IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMP GLOBAL CLEARING, LLC DANIEL CULP, and AMP FUTURES Plaintiffs, vs. BIG MIKE TRADING, LLC and MICHAEL BOULTER, Defendants.	No. 2014 L 001143

DEFENDANTS BIG MIKE TRADING, LLC AND MICHAEL BOULTER'S
REPLY REGARDING THEIR MOTION TO DISMISS

Plaintiffs AMP Global Clearing, Daniel Culp and AMP Futures ("Plaintiffs") entire Complaint focuses on alleged defamatory statements made by "CostofBusiness" on the chat forum operated by defendants Big Mike Trading, LLC ("BMT") and Michael Boulter ("Boulter")(collectively "Defendants"). The posts associated with that username are alleged to have been created by Plaintiffs' ex-employee James Stone, a non-party with no affiliation to Defendants ("the Stone Posts"). As set forth in the Motion, Defendants are not associated with that username and did not draft, prepare, compose, edit or otherwise revise the Stone Posts. Accordingly, as "providers" of an "interactive computer services", Defendants are immune under the 47 U.S.C. § 230 ("CDA") from Plaintiffs' claims that seek to treat them as a "publisher or speaker" of the third party Stone Posts. Plaintiffs' attempts to circumvent the immunity fail because the Defendants did not ratify or adopt the Stone Posts and their editorial functions are protected by the CDA.

Faced with the reality that their claims regarding the Stone Posts fail to state a claim against the Defendants, in the opposition brief, Plaintiffs improperly raise pages of new alleged facts, even citing new exhibits, regarding three allegedly untrue comments made by Boulter on the forum. The mere fact that Plaintiffs rely on alleged facts which were not pled in the Complaint demonstrates that the Complaint fails to state any cause of action. However, even considering these new alleged facts, the three new Boulter comments are not defamatory because they are either (i) unverifiable opinions and predictions about the future or (ii) have an innocent construction. And since the Boulter comments are not about Plaintiffs' products or services, they cannot be disparaging. Accordingly, using either the Stone Posts or Boulter comments, Plaintiffs have failed to state a claim for disparagement under the Illinois Uniform Deceptive Trade Practices Act ("IDPTA") (counts I-IV), defamation (counts V-VIII), and commercial disparagement (counts IX-XII) and their Complaint should be dismissed with prejudice.

I. DEFENDANTS' HAVE IMMUNITY FOR THE STONE POSTS.

In their opening brief, Defendants demonstrated that each of the three requirements of the CDA immunity are satisfied: Defendants are "the provider" of an "interactive computer service,"; the information at issue in this case—posts allegedly made by Plaintiffs' ex-employee Stone—is "information provided by another information content provider"; and Plaintiffs' claims "treat" impermissibly Defendants as the publisher of that content. Motion at 5-7. Plaintiffs' arguments fail to rebut this showing.

a. Defendants are Providers of an Interactive Computer Service.

Plaintiffs do not deny that Defendants are providers of an "interactive computer service" as defined in Section 230. Instead, they argue that Boulter's posting of his own personal comments on the forum changes this analysis.

The fact that Boulter occasionally posts his own comments on the forum does not affect this analysis in any way. It simply means that in addition to acting as a website provider, Boulter is also a website user. This makes no difference because the CDA applies equally to both: "§ 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services." *Batzel v. Smith,* 333 F.3d 1018, 1030 (9th Cir. 2003). "There is nothing inconsistent or unusual about a website operator being both an interactive computer service provider or user and an information content provider. The two are not mutually exclusive." *Donato v. Moldow,* 374 N.J. Super. 475, 489, 865 A.2d 711, 720 (N.J. Super. Ct. App. Div. 2005). Thus, so long as Defendants did not "create or develop" the actionable content, they remain immune even if they created or developed other content.

b. Defendants did not create or develop the Stone Posts.

