

Case No. 03-56431

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ENTREPRENEUR MEDIA, INC., a  
California corporation,

Plaintiff-Appellee,

vs.

SCOTT SMITH dba  
ENTREPRENEURPR,

Defendant-Appellant,

(DC No. CV-98-03607 FMC)

Central District of California

On Appeal from Judgment of the United States District Court  
For the Central District of California

Honorable Florence-Marie Cooper

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**AMICUS CURIAE BRIEF OF  
MINNESOTA HOMEBASED  
ENTREPRENEURS ASSOCIATION**

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**SUPPORTIVE OF APPELLANT'S POSITION  
SEEKING REVERSAL OF JUDGMENT**

M. Gregory Simpson  
SIEGEL, BRILL, GREUPNER, DUFFY & FOSTER  
1300 Washington Square  
100 Washington Avenue South  
Minneapolis, MN 55401  
Phone: 612.337.6107  
Fax: 612.339.6591

David Barry (SBN 70083)  
BARRY & ASSOCIATES  
Attorneys at Law  
580 California Street, 5<sup>th</sup> Floor  
San Francisco, California 94104  
Phone: 415.398.6600  
Fax: 415.398.6123

*Attorneys for Amicus Curiae Minnesota Homebased Entrepreneurs Assn.*

Corporate Disclosure Statement  
Fed. R. App. P. 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Minnesota Homebased Entrepreneurs Association states that it does not have a parent corporation; no publicly held company owns ten percent or more of its stock, and it has not issued any stock to the public.

Dated \_\_\_\_\_

\_\_\_\_\_  
Barry and Associates, by David Barry,  
Attorneys for Amicus Curiae Minnesota  
Homebased Entrepreneurs Association

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The Minnesota Homebased Entrepreneurs Association supports defendant and appellant Scott Smith in this appeal.

#### A. MHEA Background

The Minnesota Homebased Entrepreneurs Association (MHEA) was incorporated in 1996. Its original name was the SouthEast Homebased Business Association. In 2001 it changed its name to reflect its main mission: to encourage and support entrepreneurial efforts by homebased businesses.

MHEA is based in Minneapolis, Minnesota. It serves the small and home-based business and entrepreneurial community with one to twenty-five employees. Although based in Minnesota, MHEA's membership and reach is much larger.

MHEA's mission is to assist small and home-based business owners to prosper. MHEA works with numerous partners to provide education, networking, commerce, and mentoring to the small and home-based business and entrepreneurial community. These services benefit participants and strengthen the entrepreneurial environment in the region. MHEA works with at least two high schools each year, mentoring students interested in entrepreneurial futures.

Each March, MHEA organizes a small business exposition and conference in Minnesota, the largest event of its kind in the Midwest.

In recognition of MHEA's accomplishments, the United States Small Business Administration (SBA) awarded the MHEA President with two advocacy awards – the 2003 U.S. SBA Home-based Business Advocate of the Year Award for the Midwest Region, and the 2003 U.S. SBA Home-based Business Advocate of the Year Award for Minnesota.

#### B. MHEA's Interest in this Matter

MHEA volunteers perform nearly all the work of MHEA. It has a budget of only about \$8,000 per year, apart from its yearly exposition costs. It employs a part-time secretary. Sixty MHEA volunteers support its yearly small business exposition. All MHEA directors are volunteers.

MHEA publishes a monthly newsletter for its members, with a print run that often does not exceed 200. MHEA maintains a web site. Both the web site title and the newsletter contain the word "entrepreneur."

Like its members, MHEA would like to grow and reach out to other parts of the United States. MHEA would like to expand its publications. MHEA is confident that if it does increase its publications, on or off the web, that the word "entrepreneur" is likely to appear in the title such publications, along with other words.

MHEA cannot afford legal disputes with plaintiff. If this Court affirms the district court judgment, then, in the view of MHEA, any future MHEA

publication whose title bears the word “entrepreneur,” along with other words, would still be subject to demands by plaintiff. Because of the gross disparity in wealth between plaintiff and MHEA, MHEA would have no choice but to back down, or seek pro bono counsel. Plaintiff would have a very real veto over titles of MHEA publications, and therefore, indirectly, their success and the success of MHEA. It was the power of the word “entrepreneur” that led MHEA to change its name to Minnesota Homebased Entrepreneurs Association.

The word “entrepreneur” is generic. For decades “entrepreneur” has been commonly used to refer to independent business owners. Books, articles, news columns, Presidential proclamations and federal statutes all make frequent use of the term. Black's Law Dictionary defines "entrepreneur" to mean "One who, on his own, initiates and assumes the financial risks of a new enterprise and who undertakes its management." (West 5th ed. 1979). Roget's 21st Century Thesaurus defines "entrepreneur" as a "person who starts a business alone." (2d ed. 1999).

There is no substitute for “entrepreneur” that captures the daring and boldness of one who undertakes a new business.

