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Pronounced on 24-05-2019

(Coat of arms of Schleswig-Holstein)

signed
xxxxx Judicial Clerk
as Court Registrar

Kiel Regional Court

Judgment

In the Name of the People

In the proceedings of

Dr. Colleen Huber, [address]

- Plaintiff -

authorized agents:
[lawyers]

versus

Britt Marie Hermes [address]

- Defendant -

authorized agents:
Lawyers **Kötz Fusbahn Rechtsanwälte Partnerschaftsgesellschaft**, Blumenstraße 7, 40212 Düsseldorf

for injunctive relief

the following was decreed and determined by Presiding Regional Court Judgess G., Civil Division 4 of the Kiel Regional Court, on the basis of the hearing on 03-04-2019:

The action is dismissed.

The Plaintiff shall bear the costs of the proceedings.

The judgment is provisionally enforceable against a security amounting to 110% of the respective amount to be enforced.

Value in dispute: EUR 50,000.00.

Facts:

The Plaintiff makes claims for injunctive relief and damages against the Defendant in connection with an article published by the Defendant on the Internet.

The Plaintiff is a Naturopathic Medical Doctor (NMD) in Tempe, Arizona, United States. She runs the “Nature Works Best” cancer clinic in the USA. In this clinic, patients suffering from cancer receive alternative treatment in the form of specific diets and administration of vitamin preparations, and studies on the correlation between the intake of sugar and the incidence of cancer published in the Cancer Strategies Journal are conducted. In addition, the Plaintiff is a speaker at medical conferences in America (focus: oncology and naturopathy).

The Defendant is American by birth and has been living in Germany since 2015. She received a training in “Naturopathy” at Bastyr University. The Defendant first practiced in this field for approx. 5 years but then she turned away from this field of activity and began to doubt the effectiveness of these treatments. Currently, the Defendant is a student at the University of Kiel and is critical of naturopathy. She runs the Internet blog "naturopathicdiaries.com”.

On 01-12-2016 the Defendant published an online article on her website (www. naturopathic-diaries.com) entitled “Is dubious cancer “doctor” Colleen Huber cybersquatting my name?” The article is completely written in English. Only the German translation will be presented below (in German text). As regards the details of the original version in English reference is made to Annex K1a (page 3, et. seq., Annex), the translation of which can be found in Annex K 16 (p. 233, et. seq. of the file).

Based on this article entitled “Is dubious cancer “doctor” Colleen Huber cybersquatting my name on the Internet?” the Plaintiff objects to the following statements:

(1)… “An Arizonan naturopath likely owns my domain name”

(2)… “the domain natonco.org, the official website for the Naturopathic Cancer Society and a non-profit organization in Tempe, Arizona run by naturopathic cancer “doctor” Colleen Huber, NMD and her surrogate Hazel Chandler. The organization raises money for cancer patients who desire to use, but cannot afford, expensive alternative cancer therapies such as intravenous vitamins, mistletoe injections, and special diets, which is then funneled to Huber’s clinic Nature Works Best and others.”

(3) and (4) “…In addition to what appears to be a terrible failure in conducting ethical research because it was/is run out of her clinic and tied her non-profit, Huber completely bungled her analysis. Thomas Mohr, an oncology researcher at the Medical University of Vienna, reanalyzed Huber’s data in her sugar study and commented on my blog in February 2016:

> *Putting aside the ethical issues of the extremely bad study design, the lack of ethics committee approval or patients’ agreement, a quick n’ dirty analysis of the data reveals following odds ratio: 2.1 (95% CI 1.01 – 4.40, p<0.05) in favour of state of the art treatment. In other words, patients under natural care have more than a two-fold higher risk to die.*
>
> *This is criminal.*

I agree.

(5) Mohr continued with his independent analysis of Huber’s data:

> *If one removes data of questionable quality and takes into account only those with complete data and in treatment resp. died during treatment (i.e. in remission, not yet in remission, died), the odds ratio gets almost 10:1 in favour of state of the art therapy. This is really nasty.*

Indeed, her activities seem suspicious, especially when one looks at what her clinic is advertising based her “research”:

Colleen Huber, NMD, seems to be a cancer quack.”