Since Defendants did not "create" the Stone Posts, Plaintiffs' are left arguing that Defendants are not entitled to CDA immunity because they "developed" the Stone Posts by inviting, encouraging or adopting them. More specifically, Plaintiffs' claim that Boulter's alleged forwarding of Plaintiffs email to Stone destroys Defendants immunity for the Stone Posts. Response at 11. In support of this argument, Plaintiffs solely cite *Jones v. Dirty World Entm't Recordings, LLC,* 965 F. Supp. 2d 818 (E.D. Ky.

2013).[1] Response at 5. However, *Jones* is factually distinguishable.

The plaintiff in *Jones* was a high school teacher. The chat forum involved used the name "www.Dirty.com" and formed "a loose organization dubbed 'the Dirty Army,' which was urged to have a 'war mentality' against anyone who dared to object to having their character assassinated." *Id.* at 822-23. Among other posts about the plaintiff on the forum, one third party posted that her "ex" had "tested positive for [two sexually transmitted diseases] ... so im sure [plaintiff] also has both." *Id.* at 823. The third party also posted that the plaintiff's ex "brags about doing [plaintiff] in the gym ... football field ... her class room at the school where she teaches...." *Id.* In response to this post, the operator of the forum commented on the third party post itself with "Why are all high school teachers freaks in the sack?" *Id.* *Jones* finds that "a website owner who intentionally encourages illegal or actionable third-party postings *to which he adds his own comments ratifying or adopting the posts* becomes a 'creator' or 'developer' of that content and is not entitled to immunity." *Id.* at 821 (emphasis added).

Here, Defendants never posted any comments in the Stone Post itself and never posted anything even regarding the Stone Post. Complaint, Ex. 2. While Plaintiffs allege that that there are untrue Boulter posts, which is disputed, these posts have nothing to do with the Stone Posts. Therefore, it is impossible for there to be a ratification or adoption of such post as required by *Jones*. Accordingly, Defendants did not "develop" the Stone Posts and therefore, they retain the CDA immunity as the providers of the chat forum.

---

[1] *Jones* is currently being appealed to the Ninth Circuit based upon its relatively narrow interpretation of CDA immunity.

c. Defendants are not liable for their traditional editorial functions.

Plaintiffs' opposition also tries to hold Defendants liable for their traditional editorial functions including "allow[ing] James Stone to post on BMT a clearly defamatory posting. . ." Response at 9. Plaintiffs in this case are seeking to hold Defendants' liable for its alleged failure to fulfill the quintessential duty of a publisher of a chat forum. Not surprisingly, Plaintiffs fail to provide any legal support for this argument let alone a citation.

The opposition also goes on for pages about how Defendants' other publishing functions of the forum somehow make them liable. Plaintiffs' cite to Defendants' choosing not to remove the Stone post upon Plaintiffs' demand. *Id.* at 11. They also cite to Defendants "bann[ing] AMP and AMP's employees from posting on the forum" while failing to note that it was because of their previous improper conduct on the forum. *Id.* at 9. In addition, they cite to Defendants' refusal to allow Plaintiff to sponsor on the site. *Id.* at 8. However, each of these functions is the quintessential duty of a publisher of a chat forum.

Since its adoption, courts have unanimously agreed that the CDA immunity could not be lost based on such conduct. Defendants' decisions to allow the Stone Posts and prevent Plaintiffs' posts are precisely the type of editorial functions Congress intended to protect. *See,* e.g. *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content--are barred.")

Ultimately, Plaintiffs are attempting to allege that they were injured because

the Stone Posts were allowed to be viewed on the Defendants' chat forum that is, that they were published by Defendants. Under the plain language of Section 230, such claims treat Defendants as the publisher or speaker of the third-party content and accordingly are barred.

II. PLAINTIFFS' CANNOT STATE A CLAIM REGARDING THE NEW BOULTER COMMENTS.

Defendants also moved to dismiss Plaintiffs' claims for disparagement under the IDTPA (counts I-IV), defamation (counts V-VIII), and commercial disparagement (counts IX-XII). Motion at 7. The factual allegations of the Complaint were entirely focused on the alleged untrue nature of the Stone Posts. *See* ¶¶ 8-21. As set forth in the Motion and above, since the Stone Posts are third party statements, there is no basis for these claims and they must be dismissed.

