

RANDAZZA

LEGAL GROUP

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Licensed in CT, MA, NY, DC

1 July 2022

Via Email Only

Kevin Finkenauer

Liberty Bell Moving & Storage

<attorney@libertybellmoving.com>

[REDACTED]

Re: Baseless Lawsuit Threat | ID 052774¹

Dear Mr. Finkenauer:

This office has the distinct pleasure of representing Ms. [REDACTED] the recipient of your June 27, 2022, communication. I hope that this letter satisfies your arbitrary July 1, 2022, deadline. Should this process continue, we look forward to imposing our own random deadlines.

Also, your correspondence was purportedly sent by Attorney@libertybellmoving.com, but indicates that it is not actually sent by your counsel,² rather, you had “pre authorized permission”. I don't know if you think that is supposed to scare her—attorneys aren't scary. We're really nice most of the time. We have pets, play team sports, watch tv, just like regular humans. if you actually have an attorney, please be sure to share this response with them. In fact, even if you don't have an attorney, you should hire one—a good one, one who knows a thing or two about defamation law. You've made two threats against my client: defamation and breach of contract. It is clear you are using some kind of form letter, modifying dates and copying and pasting client reviews. But, since you made the threats, I have no choice but to respond.

Before I do, it is disappointing that a company named “Liberty Bell” would be so adverse to the spirit of free speech. Given your politics, having participated in the January 6 protest at the U.S. Capitol, and your obvious support for President Trump, one would think you would be against censorship. Separately, I would like to commend you on this bit of prose:

“Wait,” posted a commenter. “Were you there participating in this insurrection?”

¹ Your threat seems to have a typo, as it was Job ID 052775.

² Thus, certainly, the letter was not composed by an attorney, and that \$450 provision in the agreement does not apply. There is also some nonsense about late fees being imposed, but these attorney and defamation charges have no due date, even if they did apply.

Replied Finkenaur, with two emojis crying tears of laughter, "Biden, Hillary and Biden's crack head son. You must smoke crack to think your on the winning side. Go get your Covid injection u dub."

See Nemitz, Bill, "So, Maine businessman, you say you were in the U.S. Capitol? Tell us more", PORTLAND PRESS HERALD (Jan. 10, 2021).³

1. Introduction Done. So, What Happened?

My client reached out to you for a June 23, 2022, in-town move in New Hampshire. On June 1, 2022, you wrote to my client regarding the essential terms: "with a start time of 8am, with NVP valuation, we would bill \$225/hr for 3 movers and the moving truck. The clock starts when we arrive at your home in [REDACTED] and ends when we are done unloading at your home in [REDACTED]. Attached to that email was your form contract. At the end of the long contract, which you know no-one reads, it included the following provision:

IMPORTANT!!!! --->>>> DEFAMATION CLAUSE FOR HOURLY AND NON BINDING PRICING FLEX DATE STIPULATION.<-----IMPORTANT!!!!!!

By electronically signing this OFS, If you opted for less expensive hourly or non binding pricing. You must understand that we're do the ing this move site unseen and are not guaranteeing that we will be able to honor the exact load date noted on the OFS. While it is ALWAYS our intention to honor date(S) noted on the OFS, sometimes due to FMCSA drive time regulations beyond our control, this is not always possible. Therefore, you or anyone affiliated with you agree to not post ANY NEGATIVE REVIEWS against Liberty Bell Moving & Storage whatsoever. Any bad reviews posted against Liberty Bell Moving & Storage on any

You will note that this text ends abruptly, mid-sentence. At no time was this provision explained to Ms. [REDACTED] nor was she informed that the price was not binding—she agreed to a binding deposit of \$760.73, which included a fixed travel charge and clerical fee. There was no "option". Nor did it include any of the language you purport it did about bad reviews automatically being deemed false and defamatory (bad reviews can be true, you know), or a liability for punitive damages, or a \$1,000 defamation management fee (whatever that is), or any of the language exempting "Binding estimates where a pre move walk thru has been conducted".

Further, the "No Valuation Protection (NVP)" limited the concept of "bad reviews" to ones about "alleged damage, or lost items". And the third paragraph on page 12 speaks of bad reviews when items are left behind, not put in proper location, or other issues from the absence of the customer on delivery. Further down page 12, there is a prohibition on

³ Available at <https://www.pressherald.com/2021/01/10/bill-nemitz-so-maine-businessman-you-say-you-were-in-the-u-s-capitol-tell-us-more/> .

negative reviews where a move is not conducted on the agreed-upon date, so long as the move is not canceled. None of these circumstances occurred.

Your letter also included another snapshot of a contractual provision "Defamation Clause for Hourly and Non Binding Pricing". This appears nowhere in my client's actual contract. Please refrain from future misrepresentations of this kind. While I am guessing you have at least two versions of your contract and you routinely will include both, this is really just a waste of time. Perhaps a spreadsheet to keep track of which customer got which contract might help.

At any rate, the day of the move comes. Recall that there were emails between my client and your company on June 2, 2022, where my client confirmed the use of one pod, moving truck, and open trailer, and your company responded that she could have "the guys as long as you like crew will stay until job is complete :)".