(6) ”… Huber and these other naturopaths have perhaps found a legal loophole allowing them to blatantly mislead vulnerable cancer patients. She seems to be drawing naturopaths into what looks like an IRB sham in order to justify the use of fraudulent treatments.”

(7) “…As far as I can tell, Huber is the ringleader of what appears to be a naturopathic clinical trial and charity hoax.

As regards the details reference is made to the content of the translated article (p. 233, et. seq. of the files).

In a letter dated 17-08-2017 by her authorized agents the Defendant received on 18-08-2017 the Plaintiff warned the Defendant, calling upon the Defendant to submit a cease-and-desist letter. The Defendant refused to do so (see lawyer’s fax message dated 28-08-2017.

The Plaintiff claims that the content of the article published by the Defendant is not true. At no time the Plaintiff has been the owner of the Defendant's domains "BrittMarie-Hermes.com", "BMHermes.com" and "BrittHermes.com". There was no connection whatsoever between the Plaintiff and Thomas Philipp-Edmonds or the organization TMG Internet Marketing being the owner of the domain names.

The Plaintiff never received any money from the non-profit organization "Naturopathic Cancer Society" and the "Nature Works Best" clinic.

In particular, Thomas Mohr's comments on the evaluation of the sugar study are not true. In this respect, the Plaintiff claims that conducting such a study requires the approval by the Ethics Commission. Nevertheless, the study was approved by the "Naturopathic Oncology Research Institute's Investigational Review Board (IRB)" in 2010.

In another scientific article entitled "Defeating cancer requires more than one treatment method" the Plaintiff also claims that that the risk of conventional cancer treatment is significantly higher compared to patients treated with naturopathic methods. Insofar the Defendant took over Thomas Mohr's false assertions and untruthfully agreed to them.

The Plaintiff also claims that she does not mislead patients or that she employs fraudulent treatment methods. She regularly publishes treatment results for all her patients. Neither she nor the Arizona Naturopathic Medical Board being the regulatory agency have received any complaints about the treatment.

The Plaintiff is of the opinion that the Defendant's article violates her personal rights. Being untrue factual allegations the statements are not covered by the freedom of expression and are abusive criticism.

Since there was a serious violation of personality rights she was entitled to a compensation amounting to min. EUR 500.00.

At the hearing on 03-04-2019 the Plaintiff asserted the following claims for infringement of the provisions of Section 4 (1) and (2), Act Against Unfair Competition, claiming that there is a competitive relationship between the parties. This was not substantiated in the subsequent pleading dated 09-04-2019.

The Plaintiff petitions to the Court

> I. to order the Defendant, on pain of an administrative fine to be imposed for each infringement and imprisonment of up to six months in case such fine cannot be recovered (administrative fine of EUR 250,000.00 per case; imprisonment of max. two years), to desist from making and/or disseminating the following in regard to the Plaintiff as done in the Defendant's article dated 01-12-2016 (see Annex K1 a (English version and Annex K 1b, German version):
>
> (1) "Is dubious cancer "doctor" Colleen Huber cybersquatting my name?
>
> and/or
>
> (b) The Plaintiff likely owns my domain name
>
> and/or

(2) The Plaintiff funneled funds received from the Naturopathic Cancer Society, a Tempe based non-profit organization the president of which is the Plaintiff to the “Nature Works Best” clinic if this happens in the following context: “(…)the domain natonco.org, the official website for the Naturopathic Cancer Society and a non-profit organization in Tempe, Arizona run by naturopathic cancer “doctor” Colleen Huber, NMD and her surrogate Hazel Chandler. The organization raises money for cancer patients who desire to use, but cannot afford, expensive alternative cancer therapies such as intravenous vitamins, mistletoe injections, and special diets, which is then funneled to Huber’s clinic Nature Works Best and others”

and/or

(3)