However, in its opposition, Plaintiffs argue that the CDA immunity does not protect against statements if they are created by one of the Defendants. And Defendants do not deny that this is true; however, such facts must be pled in the Complaint which Plaintiffs have not done. Instead, Plaintiffs include pages of new alleged facts, and even cite to a new exhibit of a post made by Boulter in its opposition. Only in response to Defendants' Motion does Plaintiff outline the alleged factual allegations as to what statements made by Boulter are untrue and why they are allegedly untrue. Response at 7-8. These new alleged facts and exhibits cannot be added through a response to a motion to dismiss which tests the sufficiency of the claims as pled. *Wells v. I.F.R. Eng'g Co.*, 247 Ill. App. 3d 43, 46, 617 N.E.2d 204, 205 (1st Dist. 1993) (on a motion to dismiss, pleader is "bound by the allegations in his complaint"). The fact that Plaintiffs rely on allegations which were not pled in the

Complaint shows that the Complaint fails to state any cause of action.

a. Plaintiffs' conclusionary allegations are not sufficient.

Plaintiffs reference paragraph 24 of its Complaint as support for its claims regarding Defendants comments. Response at 12. However, this paragraph is simply a general allegation that Defendants made false and demeaning statements while citing to a 15 page group exhibit that includes, in part, over 20 posts by at least 14 different users in two separate threads.

In considering the sufficiency of a pleading, Illinois courts ignore legal and factual conclusions that are not supported by specific facts. *Knox Coll. v. Celotex*, 88 Ill. 2d 407, 426-27 (1981); *Small v. Sussman*, 306 Ill. App. 3d 639, 646 (1999)("Conclusory allegations will not substitute for well-pled facts."). In addition, a party cannot merely "label" conduct and support such labels with conclusory allegations. The conclusionary nature of paragraph 24 of the Complaint does not satisfy the particularity required. For this reason alone, Plaintiffs' Complaint should be dismissed.

b. Plaintiffs' Defamation Claims Fail to State a Claim because the Boulter Comments are Not False or are Subject to Innocent Constructions.

Putting aside the issue with the introduction of new alleged facts and evidence, the Boulter comments raised in Plaintiffs' opposition are not actionable. As discussed in Defendants' Motion, to state a cause of action for defamation, in Illinois, a plaintiff must allege: (1) the defendant made a false statement about the plaintiff; (2) there was an unprivileged publication of the statement; and (3) the plaintiff was damaged from the publication. *Vickers v. Abbott Laboratories*, 308 Ill.App.3d 393, 400 (111. App.

Ct. 1999). A defamatory statement is only the beginning, however, because it has to be tested under the innocent construction doctrine:

> Even if a statement falls into one of the recognized categories of words that are actionable per se, it will not be found to be actionable per se if it is reasonably capable of an innocent construction. The innocent construction rule requires courts to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning. If, so construed, a statement may reasonably be innocently interpreted or reasonable be interpreted as referring to someone other than the plaintiff, it cannot be actionable per se.

Bryson v. News America Publ'ns, Inc., 174 III.2d 77, 90 (1996) (quotations and citations omitted). "Whether a statement is reasonably susceptible to an innocent interpretation is a question of law for the court to decide." *Id.* (citations omitted)

For each of Boulter's three comments, Plaintiffs either cannot meet the falsity requirement of prong (1) because they are unverifiable opinions and predictions about the future or they are not actionable because the comments have an innocent construction.[2]

i. Comment 1 has an innocent construction.

The first alleged untrue comment is that Boulter was "involved in legal action with Amp in order to defend posters rights on BMT." Response at 8. Plaintiffs split hairs by arguing that they have never been involved in "litigation" against Defendants; however, the Defendants have had previous legal spats with Plaintiffs. Just last year, Defendants had to respond to a "cease and desist" letter from Plaintiffs regarding postings on the BMT forum. Allegedly defamatory material is not actionable even where it is not technically accurate in every detail. *Parker v. House*

[2] Plaintiffs have not specifically identified whether they are alleging defamation per se or defamation per quod. However, it appears that Plaintiffs are alleging defamation per se and Defendants are responding accordingly.

