Pennsylvania. Upon information and belief, Defendant's tortuous conduct originates in or around Havertown, PA.

FACTS

6. Morgan had Lasik surgery performed by Dr. Nevyas-Wallace in April of 1998 and was unhappy with the result.

7. The Lasik surgery performed on Morgan was an elective procedure and Morgan chose to have such surgery. There was no medical reason compelling such a choice.

8. Lasik surgery is a process by which the cornea is reshaped in order to reduce or eliminate the need for corrective lenses.

9. On or about April 19, 2000, Morgan filed a complaint alleging medical negligence against the instant Plaintiffs, the other doctors in their medical practice and against the professional corporation.

10. Ultimately, all defendants were dismissed from the action except Dr. Nevyas-Wallace and case proceeded to binding arbitration.

11. At the conclusion of the arbitration proceeding, the arbitrator returned a defense verdict.

12. Due to a pre-arranged high-low agreement, Morgan received the "low" payment.

13. During the discussions concerning the terms of the arbitration which occurred in January and February, 2003, Morgan refused to agree to any confidentiality provisions.

14. Morgan was disappointed with the result of the Lasik surgery and wanted to cause substantial and grave harm to Dr. Nevyas and Dr. Nevyas-Wallace and their medical practice, NEA.

15. At least as early as the beginning of 2003, Morgan created a website which intentionally and maliciously defamed Dr. Nevyas and Dr. Nevyas-Wallace.

16. Upon information and belief, Morgan's attorney in the malpractice action, Defendant Steven Friedman called the arbitrator, Thomas Rutter, Esq., and asked him if he would sue if his name appeared in the website Morgan was preparing. The arbitrator answered affirmatively and his name did not originally appear on the website.

17. On or about July 30, 2003, Dr. Nevyas received an anonymous telephone call directing him to the web address - www.lasiksucks4u.com. The website has multiple headings and categories within those headings.

18. Dr. Nevyas went to the address and found that Mr. Morgan had created a website which contained numerous defamatory statements. Many of the statements contained in this initial version of the website were similar to statements that appeared on later iterations of the website.

19. Morgan made many of the same accusations that he makes in the current version of the website. He accuses the Plaintiffs of dishonesty, greed, corruption and states his motives clearly: "I carry much anger, depression, bitterness and hatred toward the Nevyas'...."

20. Attorneys for Dr. Nevyas contacted Friedman and working through Friedman, Morgan agreed to remove defamatory statements from the website.

21. Under the contract between the parties, Morgan was to remove all defamatory material and all references to the instant Plaintiffs. In response, the instant Plaintiffs agreed not to file a lawsuit. A true and correct copy of the letters documenting the contract are attached hereto as Exhibit 1.

22. On November 3, a patient informed Dr. Nevyas that he had performed an internet search using the search engine Google and the search term "Nevyas"and that the third entry in the search was a reconstructed website: www.lasiksucks4u.com. A true and correct copy of the printout of such a search is attached hereto as Exhibit 2.

23. Morgan has spent a substantial amount of time to improve the search-result ranking of the website on various search engines. Searches performed January 21, 2004 show Morgan's site to have high rankings on many search engines: Yahoo - the number two and four searches; Google - the number three, four and seven searches; Mamma Meta - the number two, three, six, eight and ten; Alta Vista - the number two, three and six searches; Dogpile - the number five, nine and nineteen searches; and on Search.com - the number three, four, five, six and eight searches. A true and correct copy of these search results is attached hereto as Exhibit 3.

24. The review of this site reveals that Morgan has violated his contract and has renewed his efforts to defame and cause substantial and grave harm to Dr. Nevyas, Dr. Nevyas-Wallace and NEA, to cast them in a false light and to damage their reputation.

25. Many of Plaintiffs' patients are referred to the Plaintiff from internet searches and other patients research the Plaintiffs on the web.

26. Morgan's defamatory website has had and continues to have a substantial negative impact on Plaintiffs' medical practice and their reputation.