MHEA is fearful of plaintiff's expansionist intentions with the generic word “entrepreneur.” MHEA has been advised that plaintiff made threats

against Female Entrepreneur Magazine, forcing that organization to change its magazine's name to Fempreneur. *See*, the web site Female-Entrepreneur.com.

Regardless of the facts and merits of the Fempreneur dispute, MHEA reads the district court's decision as giving the right to plaintiff to force MHEA to stop using "entrepreneur" in its publication titles, even when the word "entrepreneur" is joined with other words that make it different than plaintiff's title. The district court's decision should be reversed.

### C. Generic Words in Publication Titles Do Not Confuse the Public

One of the members of MHEA, Laura Leonard, is a bead artist. Ms. Leonard earns her living full-time by sculpting creations out of beads. Her works have been featured in a variety of magazines specializing in beads. Many such titles exist, including *Beadwork*, Interweave Press, Loveland Colorado; *Bead & Button*, Kalmbach Publishing Company, Brookfield, Wisconsin; *BeadStyle*, Kalmbach Publishing Company, Brookfield, Wisconsin; *Beadwork I: Up Close*, Interweave Press, Inc., Loveland, Colorado; *Beadwork in America 2000*, Haydon Gallery, Lincoln, Nebraska; *Fantastic Beads*, Yeiser Art Center, Paducah, Kentucky; *The Beaded Object*, Southern Highland Craft Guild, Asheville, North Carolina; *Step by Step Beads*, Lapidary Journal, Devon, Pennsylvania.

Ms. Leonard is not confused at all about the sources of these publications. They distinguish themselves through their lay-outs, the colors

and fonts of the titles, and many other features. That they have the word “bead” in the title confirms for Ms. Leonard that the subject matter of the magazine is in her interest area.

Likewise, neither Ms. Leonard nor any other member of MHEA is confused by the welter of titles that use the word “entrepreneur.” The purpose behind trademark enforcement is to protect consumers from confusion as to the source of products. The members of MHEA do not need “protection” from Scott Smith and his products. It is obvious to MHEA members that “EntrepreneurPR,” “Entrepreneur Illustrated,” and “entrepreneurpr.com” are something different than plaintiff’s publication.

#### D. Alternate Argument

In the event this Court affirms, MHEA requests guidance as to what steps to take in titling future publications. MHEA has no essential dispute with the notion that a totally generic word can become the trademarked title of a magazine, as is the case with plaintiff’s publication, and Time and Fortune. MHEA would have thought that *even the slightest addition* to “entrepreneur” would permit a non-infringing use. If this Court affirms, it will be because the additions “Illustrated” and “PR” do not suffice to avoid infringement. MHEA requests the Court for guidance in its opinion, in the event of affirmance, as to

what additions to “entrepreneur” are necessary in future publications of MHEA to avoid infringement.

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the Minnesota Homebased Entrepreneurs Association requests this Court grant leave to file this amicus curiae brief.

Dated \_\_\_\_\_

\_\_\_\_\_  
Barry and Associates, by David Barry,  
Attorneys for Amicus Curiae Minnesota  
Homebased Entrepreneurs Association

Certificate of Compliance

9<sup>th</sup> Cir. Rule 32-1

I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,108 words.

Dated \_\_\_\_\_

\_\_\_\_\_  
Barry and Associates, by David Barry,  
Attorneys for Amicus Curiae Minnesota  
Homebased Entrepreneurs Association



PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled cause. My business address is 580 California Street, 5<sup>th</sup> Floor, San Francisco, CA 94104. I am readily familiar with the practice of Barry & Associates for collection and processing of correspondence for mailing with the United States Postal Service. That practice is such that all correspondence is collected daily and deposited with the United States Postal Service at the end of each day. I served the following documents:

*Amicus Curiae* Brief

- by placing the document(s) listed above in a sealed envelope, with first-class postage thereon fully prepaid, and placed for collection and mailing with the United States Postal Service this date following the ordinary business practices of Barry & Associates.
- by transmitting by fax the document(s) listed above to the fax number indicated for each of the parties set forth below prior to 5:00 p.m. today.
- by causing personal delivery today of the document(s) listed above on the persons set forth below at the addresses indicated by Quicksilver Messenger Service.
- by personally delivering the document(s) listed above on the persons at the addresses set forth below.

The names(s) and address(es) of the persons receiving these documents were:

Glenn W. Peterson	Attys for: Defendant
MCDONOUGH HOLLAND & ALLEN PC	Phone: (916) 444-3900
555 Capitol Mall, 9th Floor	Fax:
Sacramento, CA 95814	

Perry J. Viscounty, Esq.	Attys for: Plaintiff
Mark A. Finkelstein, Esq.	Phone:
LATHAM & WATKINS LLP	Fax:
650 Town Center Drive, Suite 2000	
Costa Mesa, CA 92626	

The foregoing is true and correct under penalty of perjury.

Date \_\_\_\_\_

\_\_\_\_\_  
Rashad V. Suarez

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
95 SEVENTH STREET, SAN FRANCISCO, CA 94119