O'Lite Corp., 324 Ill.App.3d 1014, 1026, 258 Ill.Dec. 304, 756 N.E.2d 286 (2001);

More importantly, this statement is reasonably susceptible to an innocent construction. The rule is often applied to grant a motion to dismiss. *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 868, 658 N.E.2d 1225, 1232 (1st Dist. 1995) (affirming dismissal of defamation claim on pleadings because statements that plaintiff was a "con artist" and "cocky" could be innocently construed); *Taradash v. Adelet/Scott-Fetzer Co.*, 260 Ill. App. 3d 313, 317, 628 N.E.2d 884, 887 (1st Dist. 1993) (affirming dismissal of per se claim because statement that plaintiff was fired for "lack of performance" could be innocently construed); *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 412, 667 N.E.2d 1296, 1301 (Ill. Sup. Ct. 1996) (affirming dismissal on pleadings because comments that employee failed to follow up on assignments could be innocently construed, statement that plaintiff was fired for "lack of performance" could be innocently construed). Here, Boulter's statement could be construed as innocently stating that Plaintiffs take legal action when they believe it is necessary. Accordingly, Boulter's first comment is not actionable.

ii. Comment 2 is a prediction and can neither be true of false.

The second alleged untrue comment is one by Boulter where he states as follows:

> Careful about making complaints about AMP. They may threaten you to remove it. Or if you post anything negative about them on other forums where they are a paid sponsor, like Elite Trader for example, they may get the admin to remove it.
>
> I have fought AMP with attorneys to preserve the right for people to post their experiences about AMP on BMT freely. Just be prepared to switch brokers if they were to decide to close your account.

Response at 8 and Ex. 3.

Plaintiffs' cannot meet the falsity element for Boulter's second comment because a defamatory statement must be an assertion of actual fact, rather than the expression of an opinion or prediction, which "cannot be 'false,'" and therefore "can never result in liability for slander." *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973, 981 (1989), abrogated on other grounds by *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill.2d 16, 25-29, 619 N.E.2d 129, 133-135 (1993); see also *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 581, 852 N.E.2d 825, 840 (2006) (citing *Mittelman*); *Uline, Inc. v. JIT Pkg., Inc.*, 437 F.Supp.2d 793, 803 (7th Cir. 2006).

The *Mittelman* and *Solaia Technology* decisions set forth a totality-of-the-circumstances test for distinguishing fact from opinion. The test takes into account the precision of the statement, whether the statement can be verified, the literary context of the statement, and the public and social context of the statement. *Mittelman*, 135 Ill. 2d at 243; *Solaia Technology*, 221 Ill. 2d at 581. Boulter's alleged comment clearly included a prediction and expression of an opinion based on the totality-of-the-circumstances test.

Predictions, even harsh predictions, are not defamatory. *Uline, Inc. v. JIT Pkg.*, Inc., 437 F.Supp.2d 793, 803 (7th Cir. 2006). In *Uline*, counter-defendant Uline's representative told a third party supplier to both Uline and counter-plaintiff JIT, that JIT "may have trouble" paying its bills. The court held that statement inactionable, explaining, "[t]his statement is potentially forward-looking as to what JIT 'may' be able to do in the future. . . . It is also an opinion as to JIT's future financial status, and

is therefore not actionable as defamation since a prediction of future events can neither be true nor false." *Uline*, 437 F.Supp.2d at 803

Therefore, Plaintiffs' claims regarding Boulter's second comment, which is based solely on Boulter's alleged opinion and prediction that AMP would seek to remove comments it does not like on BMT, a prediction which has proven true as evidenced by this action, is insufficient in law, fails to state a claim for which relief can be granted, and thus should be dismissed.

iii. Comment 3 has an innocent construction.

In a new exhibit attached to the opposition, Plaintiffs identify a third comment (reproduced below) by Boulter.

> It has come to my attention from multiple uses that AMP Trading/AMP Global is threatening to close trading accounts against users who share their experiences about AMP Trading on BMT.
>
> If this has happened to you, please contact me ASAP.
>
> Response, Ex. 2.