My client tells me you sent two lovely gentlemen who are obviously hard workers. Unfortunately, you overbooked them. They had two other jobs that day and abruptly left my client, mid-move.

Your letter has a truncated review with the Better Business Bureau that you attribute to my client.⁴ As posted on the BBB website,⁵ it is a one-star review that reads:

**** will promise you lots of things, but the real story is what happens when the movers arrive. They are subcontractors who dont have the full communication history. They are hard workers but they were booked for 3 moves on our moving day, and were told they only had to fill one small pod. I showed them the email thread with **** which said full day, moving truck + pod + utility trailer for a full house + garden shed. Plus help packing heavy tools. We were expecting a full day. They stayed four hours and left. **** will put the blame on YOU for not forcing the movers to stay. Yes, I am going to tell these men that no they cannot leave and go to their next two jobs across the state that is a ridiculous expectation. I have no issues with the movers. They were outstanding but they were triple booked by the back office. **** offers \$25 gift cards for positive reviews. Im leaving a review ****, so feel free to send me that gift card.

The BBB seems to redact your employee's name, but that's fine. This isn't about him. It's about your company and its threats. The most notable thing about your threat of a lawsuit

⁴ See <https://www.bbb.org/us/me/portland/profile/moving-companies/liberty-bell-moving-storage-inc-0021-116146/customer-reviews#1292935259> .

⁵ The BBB website indicates that you had your BBB accreditation revoked. Yet, the document whereby my client agreed to the price falsely represents that you are BBB accredited. See [REDACTED]

[REDACTED] . Your website falsely says you have an A+ rating from the Maine BBB. See <https://libertybellmoving.com>. Yikes.

was that you do not deny any of it. You're threatening Ms. [REDACTED] for telling the truth. The founder of Truth Social would be so disappointed in you.

2. You're Going to Lose, Bigly

I'm sure that, by the time you got to this point, you were thinking my client was going to roll over and accede to your demands. Nope. Let me put on my lawyer hat and explain why (remember, lawyers aren't scary).

2.1 I Can't Believe It's Not Defamation

You claimed the review is actionable in defamation. It is not. As your lawyer should explain to you:

The plaintiff in a defamation case must prove that the published statements made were defamatory, meaning that the statements harmed his reputation so as to lower him in the estimation of the community. Moreover, the plaintiff must prove that the defamatory statements are false. ... A false statement must be an assertion of fact, either explicit or implied, and not merely an opinion, provided the opinion does not imply the existence of undisclosed defamatory facts. If the publication is truly an opinion, however, then it is not actionable.

Ballard v. Wagner, 2005 ME 86, ¶ 10, 877 A.2d 1083, 1087 (Me. 2005) (internal citations and quotation marks omitted). Let's start with defamatory. While saying that your company failed to allocate enough time and bring the equipment promised, improperly blaming the customer, might be considered at first blush to possibly lower your company's reputation, you are a unique character. I say this because I saw that you viewed the Press Herald article as being good for business.⁶ Also, given the sheer number of negative reviews there are about you, it is quite possible you are what is known as "libel proof"—when your reputation is at zero, you can't go any lower.⁷

As to facts vs. opinion, the "one-star" rating is pure opinion. It's like offal—some people like steak and kidney pie, and the rest of us think they're nuts. But, how much you like something is classic opinion.

This leaves us with the facts. You sent three guys employed by a subcontractor. True. They had two other jobs that day. True. They left after four hours. True. They left before completing Ms. [REDACTED] job. True. Your company blamed her for not somehow forcing the men to stay. True. She was offered \$25 in an LL Bean gift card for a positive review. True.

⁶ See

<https://www.facebook.com/liberty.liberty.522/posts/pfbid02g8FME833iQ4PCHCwKfKTAwmuvTUJdynZr3NpQvKjeP599EXqu9kexHUeNVrDrfhTI>.

⁷ Maine does not appear to have yet adopted this doctrine. You might want to think about what it means to possibly be the one to set that precedent.

I'm sure you're familiar with Jim Carrey's body of work. Remember how, in *Liar Liar*, he raised his arms up, shouting "And the truth shall set you free"?⁸ Well, that's what we expect the outcome to be here. Or, as put more formally, "generally speaking, truth is a complete defense to an action for" defamation. *State v. Fredette*, 462 A.2d 17, 22 (Me. 1983).

2.2 Yes, Virginia, There is a Violation of Federal Law

Next, you threaten her with your mishmash of contractual terms. As noted above: 1) she didn't agree to any terms you didn't present to her; 2) there is nothing to suggest her quote was not "binding"; and 3) if binding meant something else, then it is unenforceable as ambiguous terms in contracts are construed against the drafter.⁹ Additionally, it would be incumbent upon you to show that it is negative or bad—the review included some favorable comments about the three gentlemen, and as noted above, you seem to view criticism favorably.

But, we really needn't belabor ourselves with this. You did such a good job of identifying the controlling law. However, your interpretation of it does not jibe with ours.