“In addition to what appears to be a terrible failure in conducting ethical research because it was/is run out of her clinic and tied her non-profit, Huber completely bungled her analysis. Thomas Mohr, an oncology researcher at the Medical University of Vienna, reanalyzed Huber’s data in her sugar study and commented on my blog in February 2016:

Putting aside the ethical issues of the extremely bad study design, the lack of ethics committee approval or patients’ agreement, a quick n’ dirty analysis of the data reveals following odds ratio: 2.1 (95% CI 1.01 – 4.40, p<0.05) in favour of state of the art treatment. In other words, patients under natural care have more than a two-fold higher risk to die.

This is criminal.

I agree”

and/or

(4) According to the Plaintiff’s sugar study the mortality risk of patients under natural care have double-fold higher risk to die, if done in the following context:

“In addition to what appears to be a terrible failure in conducting ethical research because it was/is run out of her clinic and tied her non-profit, Huber completely bungled her analysis. Thomas Mohr, an oncology researcher at the Medical University of Vienna, reanalyzed Huber’s data in her sugar study and commented on my blog in February 2016:

Putting aside the ethical issues of the extremely bad study design, the lack of ethics committee approval or patients’ agreement, a quick n’ dirty analysis of the data reveals following odds ratio: 2.1 (95% CI 1.01 – 4.40, p<0.05) in favour of state of the art treatment. In other words, patients under natural care have more than a two-fold higher risk to die.

This is criminal.

I agree”

and/or

(5) (4) According to an independent analysis of the Plaintiff's sugar study data the mortality risk of patients under natural care have ten-fold higher risk to die compared to state of the art treatment, if done in the following context:

Mohr continued with his independent analysis of Huber's data:

If one removes data of questionable quality and takes into account only those with complete data and in treatment resp. died during treatment (i.e. in remission, not yet in remission, died), the odds ratio gets almost 10:1 in favour of state of the art therapy. This is really nasty.

Indeed, her activities seem suspicious, especially when one looks at what her clinic is advertising based her "research":

Colleen Huber, NMD, seems to a cancer quack"

and/or

(6) The Plaintiff "blatantly mislead vulnerable cancer patients and/or uses "fraudulent treatments, if done in the following context:

"Huber and these other naturopaths have perhaps found a legal loophole allowing them to blatantly mislead vulnerable cancer patients. She seems to be drawing naturopaths into what looks like an IRB sham in order to justify the use of fraudulent treatments."

Putting aside the ethical issues of the extremely bad study design, the lack of ethics committee approval or patients' agreement, a quick n' dirty analysis of the data reveals following odds ratio: 2.1 (95% CI 1.01 – 4.40, p<0.05) in favour of state of the art treatment. In other words, patients under natural care have more than a two-fold higher risk to die.

This is criminal.

I agree

and/or

(7)

“As far as I can tell, Huber is the ringleader of what appears to be a naturopathic clinical trial and charity hoax”,

II. to find that the Defendant is required to compensate her for the damage caused or will be caused by making or disseminating the allegations in par. I.,

III. to the Defendant to pay an amount at the discretion of the Court (min. EUR 500,00) as a compensation for the non-material damage caused by making and disseminating the allegations in I.,

IV. to pay EUR 1,250.00 plus interest at the rate of 5 percent above the respective basic interest rate since pendency to the Plaintiff.

The Defendant petitions to the Court

to dismiss the action.

The Defendant is of the opinion that all statements in the article at issue are value judgments covered by the freedom of opinion according to Article 5 of the German Basic Law, and they do not cross the threshold of abusive criticism. When looking at the context of the article the Defendant only takes a critical view of the Plaintiff’s positions. Formulations should not be isolated.

In her article the Defendant mainly raises the question whether the Plaintiff or a group belonging to her cybersquatted the Defendant’s name. The Defendant claims that the contact of the domain “BrittMarieHermes.com” was originally registered on “@natconco.org”. Natonco.org is the website of the “Naturopathic Cancer Society” the president of which is the Plaintiff. She checked that question exercising journalist due diligence.