27. Examples of the defamatory statements on the website include:[1]

(a) "I went for my initial consultation at Nevyas Eye Associates in Bala Cynwyd, Pennsylvania. I thought they were reputable . . ." This statement has been changed and now reads: "I went for my initial consultation at Nevyas Eye Associates in Bala Cynwyd, Pennsylvania. They were advertising extensively (for Lasik . . . with a laser unapproved by the FDA for commercial use)."

(b) "With all the patients who have been damaged by lasik surgery losing their cases in court is it possible there is a cover-up?" This statement has since been removed.

(c) "The performing surgeons overlooked standards of care, their own, as well as federal guidelines, and have advertised extensively for a non-approved device (not allowed)." This statement has since been removed.

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[1] The section of the website entitled "My Experience" contains the statements set forth in 21a,b,h. The section of the website called "Home" contains the statements set forth in 21i-j. The section of the website entitled "Experiences" and the subcategory "Nevyas laser and the FDA." contains the statements set forth in 21k. The section of the website entitled "Experiences" and the subcategory "Are you a Candidate" contains the statements set forth in 21g,l. The "Home" section of the website under the link to "cover-up" contains the statements set forth in 21c-f,m-t.

(d) "Their history to include their investigational device shows at least 11 cases of medical malpractice. From first hand experience with these people, they are not the people they represent themselves to be. They are ruthless, uncaring, and greedy." This statement has since been removed.

(e) "They ruined my vision and they ruined my life. **They did this to me**! I was completely happy prior to and none of this was present **prior to the lasik** surgery. I **TRUSTED** these people. They made empty promises to fulfill a now empty life, and I can never forgive nor forget, not that I ever could." Emphasis in original

(f) "So again key questions are...Why are the majority of Lasik lawsuits being lost? And, why is nothing done about it? Seems like a cover-up...YES, it really does!" Emphasis in original. This statement has since been removed.

(g) "If the procedure is going to be done "experimentally," more than likely the surgeon is using a device not yet approved by the Food and Drug Administration (FDA). Since other devices are already approved, this is rarely to your advantage."

(h) "I was NOT told that a change in prescription gave me better than the 20/50 Best Corrected Visual Acuity (BCVA) I ever had, and that instead of Lasik, the new prescription would have worked just as well if not better than what I was seeing (refracted to 20/40 -2 according to my records)."

(i) "Although the marketing of LASIK focuses on quality of life, informed consent does not. Instead, the real risks are hidden in medical jargon that never mentions their true effects. . ."

(j) "Is the use of FDA non-approved lasers such as **this one** an even greater risk to Lasik patients?" Emphasis in original.

(k) "The following are reports submitted to the FDA by the Nevyas' regarding their "**black box**" (laser used for investigational surgery). This is information they **DO NOT** want the public to know..." Emphasis in original. This statement has been changed and now reads: "Some of the following reports are submitted to the FDA in 1997 regarding their "**black box** . . . Federal law also states:'A sponsor, investigator or any other person . . . shall not promote or test market an investigational device until FDA has approved the device for commercial distribution.' I could not even begin to tell you how many times I've heard their ADVERTISEMENTS on radio stations for Lasik surgery without mention of their laser being part of an investigational study." Emphasis in original.

(l) "Federal Law requires that every patient who is about to undergo a refractive surgery be given a Patient Information Booklet, published by the manufacturer of the laser used in their surgery. If your surgeon does not give you the patient information booklet, this is a violation of federal law, and your surgeon can be charged with not providing you with full informed consent. Abuse of this FDA mandate is widespread. Most patients have never seen a Patient Information Booklet, because it contains warnings that your surgeon does not want you to see."

(m) "Again, the Nevyas' and their lawyers walk all over the legal system, and seem to be able to do whatever they want, and get away with it." This statement has since been removed.

(n) "I do not understand any of this. I'm the one who has been hurt, and this is for the rest of my life. How is it they walk away only to hurt somebody else?" This statement has since been removed.

(o) "I have since been told the end result of the arbitration agreement will not be released (what gives them the right not to abide by arbitration agreement — 10 days) until I sign a release stating the Nevyas' were not at fault. There is NO WAY I will sign that. They took my sight. They will not take the truth!" This statement has since been removed.