Like the first Boulter comment, this too is reasonably susceptible to an innocent construction. For example, Plaintiffs protect their trade secrets by monitoring what its users say on chat forums. Accordingly, Boulter's third comment is not actionable.

c. Plaintiffs' Disparagement Claims Fail to State a Claim because the Boulter Comments are Not About Plaintiffs' Products or Services.

As discussed in the Motion, in order to state a claim of disparagement under the IDTPA, a plaintiff must allege that the defendant published untrue or misleading statements that disparaged the plaintiff's *goods* or *services*. *Morton Grove Pharmaceuticals, Inc. v. National Pediculosis Ass'n, Inc.*, 494 F.Supp.2d 934 (N.D. Ill.

2007). Even the mere attack on business rival, which Boulter's comments are not, no matter how malicious, which does not touch upon rival's goods or services did not state claim for deceptive trade practice disparagement. *Richard Wolf Medical Instruments Corp. v. Dory*, 723 F. Supp. 37, 41 (N.D. Ill. 1989), *Amer. Pet Motels v. Chicago Vet. Med. Ass'n*, 106 Ill.App.3d 626, 633, 62 Ill.Dec. 325, 330–31, 435 N.E.2d 1297, 1302–03 (1982).

None of the allegedly untrue or misleading Boulter comments touch upon the quality of Plaintiffs' products or services. The comments do not state that Plaintiffs' trading products or services do not operate properly, or that they are harmful. Rather, the comments merely make statements about Plaintiffs' litigious nature. The court cannot infer from these comments that Plaintiffs' products or services are poor.

In *Dory*, the defendant claimed trade disparagement based on letters sent to defendant's potential customers accusing defendant of being a "vexatious litigant" and "patent infringer." The court could not infer that the defendant's products were disparaged because the letters did not discuss the quality of defendant's products, e.g., the letters did not state that the devices did not operate properly or that the devices were harmful. 723 F. Supp. at 41. Similarly, in this case, the court cannot infer that Plaintiffs' products or services are disparaged where Boulter's comments complained about the litigious nature of Plaintiffs. Accordingly, counts I-IV of Plaintiffs' Complaint should be dismissed.

d. Commercial Disparagement is not a valid claim in Illinois.

In their opposition brief, Plaintiffs failed to respond whatsoever to the unavailability of its "commercial disparagement" claims. Accordingly, Plaintiffs' have

set forth no reasoning for why these claims (counts IX-XII) should not be dismissed under the cited *Schivarelli v. CBS, Inc.,* 776 N.E.2d 693, 702-703 (Ill App. Ct. 2002).

Alternatively, like disparagement under IDTPA, the Plaintiff must show that Defendants made false and demeaning statements regarding the quality of another's goods and services. *Appraisers Coalition v. Appraisal Institute,* 845 F.Supp. 592, 610 (N.D.Ill.1994). As set forth above regarding the IDTPA claims, Boulter's comments did not discuss the quality of Plaintiffs' goods or services. Accordingly, counts IX-XII of the Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in their Motion to Dismiss, Defendants respectfully requests that the Complaint be dismissed in its entirety and with prejudice for failure to state a cause of action and such other and further relief as the Court deems just and proper.

Date: May 27, 2014

Respectfully Submitted,

DEFENDANTS BIG MIKE TRADING, LLC AND MICHAEL BOULTER

By:_____
One of their Attorneys

Christopher J. Murdoch
Steven E. Jedlinski
HOLLAND & KNIGHT LLP
131 S. Dearborn 30th Floor
Chicago, Illinois 60603
(312) 263-3600
chris.murdoch@hklaw.com
steven.jedlinski@hklaw.com
Firm No. 37472

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true copy of the foregoing **DEFENDANTS BIG MIKE TRADING, LLC AND MICHAEL BOULTER'S REPLY REGARDING THEIR MOTION TO DISMISS** was served this 27th day of May 2014 via regular mail and e-mail as follows:

Shawn Warner
saw@sawarner.com
WARNER LAW OFFICES
155 N. Michigan Avenue
Suite 700
Chicago, IL 60601

Steven E. Jedlinski