As regards the statements referred to in (2) and (3) the Plaintiff is not actively legitimated as the Defendant only made statements on the organization called Natonco and “Nature Works Best”. Even though the Plaintiff is the president of both organizations she is not entitled to an injunction regarding her. Alternatively, the Defendant submits that on the basis of her representations on the website regarding the “Nature Works Best” clinic and “Naturopathic Cancer Society” it could be deduced that funds provided by the non-profit organization “Naturopathic Cancer Society” are also transferred to the Plaintiff’s clinic. The “Naturopathic Cancer Society” collects money for those who cannot afford naturopathic treatment. According to the website “natonco.org/doc” the Plaintiff is affiliated with “Natonco”. In addition, the website (heading “Donations”) lists various possibilities to donate money. A link directly redirects s a user to the website of “Naturopathic Cancer Society”.

As regards the Plaintiff’s sugar study, the Defendant only refers to the results of the analysis by Thomas Mohr, making it clear that she agrees with the results. This is covered by the freedom of expression.

The action was served on the Defendant on 10 October 2017.

Reasons for the decision

The action is admissible but is not successful on the merits.

From no legal point of view the Plaintiff is entitled to a cease and desist order regarding the statements in controversy.

The claim is not based on Section 1004, para. 1, sentence 2, German Civil Code, Section 823, para. 1, Art. 2, para. 1, German Basic Law, in conjunction with Art. 1, para. 1, German Basic Law. As provided for therein the Plaintiff may seek an injunctive relief, if the statements in the article published by the Defendant unlawfully violate the Plaintiff's constitutionally protected rights of personality. However, this requirement is not met. The Defendant's intervention in the Plaintiff's general right of personality was not unlawful.

The general right of personality constitutes a so-called open offence in which the unlawfulness of the act must be established positively but which is not indicated by an intervention in the sphere of personality of the person concerned (Palandt, Section 823, marginal note 95). An impairment of the general right of personality would be unlawful, if the protection of the Plaintiff's interests overrode the Defendant's legitimate rights. Individual cases this shall be assessed by way of a comprehensive balancing of interests (Federal Court of Justice, NJW 2017, 483, including additional reference).

The Plaintiff's impairment of her general right of personality is opposed to the constitutionally protected right of freedom of expression of the Defendant (Art. 5, para. 5, German Basic Law). As regards the intensity of the protection provided by Article 5 (1), German Basic Law, it depends on whether the Defendant's statements are value judgments or expressions of opinion (Federal Constitutional Court NJW-RR 2017, 1002 including additional reference).

Whilst factual assertions are characterized by an objective relation between statement and reality and can be verified by producing evidence, an opinion is a statement that is substantially influenced by elements of opinion and belief (Federal Constitutional Court, loc. cit.; Federal Court of Justice NJW 2015, 773, including additional reference).

Value judgements and expressions of opinion are influenced by the subjective relations of the person making the statement with the content and are, therefore, neither demonstrably true nor untrue (Federal Court of Justice, Order dated 13-04-1994 – 1 BvR 23/94). If a statement in which facts and opinions are mixed, is characterized by elements of opinion and advocacy, it being an opinion is protected by the fundamental rights according to Article 5, para. 1, sentence 1), German Basic Law. In particular, this applies, if a separation of the evaluative and actual content cites or falsifies the meaning of the statement (Federal Court of Justice, NJW 2015, 773). A statement shall always be judged in the context in which it is made and shall not be separated from the context or subject to isolated consideration. (Federal Court of Justice, loc. cit.).