(p) "I thought the legal system would see through the tactics these people used, and I see now I was grossly mistaken. There is no justice for the average person, so now I have to make do for myself what the legal system could **not** do. People need to be informed about these doctors, and I damn well will be telling them." Emphasis in original. This statement has since been removed.

(q) "It never really was about the money, it's about how they ruined our lives, and how they walk all over the system, just as they did you." This statement has since been removed.

(r) "So, my question is, who's covering up for whom, and why? Why was my case ripped apart so badly in the Philadelphia Court System . . . (Judge Papalini threw out EVERYTHING that had to do with the device being investigational, and anything to do with the FDA)), then I was told arbitration was the more feasible route to go?" Emphasis in original. This statement has since been removed.

(s) "Their track record is scary in that I found all of this out **after** my surgeries." Emphasis in original. This statement has since been removed.

(t) "Stupidity or greed on the doctor's part and ignorance on everyone else's, why should I have to suffer living like this?" This statement has since been removed.

A true and correct copy of a printout of the described portions of the website is attached hereto as Exhibit 4.

28. Each of the statements listed above is untrue, casts the Plaintiffs in a negative light and is intended to cause substantial harm to Plaintiffs.

29. The statements in ¶29(a) are false because they state that the Plaintiffs were not reputable. The Plaintiffs are highly reputable and well-respected ophthalmologists. The revised statements are equally false because they suggest and are intended to suggest that Nevyas' advertising was inappropriate and the laser being used for Lasik was substandard.

30. The statements in ¶29(b) are false because they suggest that a cover-up exists and that Plaintiffs are participating in it and more importantly that Plaintiffs are tampering with the legal system in violation of the law. No such cover-up exists nor would Plaintiffs be participants if it did.

31. The statements in ¶29(c) are false because they state that Plaintiffs committed malpractice and violated their own as well as Federal standards of care. None of these allegations are true. The arbitrator found no liability in Morgan's lawsuit. Further it states that Plaintiffs illegally advertised the laser. This is also not true and these claims were dismissed from Morgan's lawsuit in a final, binding judgment.

32. The statements in ¶29(d) are false because they suggest and are intended to suggest that the Nevyas' are corrupt. The allegation is incorrect as to the number of malpractice lawsuits

and how each of them was resolved. The allegation that eleven malpractice lawsuits were filed does not reflect that not a single court found any of these cases to be meritorious.

33. The statements in ¶29(e) are false because they state that Plaintiffs lied to Morgan, are responsible for his alleged loss of sight, and are unconcerned about their patients welfare.

34. The statements in ¶29(f) are false because they suggest and are intended to suggest that Plaintiffs are corrupt and have violated the law to pervert the legal system.

35. The statements in ¶29(g) are false because they suggest that the use of this investigational laser by Plaintiffs was detrimental to the Plaintiffs' patients. Plaintiffs' laser did have FDA approval. The use of Plaintiffs' laser on patients was not detrimental to the patients in any way. This was another claim brought by Morgan that was dismissed in his lawsuit against Plaintiffs and it is a final binding judgment.

36. The statements in ¶29(h) are false because these statements are simply untrue; no information was withheld from Morgan. Morgan wanted Lasik surgery.

37. The statements in ¶29(i) are false because the informed consent signed by Morgan is replete with warnings about the possible negative consequences of Lasik. The first listing under of possible complications is "It is possible that there could be a loss of some or all useful vision."

38. Morgan read and signed a detail informed consent form for each eye. The informed consent was twelve pages long and was so comprehensive that it included a written true/false test concerning the content of the disclosures. Additionally, Morgan's claims concerning lack of informed consent were dismissed in his lawsuit against Plaintiffs, another final, binding judgment. A true and correct copy of the informed consent signed by Morgan is attached hereto as Exhibit 5.

39. The statements in ¶29(j) are false because they suggest and are intended to suggest that Plaintiffs were unconcerned with the well-being of their patients and that the use of the laser was detrimental to their patients. All of Morgan's claims relating to the laser were dismissed from his lawsuit in a final, binding judgment.

