IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

JODY SHACKELFORD PLAINTIFF

v. CASE NO. 3:24-CV-00123-JM/JJV

MORGAN & MORGAN
COMPLEX LITIGATION SERVICES, P.A. DEFENDANT

RESPONSE TO PLAINTIFF'S BRIEF ON STANDING

Morgan & Morgan Complex Litigation Services, P.A. ("Defendant") submits the following brief pursuant to the Court's November 4, 2024, Order (the "Order), directing Jody Shackelford ("Plaintiff") to articulate his Article III standing to bring this lawsuit.

ARGUMENT

I. PLAINTIFF FAILS TO COMPLY WITH THE COURT'S ORDER.

The Court's Order clearly required Plaintiff to articulate his Article III standing to bring this lawsuit. *See* Dkt. No. 28 (providing that "[t]he jurisdiction of federal courts is limited to actual cases and controversies by Article III" and identifying the elements of Article III standing). However, Plaintiff's brief entirely fails to address Article III standing and merely addresses statutory standing. *See* Dkt. No. 29. Article III standing and statutory standing are separate standing-related inquiries. *See Miller v. Redwood Toxicology Laboratory, Inc*., 688 F.3d 928, 934 (8th Cir. 2012) ("The 'issue of statutory standing ... has nothing to do with whether there is case or controversy under Article III,' …and we are careful not to conflate the two.") (internal citations omitted). For this reason alone, the Complaint should be dismissed. Regardless, to the extent the statutory standing arguments forwarded in Plaintiff's brief are applicable to Article III standing, Plaintiff still fails to articulate his standing to bring this lawsuit.

II. PLAINTIFF FAILS TO ESTABLISH ARTICLE III STANDING.

To establish Article III standing, a plaintiff must prove:

(1) an "injury in fact," or an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent";
(2) proof that the injury is "fairly ... trace[able] to the challenged action of the defendant; and
(3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992) (internal citations omitted). At the pleading stage, the plaintiff must "clearly ... allege facts demonstrating" each element. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 1547 (2016). [1]

The purported "injuries" alleged in the Complaint include: (1) "[l]oss of clients who were misled by Morgan & Morgan's advertisements"; (2) "[d]amage to Plaintiff's reputation due to perceived inferiority compared to Morgan & Morgan's services"; and (3) "[u]nfair competition as Morgan & Morgan gains an unfair advantage by violating advertising rules that Plaintiff adheres to." *See* Dkt. No. 12, ¶ 20. The Complaint fails to state facts which demonstrate that the foregoing are "injuries in fact," are causally linked to the Defendant's actions, or will likely be redressed by a favorable decision. Plaintiff lacks Article III standing and the Complaint should be dismissed.

[1] The Plaintiff has set forth, or has attempted to set forth, the elements of statutory standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), the Lanham Act, 15 U.S.C. § 1125(a), and various state law causes of action. Again, statutory standing and Article III standing are separate inquiries. Further, Plaintiff has identified several elements of statutory standing that are not fairly comparable to any Article III standing requirement (i.e. a "violation of Section 1962" and "Zone of Interests"). However, as required by the Order, Defendant addresses Article III standing and, for that reason, requests the Court treat Defendant's briefing on Article III's "injury in fact," "fairly traceable," and "redressability" requirements as responsive to Plaintiff's briefing on "injury," "proximate cause," and "redressability." *See* Dkt. No. 29, pp. 2-3, 5, 8-10.

A. THE COMPLAINT FAILS TO STATE FACTS WHICH DEMONSTRATE AN INJURY IN FACT.

i) The Alleged Injuries Are Not Concrete.

To constitute an "injury in fact," the injury must be "concrete," meaning that it "must actually exist." *Spokeo, Inc*., 578 U.S. at 340, 136 S.Ct. at 1548 ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"). In determining whether an injury is "concrete," courts "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424, 141 S.Ct. 2190, 2204 (2021). Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id*. at 426, 141 S.Ct. at 2205. As such, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id*.

Defendant does not dispute that economic and reputational harms may qualify as concrete injuries. However, Plaintiff's Complaint is entirely based upon a purported violation of the Arkansas Rules of Professional Conduct ("ARPC"), which is not a basis for civil liability and does not create a private right of action.[2] Likewise, with respect to Article III standing, Plaintiff's purported injuries are necessarily based on Defendant's alleged violation of the ARPC. Certainly, conduct which violates the ARPC may, independently, cause injury. *See* Dkt. No. 23, pp. 3-5. However, with few exceptions, courts have refused to acknowledge actionable injury resulting from a violation of ethical rules. Dkt. No. 18, pp. 3-5. Therefore, these "injuries" are not concrete because they do not have a "'close relationship' to a harm 'traditionally' recognized as providing

[2] This argument is stated in full at Dkt. No. 18, pp. 3-5, 6, 15-18, 20-22, and Dkt. No. 23, pp. 1-7, and incorporated here by reference.

a basis for a lawsuit in American courts." *TransUnion LLC,* 594 U.S. at 424, 141 S.Ct. at 2204; *see Igbanugo v. Minnesota Office of Lawyers Professional Responsibility*, 56 F.4th 561, 566 (8th Cir. 2022) (affirming that plaintiff lacked Article III standing to seek declaration that defendants violated the Minnesota rules of professional conduct).