Accordingly, the challenged statements made by the Defendant are classified as statements of opinion. In detail:

(1) The question raised by the Defendant in the heading of the article ("Is dubious cancer "doctor" Colleen Huber cybersquatting my name?") is a value judgment (in the

context of the other objected formulation “An Arizonan naturopath likely owns my domain name”. Basically, questions are protected by Art. 5, para. 1, sentence 1, German Basic Law, like value judgments (Federal Constitutional Court, 1992, 1442). In contrast to value judgments questions or factual assertions are different as they do not make a statement but they want to cause a statement to be made. To that extent questions cannot be assigned to one of the two terms; they are a separate semantic category. This, however, does not mean that they are not protected by the freedom of opinion as provided for in Art. 5 (1), German Basic Law; they play a key role in an opinion-forming process as they draw attention to problems and contribute to opinion forming (Federal Constitutional Court, loco cit.). As in contrast to factual assertions questions cannot be inaccurate, a question itself cannot be measured by the criteria of truth and untruth. Therefore, it is crucial to determine whether this is a “real” question (questioner expects a third party to answer) or merely a rhetorical question that is equivalent to a statement which is qualified as a factual assertion or a value judgement. In case of doubt and considering an effective protection of basic rights a question shall be defined in a broader sense (Federal Constitutional Court, loco cit.)

Since freedom of expression is not unconditionally guaranteed by the German Basic Law and limited by the general provisions of law and the law of personal honour, there must be a case-related balancing of the fundamental right to freedom of expression and the legally protected interest under the law restricting fundamental rights This also applies to questions since they can violate a third party’s honour, particularly, if actual assumptions presupposed or expressed are defamatory . As in case of expressions of opinion in which value judgements and factual assertions are inseparably mixed it depends on whether a questioner had any evidence in support of the factual or defamatory content of the question or whether it was fictitious. However, no requirements may be imposed having a deterrent effect on the use of this fundamental right. It would be incompatible with the protective nature of Article 5 (1), German Basic Law, if in a question significantly affecting the public aiming at the clarification and verification of public grievances the alternative was to conduct an investigation or to abstain from queries. The presumption in favour of free speech, therefore, also applies to questions (Federal Constitutional Court, loco cit.).

Applying those principles the question raised by the Defendant can be qualified as an expression of opinion although it also contains factual elements. It can be verified at which e-mail address the domain was originally registered. On the other hand the Defendant makes it clear (optically by font size and bold print) that she is not sure whether her consideration formulated as a question is correct by adding “An Arizonan naturopath likely owns my domain name”. By using the word “likely” and a corresponding optical presentation the Defendant qualifies her question in a way that it is not a rhetorical question but a strong presumption. The reader is not necessarily led into a certain direction but should make up his / her own mind. The Defendant expresses an opinion in the form of a presumption. The focus of Defendant’s statements in connection with the unauthorized use of her name for an Internet domain is characterized by elements of thinking and statement thus expressing an opinion. The factual elements are put in the rear as the Defendant does not expect an answer but presents the results of her investigations to the reader according to which the domain name “BrittMarieHermes.com” was registered by the organization “Naturopathic Cancer Society” the president of which is the Plaintiff. Hence the conclusion could be

drawn (which in her opinion is possible but not logical) that the Plaintiff was responsible for the registration of the domain name. In the following paragraph she justifies that by stating that she refrained from naturopathic treatment methods and that she is critical of these treatment approaches. From the Defendant's point of view an Internet domain was registered under her name in order to (in contrast to her convictions) promote treatment methods to fight cancer she does not support and which she considers ineffective. By raising this question the Defendant ultimately intends a critical examination of the Plaintiff's standpoints in regard to naturopathic treatment methods in order to clearly dissociate herself therefrom. She wants readers to make up their own mind without insinuating a result and without concealing her own standpoint.

The Defendant's statements are no abusive criticism not covered by Article 5 (1), German Basic Law. Abusive criticism means if statements are exaggerated or abusive and if the party expressing such criticism is not interested in the matter as such but in defaming another person. A defamation is characterized by the fact that the matter itself is totally put in the rear. In case of statements in a public dispute abusive criticism is an exception (Federal Constitutional Court NJW 1991, 95; NJW 2016, 2870 including additional reference). Accordingly, the prerequisites for abusive criticism do not exist. The Defendant accuses the Plaintiff of cybersquatting (a domain name is registered by a person or an organization that is not entitled to that name in order to sell the domain name to the entitled person at a clearly higher price). Insofar the Defendant stated in her article how she had drawn that conclusion. The context clearly shows that the Defendant was mainly interested in a dispute on the facts and a clarification that the Plaintiff (not the Defendant) made the statements published under that domain name. The Defendant runs the Internet blog "naturopathicdiaries.com" in which she critically examines naturopathic treatment methods. Against this background the Defendant has a legitimate interest in making it clear that Internet domains might be held by an organization under her name that is in favour of a naturopathic treatment thus being diametrically opposed to her own views.