40. The statements in ¶29(k) are false because they state that the Plaintiffs have something to hide from their patients are withholding such information from their patients. There is nothing for Plaintiffs to withhold from their patients and Plaintiffs are completely candid with their patients. The revised statements are equally false because they suggest and are intended to suggest that Plaintiffs' radio advertisements were in violation of federal law when they were not.

41. The statements in ¶29(l) are false because they suggest that Plaintiffs did not comply with Federal law and provide Morgan with this booklet. Such an allegation is completely without basis and was not even made in his action against Plaintiffs.

42. The statements in ¶29(m) are false because they suggest and are intended to suggest that Plaintiffs are corrupt and have violated the law to pervert the legal system.

43. The statements in ¶29(n) are false because they suggest and are intended to suggest that the Nevyas' are responsible for Morgan's alleged vision loss, that it may have been done intentionally and that they are corrupt in attempting to pervert the truth. The arbitrator found no liability on Morgan's lawsuit.

44. The statements in ¶29(o) are false because they state that Nevyas' are responsible for Morgan's alleged vision loss, that it may have been done intentionally and that they are corrupt in attempting to pervert the truth. The arbitrator found no liability on Morgan's lawsuit.

45. The statements in ¶29(p) are false because they suggest and are intended to suggest that the Nevyas' are corrupt and have perverted the legal system to fit their own ends. This allegation of the perversion of the legal system is also an allegation that Plaintiffs have violated the law. They also evidence Morgan's intention to damage the Plaintiffs.

46. The statements in ¶29(q) are false because they suggest and are intended to suggest the Plaintiffs are corrupt, uncaring and incapable surgeons.

47. The statements in ¶29(r) are false because they suggest and are intended to suggest that Plaintiffs are corrupt and violated the law to pervert the legal system.

48. The statements in ¶29(s) are false because they suggest and are intended to suggest that Plaintiffs are incompetent in their field of ophthalmological surgery and are unconcerned about the welfare of their patients. The exact opposite is true.

49. The statements in ¶29(t) are false because they suggest and are intended to suggest that Plaintiffs are greedy, stupid and did not disclose information to Morgan. The Plaintiffs are highly committed ophthalmological surgeons. All of Morgan's claims concerning lack of informed consent are false and were dismissed by the court in a final, binding judgment.

50. Morgan uses the website to make allegations that are defamatory, untrue and many of which have been thoroughly considered by a court of law and rejected.

51. Morgan's acts are deliberate, outrageous and made with malicious intent to cause harm to Plaintiffs.

52. Plaintiffs brought an action in Common Pleas Court, Philadelphia County, entitled: Nevyas v. Morgan, November 2003, No. 946, and applied for a Temporary Restraining Order compelling Morgan to cease his defamatory conduct adhere to the contract reached in August.

53. Morgan and Friedman, who was again representing Morgan as he did in the medical malpractice action, assured the Court that Morgan had no intention of defaming the Plaintiffs and that he simply wanted to tell his story with respect to Lasik surgery.

54. Morgan and Friedman assured the Court that changes would be made to the website and that Morgan was willing to consider the deletion of material Plaintiffs identified as defamatory.

55. Plaintiffs were well aware of the hatred and bitterness that Morgan admittedly had for them, and insisted that the only way they could be protected from Morgan's malicious attacks, was through adherence to the August contract. Morgan refused to comply.

56. On November 17, 2003, Judge Sylvester denied Plaintiffs motion for Temporary Restraining Order.

57. Later that week, Morgan made further modifications to the website. These modifications, along with future modifications belie Morgan's representations to Judge Sylvester that he simply wanted to tell his story.

58. Morgan added three letters written by Friedman and sent to the Food and Drug Administration ("FDA"). A true and correct copy is attached hereto as Exhibit 6. Upon information and belief Friedman agreed to have the letters included in the website.

59. Friedman's letters to the FDA are defamatory and accused Plaintiffs of committing federal crimes, violating FDA regulations and violating the Pennsylvania Consumer Protection Act.

