

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

AMP GLOBAL CLEARING, LLC
DANIEL CULP, and AMP FUTURES

Plaintiffs,

vs.

No. 2014 L 001143

BIG MIKE TRADING, LLC and
MICHAEL BOULTER,

Defendants.

2014 FEB 23 PM 3:49

NOTICE OF MOTION

To: Shawn A. Warner
Warner Law Office
155 N. Michigan Avenue
Suite 700
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on March 10, 2014, at 10:30 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Flannery, or any judge sitting in his stead, in the courtroom usually occupied by him in Room 2005 of the Richard J. Daley Center, Chicago, Illinois, 60602 and then and there present Defendant's Motion to Dismiss, copies of which are attached hereto.

Date: February 28, 2014

Respectfully Submitted,

Christopher J. Murdoch
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131 S. Dearborn 30th Floor
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Firm No. 37472

DEFENDANTS BIG MIKE
TRADING, LLC AND MICHAEL
BOULTER

By: 

One of their Attorneys

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**DEFENDANTS BIG MIKE TRADING, LLC AND MICHAEL BOULTER'S
COMBINED SECTION 2-615 AND 2-619 MOTION TO DISMISS
PLAINTIFFS' VERIFIED COMPLAINT**

Defendants Big Mike Trading, LLC ("Big Mike Trading") and Michael Boulter ("Boulter")(collectively "Defendants"), pursuant to Sections 2-615 and 2-619, move to dismiss counts I-XII set forth in the Verified Complaint by plaintiffs AMP Global Clearing, LLC, Daniel Culp and AMP Futures' (collectively "Plaintiffs") with prejudice because: (1) the claims are barred by the Communications Decency Act, 47 U.S.C. § 230; and (2) Plaintiffs have failed to allege facts sufficient to state a claim against either of the Defendants for deceptive trade practices, defamation or commercial disparagement.

INTRODUCTION

This action should be dismissed because the federal safe harbor of 47 U.S.C. § 230 of the Communications Decency Act ("CDA") provides Defendants a complete

immunity against Plaintiffs' claims. Defendant Big Mike Trading operates an online chat community that provides a venue for users to discuss their opinions regarding trading. Defendant Michael Boulter is the owner of Big Mike Trading, LLC and manages the online chat forum.

Plaintiffs' complaint centers on the allegedly defamatory comments made by a third-party, believed to be James Stone, not either of the Defendants. The crux of Plaintiffs' complaint is that Defendants should be considered the ones posting Stone's allegedly defamatory comments because they own or operate the chat forum. Plaintiffs seek to hold Defendants liable for these comments as if they were actually statements made by the Defendants themselves.

However, this is in blatant disregard of federal immunity provided by Section 230 of the CDA. Defendants cannot be held liable for comments posted by one of the forum's users. Plaintiffs' allegations fail to plead around this immunity. Furthermore, Plaintiffs' allegations are insufficient to support its claims of deceptive trade practices, defamation, and commercial disparagement. Therefore, each of Plaintiffs' claims must be dismissed pursuant to Sections 2-615 and 2-619.

FACTS

Plaintiff AMP Global Clearing, LLC and AMP Futures ("AMP") is owned by Plaintiff Daniel Culp ("Culp") and provides trading platform services. (Complaint, ¶¶ 1-3.) Defendant Big Mike Trading provides a chat forum at www.bigmiketrading.com for its registered users to openly share information

and opinions about trading and market participants (“Forum”). (*Id.*, ¶¶ 11-12.)

Boulter is the owner of Big Mike Trading and operator of the Forum. (*Id.*, ¶ 6.)

AMP and Culp were in a dispute with a former consultant, James Stone (“Stone”) regarding monies owed for consulting services provided in 2012 and 2013 (“Dispute”). (*Id.*, ¶¶ 4,8-10, 14-21.) On January 5, 2014, a person or persons using the name “CostofBusiness” started a thread on the Forum which discussed the Dispute. (*Id.*, ¶ 21; Ex. 2.) The “CostofBusiness” user name is not associated with Big Mike Trading or Boulter. (Ex. 1, Affidavit of Michael Boulter (“Boulter Affidavit”), ¶¶ 4, 6) The Defendants did not draft, prepare, compose, edit or otherwise revise the text of any “CostofBusiness” post. (*Id.* at ¶¶ 5, 7)

ARGUMENT

I. SECTION 2-619 MOTION TO DISMISS - PLAINTIFFS’ CLAIMS ARE BARRED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT.