(2) The statement that the "Naturopathic Cancer Society" operated by the Plaintiff and her representative Hazel Chandler raised money for cancer patients which are "funneled" to Huber's clinic is an expression of opinion. It is true that this statement contains a basic fact but the elements of opinion are clearly in the foreground. The Defendant makes it clear that there is a link between the "Nature Works Best" clinic operated by the Plaintiff and the non-profit organization called "Naturopathic Cancer Society" the president of which is the Plaintiff. She states that this non-profit organization collects money for those patients who cannot afford naturopathic treatment. When clicking the link on the website of the non-profit organization "Nature Works Best" users are re-directed to the website of the non-profit organization "Naturopathic Cancer Society". The website of "Naturopathic Cancer Society" also includes a link to the Plaintiff's clinic with such clinic being called "affiliated". From this the Defendant infers that funds collected by the non-profit organization for naturopathic cancer treatment could also be transferred to the Plaintiff's clinic also providing naturopathic cancer treatment in her "Nature Works Best" clinic. In doing so the Defendant wants to express that the Plaintiff being both the owner of the clinic and the president of the non-profit organization could be accused of a lack of transparency thus giving the impression that funds collected could go to the Plaintiff's clinic for the purpose of treating cancer patients. It is true that a critical confrontation with possible mutual re-

lations and cash flows between the organization “Naturopathic Cancer Society” and the clinic managed by the Plaintiff also includes a disapproval of the Plaintiff’s business conduct. Primarily, this constitutes a subjective evaluation that is inseparably linked to actual content (Federal Court of Justice NJW 2015, 773, marginal note 10). This also applies to the term “funneling” which generally has a negative connotation and no concrete facts.

These statements, too, are no abusive criticism. They can be classified as factual assertions as the content is related to the connection between the non-profit organization and the Plaintiff’s clinic. If donations are made to a non-profit organization, it is of particular interest to the public under which circumstances and to which party the funds raised are paid. This requires a high level of transparency and trust to ensure that the funds are paid and used for the intended purpose and that no clinic is given preferential treatment.

(3) and (4) The statements complained in the action constitute an expression of opinion; they are not classified as factual assertions. Medical studies are generally based on actual procedures. The result of a medical study, however, is characterized by the fact that the person referring to such study carries out an evaluation on the basis of existing data. The results of a scientific analysis are subjective perceptions and conclusions drawn on the basis of underlying facts. When evaluating medical studies it must be decided which should be included in an evaluation which will remain unconsidered. It is an evaluator’s subjective decision which conclusions can be drawn on the basis of the data. Different scientists frequently draw different conclusions from the same data.

The requirements of abusive criticism are not met either. It is true that in regard to the sugar study published the Defendant shows in polemical terms that “In addition to what appears to be a terrible failure in conducting ethical research because it was/is run out of her clinic and tied her non-profit, Huber completely bungled her analysis”. In doing so she expressly refers to Mr. Thomas Mohr, oncology researcher at the Medical University of Vienna, who reanalyzed the data of the sugar study and his comments on that in her blog in February 2016 dealing with the mortality risk of patients receiving naturopathic treatment. The Defendant agreed with that. This was a posting by the Defendant in the course of a public dispute over the effectiveness of certain treatments meeting aforementioned criteria of a value judgment. The Defendant makes it clear that she agrees with the opinion and conclusions of Thomas Mohr. This is primarily a subjective evaluation even if facts can be found therein. This applies, in particular, against the background that the term “bungling” is used implying an accusation of carelessness but the evaluative element is clearly in the foreground. As this is a dispute over the facts in this case without merely defaming the Plaintiff this does not constitute abusive criticism.