60. Friedman's first letter to the FDA is dated December 28, 2001. It accuses the Plaintiffs of violating 18 U.S.C. §1001, making false statements to the government, of violations of

21 CFR §812, improper promotion of an investigational device, of violating 21 CFR §54, failure to disclose the financial interest of clinical investigators, and violation of 73 Pa.CSA §201, Pennsylvania Unfair Trade and Consumer Protection Law.

61. The letter further states specifically that Plaintiffs were broadcasting misleading radio advertisements: "The radio advertisement was misleading in that it: (a) sought to promote the Nevyas Excimer Laser in violation of FDA regulations, (b) did not mention that an experimental device and an experimental protocol were involved, (c) implied that only standard therapy was involved, (d) did not state that visual acuity could not be achieved beyond what spectacles or contacts could provide, (e) implied that Nevyas was part of a regional laser surgery institute specializing in laser surgery, and thus more authoritative and experienced, when the Institute was a fictitious name for Nevyas, and (f) implied that Nevyas was part of regional Refractive Surgery Partnership devoted to refractive eye surgery, when such partnership was largely fictitious."

62. The December 28 letter also states: "The mere existence of promotional advertisements in violation of FDA regulations, and the failure of Nevyas to correct misrepresentations upon being asked specific questions by Mr. Morgan, constitute violations of 73 P.S. §201 (Pennsylvania Unfair trade and Consumer Protection Law)."

63. The letter also further asserts that Plaintiffs violated FDA regulations by making false representations to the FDA by failing to report adverse events. Friedman later refers to the Nevyas Excimer Laser as a "rogue device."

64. One week later, January 4, 2002, Friedman wrote another letter to the FDA. This letter is also published on Morgan's website and upon information and belief was published with the approval and encouragement of Friedman. In this letter Friedman repeats his earlier claims but

adds a new allegation: "I believe Nevyas may have been violating the federal Anti-kickback and False Claims Acts."

65. Friedman wrote another letter to the FDA on August 10, 2002 and upon information and belief was published with the approval and encouragement of Friedman. He again repeats and refers to his earlier claims and now accuses the Plaintiffs of engaging in "a 'bait and switch' tactic."

66. In response to Friedman's letters, the FDA sent an investigator to the Nevyas offices to assess the allegations against them.

67. The FDA did investigate these allegations and took no action against the Nevyas' or their medical practice.

68. Morgan and Friedman remain embittered by the defense verdict entered against them in the malpractice action against the Plaintiffs.

69. Friedman and Morgan took further action to violate the August contract and to defame Plaintiffs.

70. Despite repeated statements that Morgan did not intend to defame Plaintiffs or to cause them harm, Morgan has posted another letter written by Friedman to the FDA on his website.

71. On December 4, 2003, three weeks after personally assuring Judge Sylvester that Morgan did not want to defame Plaintiffs but only wanted to tell his story, Friedman wrote a letter to the FDA accusing Plaintiffs of criminal activity and requesting criminal sanctions. A true and correct copy is attached hereto as Exhibit 7.

72. Some examples of the defamatory statements in the December 4 letter include:

(a) "I believe however, that emphasis need be placed upon investigation of possible outright *criminal* activity." Emphasis in original.

(b) "I now call for an investigation by the Office of Criminal Investigation, for action which would: 1. Terminate all IDEs and stop Nevyas from performing LASIK. 2. Fine and otherwise sanction Nevyas for past improprieties."

(c) "The Nevyas' attorney told me that they intend to confiscate the social security disability checks Mr. Morgan gets for his legal blindness."

(d) "The public needs protection. The FDA can give that protection, through criminal investigation and regulation."

73. Friedman gave the December 4 letter to Morgan for inclusion on the website.

74. Friedman knew the statements contained in the December 4 letter were not true but sent the letter to the FDA and gave it to Morgan as part of his continuing effort to cause as much harm as possible to Nevyas.

75. Morgan quickly posted the December 4 letter on the website.

76. The allegations contained in the December 4 letter allege criminal activity. Such statements are defamation per se.

77. Each of the statements listed in ¶74 above is untrue, casts the Plaintiffs in a negative light, accuses Plaintiffs of criminal conduct and is intended to cause substantial harm to Plaintiffs.