In 2016, President Obama signed into law the Consumer Review Fairness Act, 15 U.S.C. § 45b. Here's a summary:

Section 45b explicitly protects consumer reviews related to the provision of goods and services when the consumer agrees to a form contract. See 15 U.S.C. § 45b(a)(2) (defining "covered communication"). The law defines a form contract as one with "standardized terms" that is "used by a person in the course of selling" his services and "imposed on an individual without meaningful opportunity for such individual to negotiate the standardized terms." *Id.* § 45b(a)(3)(A).⁸ Congress has directed that "a provision of a form contract is void from the inception of such contract if such provision (A) prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication [or, as relevant] (B) imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication . . ." *Id.* § 45b(b)(1). It is "unlawful for a person to offer a form contract containing a provision described as void in subsection (b)." *Id.* § 45b(c).

Seibert v. Precision Contracting Sols., LP, Civil Action No. 18-818 (RMC), 2019 U.S. Dist. LEXIS 29755, at *20-21 (D.D.C. Feb. 26, 2019). The tl;dr is that a form contract is unenforceable if it bars consumer reviews or has a penalty provision for doing so.

⁸ It is my understanding that this is a quote from John 8:32.

⁹ Maine uses "the familiar principle of construction requiring the wording of a written instrument, in the event of ambiguity, to be construed against the drafter of the disputed provision." *T-M Oil Co. v. Pasquale*, 388 A.2d 82, 86 (Me. 1978)

Now, you say, in your threat:

The CRFA applies only to “form contracts” that are “imposed” on an individual without a meaningful opportunity for such individual to negotiate the standard terms.” In this case, you had a full opportunity to choose whether to accept the non-disparagement provision or not. If you did not wish to agree to the non-disparagement provision, you could simply requested a binding estimate, which would have resulted in a somewhat more expensive move but would have offered you a binding price. This being said, you voluntarily accepted the non-disparagement provision. Since You had full opportunity to negotiate and decline the non-disparagement provision, it was not “imposed on” you, and the CRFA does not apply.

Yeah, no. Ms. [REDACTED] had no opportunity to negotiate. The only option she was given was the level of valuation protection (essentially insurance for when your guys might break things). She was never given an option for an alternate form of estimate or even told her estimate was not, in your opinion, binding. Your threat may cause others to take down their reviews, but if you think this will have any effect on Ms. [REDACTED] well, you would be: <https://www.youtube.com/watch?v=WrjwaqZfjIY> (watch with volume on).

2.3 Did Somebody Say “Violation of Two State Consumer Protection Laws”?

Two states, how can that be? Maine law prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce. 5 M.R.S. § 207. This is enforceable by the state Attorney General and by private right of action. (To the extent applicable, this should be deemed a written demand for relief under 5 M.R.S. § 213 (1A), with my client suffering distress and embarrassment and incurring legal fees.)

New Hampshire law also makes such conduct unlawful. RSA 358-A:2. Yeah, I know, your contract has a Maine choice of law provision, but the New Hampshire Attorney General might not care about that.

Section 207 of the Maine law and RSA 358-A:13 in New Hampshire both look to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), for guidance. This is important because we have some experience in this area. A few years ago, we represented a consumer review website that was sued by a weight-loss company that also prohibited negative reviews. While we won that suit, we also put the FTC on notice that the company was suing its customers over negative reviews, among other things. As part of the \$25 million judgment against the company and its owner, was the determination that the gag clause was a violation of the FTC Act.¹⁰ See *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1395 (M.D. Fla. 2018). Also, the CFRA that you referred to is also now a part of the FTC Act. We are sending you this letter to hopefully avoid a repeat of us having to represent Ms. [REDACTED] in a complaint to the FTC.

¹⁰ Notably, that case was brought up in testimony to the U.S. Senate when the CFRA was being considered.

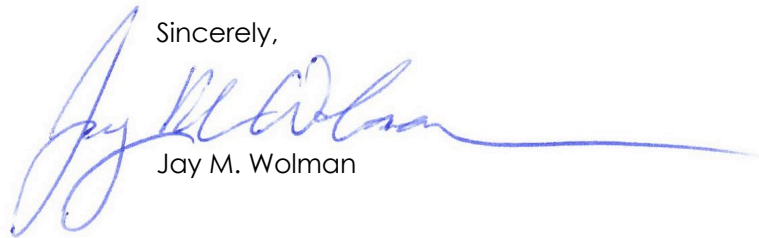
The reason why this is a consumer protection issue should be obvious. If a business acts to prevent truthful, negative reviews, then consumers will wrongly be given only rosy reviews, which is fundamentally misleading. That is precisely what the court determined in *Roca Labs, supra*. We can end this here—withdraw your frivolous litigation threat. If you don't, we will enjoy watching the FTC do its thing.

Your letter mentioned a lawyer. Talk to him/her. Then talk to a better one.

3. Conclusion

Need I say more?

Sincerely,

A handwritten signature in blue ink, appearing to read "Jay M. Wolman", with a long horizontal flourish extending to the right.

Jay M. Wolman