As regards the statement complained in (5) of the action dealing with the sugar study data and the mortality risk of patients receiving naturopathic treatment being clearly higher than the mortality risk of patients receiving state of the art treatment is an expression of opinion. The Defendant repeats parts of the analysis by Mr. Mohr she agrees with. Insofar reference is made to the comments on statement (3). The formulation “Colleen Huber, NMD, seems to be a cancer quack” is an expression of opinion albeit in the form of sharp criticism. However, this does not constitute abusive criti-

cism as it is no incoherent defamation of the Plaintiff; the statement was made in the context of the Plaintiff's professional activities in the field of naturopathy. The statement should also be seen in the context of the overall content of the article being a critical (but fact-based) and no defamatory discussion of different therapies for cancer diseases, i.e. conventional medicine versus naturopathy.

This also applies to the statements referred to in (6) and (7) of the action. The accusation of "blatantly misleading vulnerable cancer patients" using "fraudulent treatments" is also classified as an expression of opinion like the statement "As far as I can tell, Huber is the ringleader of what appears to be a naturopathic clinical trial and charity hoax". The latter formulation "As far as I can tell" makes it clear that it is the Defendant's personal opinion. In these statements the Defendant mainly expresses her disapproval of the Plaintiff's standpoints in regard to the effectiveness of naturopathic treatments, with a subjective evaluation being in the foreground. As there is a factual reference and no mere denigration this does not constitute abusive criticism.

The statements by the Defendant the Plaintiff complains about are covered by the freedom of opinion thus being not unlawful. They encroach upon the protection of the Plaintiff's right of personality and the social validity claim of the Plaintiff being a tradesperson is affected (Art. 2, para. 1, in conjunction with Art. 19, German Basic Law). The use of the formulations complained about could be detrimental to the Plaintiff's reputation as a naturopath. However, the balance between the Plaintiff's interest in the protection of her general rights of personality on the one hand and the Defendant's right of freedom of opinion leads to the fact that the statements are covered by the freedom of opinion. This generally requires a balance between the severity of the personality impairment caused by a statement on the one hand and the loss of freedom of expression by a prohibition of such statement on the other hand. The result of such consideration is not defined by constitutional law and depends on the circumstances of each case. It should be noted that Art. 5, para. 1, German Basic Law, does not only cover factual statements but also criticism (pointed, polemic and exaggerated); insofar the limit of a permissible expression of opinion is not where a polemic exaggeration is not needed to express factual criticism (Federal Constitutional Court NJW 2017,1461).

Accordingly, the right to freedom of opinion takes precedence over the protection of the Plaintiff's rights of personality. The decisive factor is that an encroachment upon the Plaintiff's general right of personality refers to the social sphere. The Plaintiff's professional activities are connected to the outside world. The Defendant's statements solely refer to the Plaintiff's professional activities, i.e. president of "Naturopathic Cancer Society" and owner of "Nature Works Best" clinic. In this respect you have to be aware of the fact that your activities are observed and criticized by the public (Federal Court of Justice GRUR 2014, 1231, 35). Statements within the social sphere are only subject to negative sanctions in case of serious effects on the right of personality (if a statement can be linked to stigmatization, social segregation or a pillory effect – Federal Court of Justice, loco cit.). This was neither pleaded nor apparent.