78. The statements set forth in ¶74(a) are false because they state that the Plaintiffs were involved in criminal activity. The Plaintiffs are not engaged in and have never been engaged in criminal activity. The Plaintiffs are highly reputable and well-respected ophthalmologists.

79. The statements set forth in ¶74(b) are false because they state that the Plaintiffs were involved in criminal activity. Further, the statement suggests that Plaintiffs use a laser subject to an IDE to perform Lasik surgery. Plaintiffs have not used such a laser in approximately two years. The Plaintiffs are not engaged in and have never been engaged in criminal activity. The Plaintiffs are highly reputable and well-respected ophthalmologists.

80. The statements set forth in ¶74(c) are false because they state that the Plaintiffs' attorney threatened to confiscate Morgan's social security payments. Such threats were never made.

81. The statements set forth in ¶74(d) are false because they state that the Plaintiffs were involved in criminal activity. The Plaintiffs are not engaged in and have never been engaged in criminal activity. The Plaintiffs are highly reputable and well-respected ophthalmologists.

82. The addition of these four letters to the FDA, each authored by Friedman, demonstrates that Morgan and Friedman are conspiring to cause as much harm as possible to Plaintiffs.

83. Friedman had no purpose in writing the December 4 letter other than to try and cause as much harm as possible to the Plaintiffs. Friedman knew that the FDA had already investigated his claims against Plaintiffs and found them baseless, but he also gave the letter to Morgan for posting on the website, knowing it would be read by colleagues, current and potential patients of Plaintiffs. Friedman wrote the letter simply to cause harm to the Plaintiffs' reputations and medical practice.

84. Plaintiffs' harm is in the form of damage to their practice and damage to their reputation. Plaintiffs have no adequate remedy at law as money cannot remedy the damage to Plaintiffs' reputation.

COUNT I - DEFAMATION (Plaintiff v. All Defendants)

85. Plaintiffs hereby incorporate paragraph 1-84 as if fully set forth herein.

86. Morgan and Friedman made false and defamatory statements about Plaintiffs as set forth in detail above.

87. The false and defamatory statements were published on Morgan's website: www.lasiksucks4u.com and are available through internet search engines. Morgan's website is the third entry in a Google search of "Nevyas". Defendants did not have Plaintiffs' permission to disseminate this false information nor did Defendants have a privilege which allowed them to publish the defamatory material.

88. Defendants intended to publish these false and defamatory statements about Plaintiffs so as to create harm to Plaintiffs' reputation and business and were at least negligent in doing so.

89. Plaintiffs have suffered irreparable harm to their reputations due to the publication of the defamatory material. Plaintiffs continue to suffer harm while the defamatory material is on the website. Morgan and Friedman have violated a previous agreement to remove all mention of Dr. Nevyas, Dr. Nevyas-Wallace and their medical practice from the website.

90. Defendants' conduct is outrageous.

91. Defendants have committed defamation per se.

92. There is no adequate remedy at law.

WHEREFORE, Plaintiffs demand judgment in their favor and against Defendants granting temporary and permanent injunctive relief in their favor and against the Defendants, compelling the Defendants to cease and desist from defaming the Plaintiffs and compelling the Defendants to remove the defamatory material from the www.lasiksucks4u.com website. Plaintiffs further request damages jointly and severally against Defendants in an amount in excess of $50,000, exclusive of interest and costs, plus punitive damages and for any other remedies as this Court determines are just and proper.

COUNT II - BREACH OF CONTRACT(Plaintiffs v. Morgan)

93. Plaintiffs hereby incorporate paragraph 1-91 as if fully set forth herein.

94. In late July and early August, counsel for Plaintiffs and Morgan discussed an agreement between the parties concerning the website to prevent litigation.

95. Plaintiffs and Morgan entered a contract whereby Morgan agreed to remove any and all references to Plaintiffs and their medical practice from the website and Plaintiff agreed not to file a defamation lawsuit against Morgan. A true and correct copy of the letters constituting the contract are attached hereto as Exhibit 1.