As to Plaintiff's claimed injury of unfair competition, Plaintiff fails to provide any legal authority whatsoever that "unfair competition," in and of itself, is a cognizable injury. Certainly, unfair competition may *result* in injury. *See Lexmark*, 572 U.S. at 131, 134 S.Ct. at 1389-90 ("Although 'unfair competition' was a 'plastic' concept at common law … it was understood to be concerned with injuries to business reputation and present and future sales.") (internal citations omitted). However, Plaintiff fails to allege any injury resulting from the purported unfair competition. Plaintiff simply cannot claim he has been harmed by unfair competition without alleging a resulting economic loss, reputational loss, or other concrete injury.

The Complaint fails to state facts which demonstrate an injury in fact; therefore, dismissal is proper.

ii) The Alleged Injuries Are Neither Particularized Nor Actual.

To constitute an "injury in fact," the injury must also be "particularized," in that it "must affect the plaintiff in a personal and individual way." *Spokeo, Inc*., 578 U.S. at 339, 136 S.Ct. at 1548. Further, the injury must be "actual" or "imminent," not conjectural, hypothetical, or speculative. *See Lujan,* 504 U.S. at 560, 112 S.Ct. at 2136; *Wallace v. ConAgra Foods, Inc*., 747 F.3d 1025, 1030 (8th Cir. 2014).[3]

First, the Complaint asserts that Defendant's purportedly "deceptive" advertisements misled Arkansas consumers and, thus, diverted potential clients, and revenue, from "Arkansas

[3] Given the related nature of these requirements, they are addressed together.

attorneys who comply with ethical rules." *See* Dkt. No. 12, ¶¶ 17-20. Even assuming Defendant's advertisements were misleading, the "harm" would be to Arkansas consumers, generally. This type of generalized "harm" falls short of Article III requirements. *See Carney v. Adams*, 592 U.S. 53, 59-60, 141 S.Ct. 493, 499 (2020) ("a plaintiff cannot establish standing by asserting an abstract 'general interest common to all members of the public.'").

To the extent any Arkansas attorneys were supposedly harmed—and Plaintiff, specifically—the "injury" is entirely reliant upon a speculative chain of events which depend on the decisions of third parties. *See Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009) (affirming dismissal for lack of Article III standing where competitor's alleged injury of lost business depended on "several layers of decisions by third parties … and [was] too speculative to confer Article III standing"). In such cases, dismissal for lack of Article III standing is proper. *Id*.

As in *Little*, Plaintiff's alleged injury requires several layers of decisions by third parties:

1) a showing of at least one person that intended to retain Plaintiff;
2) that person instead retained Defendant;
3) that person retained Defendant as a result of Defendant's advertisements; and
4) that person retained Defendant *because* they believed "client testimonials and dramatizations are an acceptable form of attorney advertising," and, thus, that Defendant is compliant with ethical advertising standards.

See Dkt. No. 12, ¶¶ 14-19. Plaintiff fails to allege any facts to support any given link in this chain of events. Stated differently, Plaintiff fails to establish that his alleged injury is anything more than speculative or hypothetical. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 985 (11th Cir. 2005) ("We simply cannot conclude that the loss of a hypothetical and uncertain prospect of earning a sum of money amounts to an 'actual' or 'imminent' injury."). Thus, as in *Little*, Plaintiff's injury is too speculative to establish Article III standing.

Regarding Plaintiff's allegation that Defendant's purported conduct has "diminished the effectiveness" of Plaintiff's advertising dollars, *see* Dkt. No. 29, p. 3, this, again, is too speculative

to support Article III standing. This "diminished effectiveness" injury requires the following speculative layers of decisions by third parties:

1) Plaintiff's advertisements had previously been effective;
2) There was at least one person who intended to hire Plaintiff but, instead, hired Defendant after viewing Defendant's advertisements; and
3) That person hired Defendant rather than Plaintiff because the person believed "client testimonials and dramatizations are an acceptable form of attorney advertising," and thus Defendant is complaint with ethical advertising standards.

Plaintiff fails to even allege such a hypothetical series of events and, even if alleged, such claims would involve far too many "what ifs" to establish a particularized or actual injury. *See Little*, 575 F.3d at 540; *Bochese*, 405 F.3d at 985.

Finally, the Complaint asserts Defendant caused "[d]amage to Plaintiff's reputation due to perceived inferiority compared to Morgan & Morgan's services." *See* Dkt. No. 12, ¶ 20. The Complaint states no facts which support this claimed "injury." *See, generally*, Dkt. No. 12. Even when construed liberally, it simply cannot be inferred how Defendant's advertisements—more specifically, the false impression of compliance with the ARPC—might have created the perception that Plaintiff's services are inferior to Defendant's services.