Here, counts I-XII of Plaintiffs’ Complaint should be dismissed with prejudice because Plaintiffs have not stated, and cannot plausibly state a cause of action based on the alleged facts. Plaintiff has not and cannot allege that Defendants wrote or were responsible for preparing the third party posts at issue. By displaying the posts made by “CostofBusiness” on the Forum, Defendants are simply not liable for any allegedly defamatory content in those posts. The law could not be clearer on this point as Section 230 of the CDA specifically preempts Plaintiff’s claims against Defendants.

a. Standard of Review

Under Section 2-619(a)(9), a claim should be dismissed if it is barred by other affirmative matter. The Illinois supreme court has defined an affirmative matter, under a Section 2-619(a)(9) motion, as something in the nature of a defense which negates the cause of action completely. *Van Meter v. Darien Park District*, 207 Ill.2d 359, 367 (2003). Submission of affidavits and other documents outside the pleadings are appropriate on a Section 2-619 motion to dismiss. *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 308 Ill. App.3d 18, 31 (1st Dist. 1999). Immunity from suit is an “affirmative matter” properly raised under section 2-619(a)(9). *Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 383 (1997).

b. Legislative Background of Section 230(c) Immunity

In 1996, Congress enacted the landmark federal Communications Decency Act (“CDA”). Pub. L. 104-104, Title 1, § 509 (1996). The CDA includes Section 230, an omnibus safe harbor provision, which affords immunity to Internet service providers, websites and other online services, such as Defendants, that host or transmit content created by third parties. The Fourth Circuit’s seminal decision in *Zeran v. America Online*, explains Congress’s intent in passing the statute:

Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

129 F.3d 327, 330-31 (4th Cir. 1997). The simple and straightforward statute states: “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Congress expressly and expansively preempted any state or local law inconsistent with Section 230. *Id.* at § 230(e)(3). Contrary to the plain language of Section 230, Plaintiffs seek to hold Defendants liable for precisely the sort of conduct Congress sought to immunize through the provisions of Section 230 of the CDA.

c. Section 230 of the CDA Broadly Immunizes Defendants from Plaintiffs’ Claims

An unambiguous statute confirms that provider of an online forum like Big Mike Trading and its operator Boulter cannot be held liable for hosting comments on the Forum created by third parties such as “CostofBusiness.” Under the CDA, a defendant is immune from suit if: (1) it qualifies as a “provider or user of an interactive computer service;” (2) the information at issue is provided by “another information content provider”; and (3) the asserted claims seek to “treat the defendant as a publisher or speaker” of information created by third parties. 47 U.S.C. § 230(c)(1). The immunity’s three elements are easily satisfied based on the facts alleged in Plaintiffs’ Complaint.

The CDA broadly defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]” 47 U.S.C. § 230(f)(2). Plaintiffs

admit that Defendants are an interactive computer service as defined by Section 230. (Complaint, ¶¶ 6, 11-12). Here, Defendant Big Mike Trading, provided the online Forum for registered users to post their personal comments and views about trading. Defendant Boulter, as the owner Big Mike Trading, operated the Forum. *See Batzel v. Smith*, 333 F.3d 1018, 1039 (9th Cir. 2003) (an operator, organizer, or moderator of an Internet bulletin board, chat room, or listserv would be immune from libel suits arising out of messages distributed using that technology)

Section 230 of the CDA defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the *creation or development of information* provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3)(emphasis added). Plaintiffs’ claims in the Complaint are predicated solely on alleged defamatory statements provided by a user of the Forum under the name “CostofBusiness.” However, neither Big Mike Trading nor Boulter are associated with that user name nor have they revised or otherwise edited the text of any posts associated with that user name. (Ex. 1, Boulter Affidavit, ¶¶ 4-7) Defendants merely provided the Forum for the third party to make the posts. As such, under Section 230(c) of the CDA, Defendants do not qualify as the “publisher or speaker” of the third party posts at issue, but are merely the “interactive computer service” as defined under Section 230(f)(2) of the CDA

Holding Defendants liable for these third party posts regarding the Dispute

would contravene Section 230's prohibition against treating interactive computer services as the publisher of the content it did not provide. Thus, Defendants are protected under the immunities provided in the CDA.

II. SECTION 2-615 MOTION TO DISMISS - IN ADDITION TO THE PROTECTIONS OFFERED BY SECTION 230, PLAINTIFFS' ALLEGATIONS ARE INSUFFICIENT TO SUPPORT ANY OF ITS CLAIMS AGAINST DEFENDANTS.