96. Morgan has willfully breached the contract by reconstructing the "lasiksucks4u" website replete with references to Plaintiffs and their medical practice.

97. Plaintiffs have suffered and continue to suffer damages due to Morgan's breach of contract, and has no adequate remedy at law.

WHEREFORE, Plaintiffs demand judgment in their favor and against Morgan and request that this Honorable Court enter an Order granting temporary and permanent injunctive relief in their favor and against Morgan, compelling Morgan's specific performance of the existing contract

including the removal of any and all references to the Plaintiffs and their medical practice, ordering Morgan to desist from defaming the Plaintiffs and compelling the Defendants to remove the defamatory material from the www.lasiksucks4u.com website. Plaintiffs have no adequate remedy at law. Plaintiffs further request damages against Morgan in an amount in excess of $50,000, exclusive of interest and costs, and for any other remedies as this Court determines are just and proper.

COUNT III - SPECIFIC PERFORMANCE (Plaintiffs v. Morgan)

98. Plaintiffs hereby incorporate paragraph 1-96 as if fully set forth herein.

99. Plaintiffs and Morgan entered a contract whereby Defendant agreed to remove any and all references to Plaintiffs and their medical practice from the website and Plaintiff agreed not to file a defamation lawsuit against Morgan.

100. Defendant has willfully breached the contract by reconstructing the "lasiksucks4u" website replete with references to Plaintiffs and their medical practice.

101. Plaintiff has suffered and continues to suffer damages due to Defendant's breach of contract, and has no adequate remedy at law.

WHEREFORE, Plaintiffs demand judgment in their favor and against Morgan granting temporary and permanent injunctive relief in their favor and against Morgan, compelling specific performance of the Defendants to honor the existing contract to remove any and all references to the Plaintiffs and their medical practice, to desist from defaming the Plaintiffs and compelling the Defendants to remove the defamatory material from the www.lasiksucks4u.com website. Plaintiffs have no adequate remedy at law.

Dated: March __, 2004

STEIN & SILVERMAN, P.C.

____
Andrew Lapat
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I, Jeffrey B. Albert, Esquire , hereby certify that on January 18, 2005, a true and correct copy of the forgoing Defendant Friedman's Motion to Determine Amended Preliminary Objections to Plaintiffs' Amended Complaint was delivered via United States First-Class Mail, postage prepaid, as follows:

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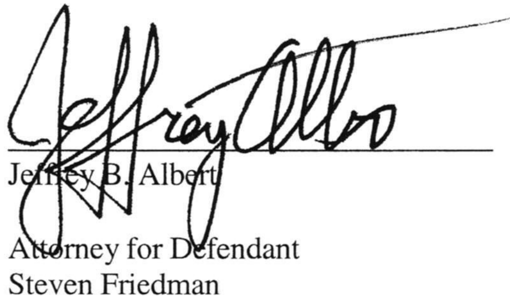

Jeffrey B. Albert

Attorney for Defendant
Steven Friedman

Dated: January 18, 2005

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January 18, 2005

Andrew Lapat, Esquire
Stein & Silverman, P.C.
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Philadelphia, PA 19102

Re: Herbert J. Nevyas, M.D., et al. v. Dominic Morgan and Steven Friedman
Phila. CCP November Term, 2003 No. 946
Our File No. 579-393

Dear Mr. Lapat:

Enclosed is a copy of Defendant Friedman's Amended Preliminary Objections to Plaintiffs' Amended Complaint, the original of which was filed with the Court.

If you wish to oppose this Motion, Philadelphia Rule of Civil Procedure 206.1 requires your answer or answering memorandum be filed with the Motion Court no later than twenty (20) days from the date of this letter or by **February 7, 2005**. This motion has been assigned **Control No. 011350**. In accordance with Philadelphia Civil Rule 206.1, you are further advised that if you do not choose to file a response, you are nevertheless required to comply with all requirements of Section D of Philadelphia Rule of Civil Procedure 206.1.

Very truly yours,

JEFFREY B. ALBERT

JBA:maa
Enclosure

cc: Steven Friedman, M.D., J.D., LLM (w/ enclosure)
Dominic Morgan (w/ enclosure)