Further, the Complaint, again, fails to identify any person holding this perception of Plaintiff's services who, somehow, reached this conclusion based on their impression that Defendant's advertisements complied with the ARPC. "'[N]aked assertion[s]' of reputational harm 'fall[ ] short of plausibly establishing injury.'" *McNaught v. Nolen*, 76 F.4th 764, 771 (8th Cir. 2023) (finding no "injury in fact" for purposes of Article III standing where plaintiff failed to allege facts establishing how the defendant's actions harm her reputation).

The Complaint fails to state facts which demonstrate an injury in fact; therefore, dismissal is proper.

B. THE COMPLAINT FAILS TO STATE FACTS WHICH DEMONSTRATE AN INJURY "FAIRLY TRACEABLE" TO DEFENDANT THAT IS "REDRESSIBLE."

Article III requires a second step of "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Further, it must be likely, as opposed to speculative, that the injury will be redressed by the requested judicial relief. As causation and redressability "are often 'flip sides of the same coin,'" causation and redressability are discussed together. *See Food and Drug Admin. v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 381, 144 S.Ct. 1540, 1555 (2024) ("If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury. So the two key questions in most standing disputes are injury in fact and causation.").

Assuming that the Complaint states facts which demonstrate an injury in fact, which it does not, then the alleged injuries are not "fairly traceable" to Defendant's purported actions. Like the "injury in fact" requirement, causation is entirely reliant upon a speculative chain of events which depends on the decisions of third parties, namely, Arkansas consumers. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45, 96 S.Ct. 1917, 1927 (1976) (If "[s]peculative inferences are necessary to connect [a plaintiff's] injury to the challenged action," this burden has not been met). Arkansas consumers may have chosen not to hire Plaintiff for any number of reasons—reasons that are entirely unrelated to Defendant or Defendant's advertisements. Indeed, it is entirely possible that consumers who did not hire Plaintiff also did not hire Defendant, given that the parties are participating in "a competitive legal market." *See* Dkt. No. 29, p. 3. Further, consumers who did hire Defendant may have done so for any number of reasons; therefore, it cannot "fairly" be said

that these consumers did so because of Defendant's advertisements, or, more specifically, because these consumers somehow inferred that Defendant's advertisements complied with the ARPC. *See Habecker v. Town of Estes Park, Colo*., 518 F.3d 1217, 1224 (10th Cir. 2008) (holding that plaintiff's loss of elected office was the result of the electorate—independent third parties—who voted plaintiff out of office and not any action taken by the defendant); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 246-48 (3rd Cir. 2012) (affirming dismissal of RICO claim for lack of Article III standing due to speculative, factually unsupported allegations on causation).

The foregoing is equally applicable to Plaintiff's claim of reputational damage. Again, the Complaint fails to allege any facts demonstrating how Defendant harmed Plaintiff's reputation. However, assuming that Plaintiff's reputation has been harmed, there are no facts which connect Plaintiff's reputation to Defendant—or, more specifically, to an Arkansas consumer's supposed perception of Plaintiff based on the belief that Defendant's advertisements comply with the ARPC. There may be a multitude of reasons why Arkansas consumers hold a particular perception of Plaintiff which are unrelated to Defendant or Defendant's advertising.

Given the wholly speculative nature of both the claimed "injuries" and the causal connection to Defendant, it is difficult to see how the relief sought might redress any purported injury. An award of damages cannot *remedy* a non-existent "injury." Further, an award of injunctive relief will not necessarily result in an increase in Plaintiff's business. Notably, even if this Court were to enjoin Defendant from engaging in advertising which, purportedly, violates the ARPC, Defendant would still be able to advertise and compete with Plaintiff for business. Thus, if Arkansas consumers hire Defendant for any reason other than a belief that "client testimonials and dramatizations are an acceptable form of attorney advertising," and, thus, that Defendant

complies with ethical advertising standards, there likely will be no change. Further, taking Plaintiff's allegations as true, if Defendant modifies its advertising to comply with the ARPC, consumers could continue to hire Defendant based on a belief that Defendant complies with ethical advertising standards, meaning there will be no change. Regardless, it is purely speculative to state that Arkansas consumers have hired Defendant, as opposed to Plaintiff, because consumers believe that Defendant's advertisements comply with the ARPC. Consumers may have any number of reasons for hiring, or not hiring, a given law firm or attorney to represent them.

The Complaint fails to state facts which demonstrate an injury that is fairly traceable to Defendant or likely redressable by a favorable judgment; therefore, dismissal is proper.

CONCLUSION

Plaintiff wholly failed to address the issue identified by the Court (Article III standing), but even if Plaintiff's statutory standing arguments can be considered as addressing Article III standing, they fail to chin the bar. The Complaint fails to state facts which demonstrate an injury in fact, as the claimed injuries are not concrete and are too speculative in nature. Further, the Complaint fails to state facts which demonstrate that any injury is fairly traceable to Defendant's alleged conduct, or that the complained of injury would be redressed by the relief sought. Therefore, Plaintiff has failed to establish Article III standing, and the Complaint should be dismissed.

Respectfully submitted,

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