Independent of the protections afforded to Defendants by Section 230, Plaintiffs failed to plead allegations to support essential elements of each cause of action alleged: deceptive trade practices, defamation; and commercial disparagement. Thus, counts I-XII of Plaintiffs' Complaint against Defendants must be dismissed in their entirety for failure to state a claim.

a. Standard of Review

Motions under Sections 2-615 and 2-619 may be filed together as one motion. 735 ILCS 5/2-619.1. A motion under Section 2-615 attacks the legal sufficiency of a complaint by asserting that it fails to state a cause of action upon which relief can be granted. *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 147 (2002). A pleading must allege facts sufficient to satisfy each element of a claim. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 427 (1981). In determining the sufficiency of a claim under Section 2-615, courts must disregard conclusions of fact or law that are not supported by allegations of specific fact. *Id.*

b. Plaintiffs Failed to Plead Facts To Support the Essential Elements of a Claim for Deceptive Trade Practices

In order to state a claim of disparagement under the Illinois Uniform Deceptive Trade Practices Act (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). As discussed herein, the statements at issue regarding the Dispute were published by a third party, not either of the Defendants. Accordingly, counts I-IV for disparagement under IDTPA should be dismissed.

c. Plaintiffs Failed to Plead Facts To Support the Essential Elements of a Claim for Defamation

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 (Ill. App. Ct. 1999). Plaintiffs' complaint is devoid of any facts that either of the Defendants made a false statement about the Plaintiffs. The only statements at issue regarding the Dispute were made by a third party. Accordingly, counts V-VIII for common law commercial disparagement should be dismissed.

d. Plaintiffs Failed to Plead Facts To Support the Essential Elements of a Claim for Commercial Disparagement

Currently, it is disputed as to whether Plaintiffs' claims for common law

commercial disparagement even remain viable in Illinois. *See Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 702-703 (Ill. App. Ct. 2002). Notwithstanding the foregoing viability argument, Plaintiffs have failed to state a claim for commercial disparagement against either of the Defendants.

To state a cause of action for common law commercial disparagement, Plaintiffs must show that Defendants made false and demeaning statements regarding the quality of Plaintiffs' goods or services. *Barry Harlem Corp. v. Kraff*, 273 Ill.App.3d 388, 396 (Ill. App. Ct. 1995). As discussed herein, the statements at issue regarding the Dispute were made by a third party, not either of the Defendants. Accordingly, counts IX-XII for common law commercial disparagement should be dismissed.

CONCLUSION

Based on the foregoing reasons, Plaintiffs' Complaint should 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: February 28, 2014

Respectfully Submitted,

**DEFENDANTS BIG MIKE
TRADING, LLC AND MICHAEL
BOULTER**

By: 

One of their Attorneys

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Firm No. 37472

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true copy of the foregoing **MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT** was served this 28th day of February 2014 via messenger delivery as follows:

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

A handwritten signature in black ink, appearing to read "Chris Murdoch", written over a horizontal line.

Christopher Murdoch

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Defendants.

AFFIDAVIT OF MICHAEL BOULTER

I, Michael Boulter, being more than 18 years of age and first duly sworn on oath, state and affirm as to personal knowledge of the following facts and am competent to testify to the matters stated herein:

1. I am the owner of Big Mike Trading, LLC ("Big Mike Trading").
2. Big Mike Trading supports a chat forum which is available at www.bigmiketrading.com for registered users to post information and opinions about trading and market participants ("Forum").
3. One of the registered users of the Forum posts under the user name "CostofBusiness."
4. Big Mike Trading has no association with the "CostofBusiness" account.

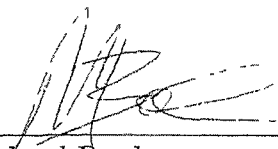
5. Big Mike Trading has not drafted, prepared, composed, edited or otherwise revised any text associated with a post made by the user name "CostofBusiness" on the Forum.

6. I have no association with the "CostofBusiness" account.

7. I have not drafted, prepared, composed, edited or otherwise revised any text associated with a post made by the user name "CostofBusiness" on the Forum.

FURTHER AFFIANT SAYETH NOT

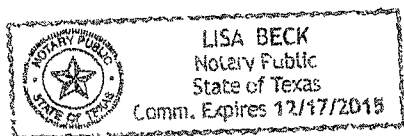
Dated: February 21, 2014



Michael Boulter

STATE OF _____)
COUNTY OF _____)

The foregoing instrument was subscribed and sworn to me this 21 day of February, 2014, by Michael Boulter.



Notary Public – State of