As regards the Defendant it should be taken into consideration that her statements constitute opinions but they also contain facts. In cases in which valuations and facts are mixed the truth content must be taken into account (see Federal Court of Justice

NJW 2015, 773). If an expression of opinion contains proven false or deliberately untrue facts, the general right of personality takes precedence over the basic right of freedom of opinion (Federal Court of Justice, NJW-RR 2008, 913). True factual allegations must be accepted even if they are detrimental to the person concerned (Federal Court of Justice, NJW 2013, 229). The factual elements containing the Defendant's expressions of opinion are neither provably wrong nor deliberately untrue. It is indisputable that the Plaintiff is the president of the non-profit organization "Naturopathic Cancer Society" and the owner of the cancer clinic "Nature Works Best". The funds collected are intended to provide treatment for patients who cannot afford such treatment. Such treatment is provided by the Plaintiff's clinic. The effectiveness of naturopathic treatment is a highly controversial issue among experts. This is exactly what is intended by the Defendant's article. It is a concern for information in connection with an issue that is discussed controversially and emotionally in the public. In medicine, in particular, a comprehensive and critical approach is required so even medical laymen can get an idea of different treatments and approaches. By making critical and partly exaggerated statements the Defendant intends to initiate to a discussion about treatments she regards as dubious. As the Defendant mainly expresses her person opinion (marked as such) the freedom of opinion would be affected in general if the Court enjoined the Defendant from doing so. A cease and desist order regarding a statement must be limited to what is absolutely necessary in terms of legal interests in order to protect the freedom of opinion (Federal Court of Justice NJW 2012, 3712; Federal Court of Justice NJW 2015, 773).

A claim arising from Section 1004, para. 1, sentence 2, German Civil Code, Section 823, para. 2, Section 185, et. seq,, German Criminal Code, is ruled out on the grounds referred to hereinbefore.

The Plaintiff is not entitled to a cease and desist order pursuant to Section 1004, para. 1, sentence 2, German Civil Code, in conjunction with Section 824, German Civil Code, as Section 824, German Civil Code, only grants a party a right of cease and desist in case of untrue factual assertions. The Defendant's statement are classified as expressions of opinion.

The claim for an injunctive relief is not based on Section 8, Section 4, para. 1, subpara. 1 and 2, Act Against Unfair Competition. According to these provisions an injunctive relief may be sought against a party discrediting or denigrating the distinguishing marks, goods, services, activities, or personal or business circumstances of a competitor or asserting or disseminating facts about the goods, services or business of a competitor or about the entrepreneur or a member of the management of the business, such facts being suited to harming the operation of the business or the credit of the entrepreneur, However, these conditions are not fulfilled here. The Defendant is no competitor of the Plaintiff in terms of the Act Against Unfair Competition. Pursuant to Section 2, para. 1, subpar. 3, Act Against Unfair Competition, "Competitor" means any person who has a concrete competitive relationship with one or more entrepreneurs supplying or demanding goods or services. This prerequisite does not exist as there is no concrete competitive relationship between the Plaintiff and the Defendant. According to the case law of the Federal Court of Justice a competitive relationship exists, if both parties try to sell similar goods or services to the same end users thus affecting competitive behaviour (i.e. hindering or disturbing sales). This means that the companies concerned are active in the same market without the customers and the goods or services

offered having to match (Federal Court of Justice GRUR 2014, 573 including additional reference. Here, it is doubtful whether the Defendant performs any market activities at all. Currently, she is a student and does not practice in the field of naturopathy, i.e. she does not provide any treatment. She only operates a blog on the Internet critically dealing with naturopathy without offering any medical treatment. The Defendant does not offer comparable services like the Plaintiff. Operating a blog on the Internet is not sufficient. In her capacity as a naturopathic physician the Plaintiff provides cancer treatment at her clinic, dispensing with conventional treatment such as chemotherapy or radiation. Hence there are no identical activities of the parties regarding a specific market.

Lacking existing claims for injunctive relief the claim for a declaratory judgement and the petition for payment of compensation are in vain.

The Plaintiff is not entitled to a claim for reimbursement of lawyer's fees amounting to EUR 1,250.00 in connection with a cease and desist declaration with penalty clause. Such cost can only be reimbursed, if the claim for injunctive relief proves to be justified (Federal Court of Justice, GRUR 2019, 82). However, this is not the case here.

The decision as to costs is based on Section 91, para. 1, German Code of Civil Procedure; the decision as to a provisional enforceability is based on Section 709, sentence 1 and 2, German Code of Civil Procedure.