No. 12-6122

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

KENNETH M. SEATON
d/b/a Grand Resort Hotel and Convention Center,

Appellant,

—v.—

TRIPADVISOR, LLC,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF FOR APPELLEE

LAURA R. HANDMAN
JAMES ROSENFELD
SAMUEL M. BAYARD
DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th Floor
New York, New York 10019
(212) 489-8230

S. RUSSELL HEADRICK
MEGHAN H. MORGAN
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ
265 Brookview Centre Way, Suite 6000
Knoxville, Tennessee 37919
(865) 549-7000

Attorneys for Appellee TripAdvisor LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, TripAdvisor LLC hereby makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Yes. TripAdvisor LLC is a wholly owned subsidiary of TripAdvisor Holdings, LLC, a Massachusetts LLC. TripAdvisor Holdings, LLC is a wholly owned subsidiary of TripAdvisor, Inc., a Delaware corporation. Liberty Interactive Corporation, a publicly traded Delaware corporation, holds more than 10% of TripAdvisor, Inc. stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate 34(a) and Sixth Circuit Rule 34, TripAdvisor LLC ("TripAdvisor") respectfully submits that oral argument is appropriate given the important First Amendment interests at stake in this appeal. Consumer review websites like TripAdvisor present a new, valuable type of forum for the application of free speech principles. Oral argument would help sharpen the legal issues and provide the Court with the fullest opportunity to explore the parties' arguments.

STATEMENT OF ISSUES

1. Whether the District Court correctly held that Appellant Seaton's defamation and false light invasion of privacy claims fail to state a claim because Appellee TripAdvisor's "Dirtiest Hotels" ranking, based on a survey of user reviews of travel accommodations, is protected non-actionable opinion?

2. Whether the District Court properly exercised its discretion to deny as futile Seaton's motion to amend the complaint in order to "expound upon" his original claims and to add claims of tortious interference with prospective business relationships and trade libel/injurious falsehood, all based on the same ranking that allegedly gave rise to his non-actionable defamation and false light claims?

STATEMENT OF THE CASE

Kenneth M. Seaton d/b/a Grand Resort Hotel and Convention Center ("Seaton" or "Plaintiff") filed suit against TripAdvisor LLC ("TripAdvisor") in the Circuit Court for Sevier County, Tennessee on October 11, 2011. (Complaint ("Cplt."), R. 1-1, PageID # 4-7). The complaint fails to identify the specific claim under which Seaton seeks relief, but uses the word "defaming" (Cplt. ¶ 7, PageID # 6), indicating an intent to assert a libel claim. It alleges that, on January 25, 2011, TripAdvisor published "a survey which concluded that the Plaintiff . . . was the dirtiest hotel in America." (*Id.*, PageID # 6). On November 17, 2011, TripAdvisor removed the case to the United States District Court for the Eastern District of Tennessee. (Notice of Removal, R. 1, PageID # 1-3).

On January 6, 2012, TripAdvisor moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that its "2011 Dirtiest Hotels" list is a statement of opinion, not an objectively verifiable statement of fact, and, as such, is protected by the First Amendment to the United States Constitution and Article 1, Section 19 of Tennessee's Constitution. (Motion to Dismiss, R. 7, PageID # 39-40; Memorandum in Support ("Mem."), R. 8, PageID # 47-48). Specifically, TripAdvisor argued that its ranking of Seaton's hotel, based on its website's users' reviews, is an inherently subjective, comparative judgment not capable of being objectively proven true or false. (Mem., R. 8, PageID # 53-62).

Seaton filed a responsive brief and supporting affidavits on March 31, 2012. (Plaintiff's Response to Defendant's Motion to Dismiss, R. 15, PageID # 82-103). Seaton also filed a motion to amend the complaint and a proposed amended complaint, which sought to add claims for false light, tortious interference with prospective business relationships, trade libel/injurious falsehood, and vicarious liability (against two TripAdvisor parent companies), all premised on TripAdvisor's publication of the "Dirtiest Hotels" ranking. (Motion to Amend, R. 16, PageID # 200-01; Amended and Restated Complaint ("Am. Cplt."), R. 16-1, PageID # 202-15). On May 14, 2012, TripAdvisor filed a reply memorandum in support of its motion to dismiss and a memorandum in opposition to Plaintiff's motion to amend. (Reply Memorandum in Support of Motion to Dismiss, R. 19, PageID # 221-34; Memorandum of Law in Opposition to Plaintiff's Motion to Amend, R. 20, PageID # 235-52).

The District Court issued an order on August 22, 2012, granting TripAdvisor's motion to dismiss the complaint with prejudice and denying Seaton's motion to amend. (Order, R. 25, PageID # 266-282). It construed the complaint as asserting both defamation and false light invasion of privacy claims, dismissing both on the same ground: that TripAdvisor's "Dirtiest Hotels" ranking is "unverifiable rhetorical hyperbole" which no reasonable reader "could believe" is "anything more than the opinions of TripAdvisor's millions of online users" and

therefore not actionable as a matter of law. (*Id.*, PageID # 277-78). The Court also ruled that Seaton's motion to amend was futile, rejecting the tortious interference and trade libel/injurious falsehood claims on the same grounds as the defamation and false light claims. (*Id.*, PageID # 273-74, 278, 280). It also found that Seaton had not made sufficient allegations of intent or improper means or motive to state a claim for tortious interference. (*Id.*, PageID # 280-82). Finally, the Court ruled that Seaton's vicarious liability claim failed as a matter of law because Seaton had not stated a claim against TripAdvisor. (*Id.*, PageID # 282). The Court entered judgment on August 22, 2012. (Judgment, R. 26, PageID # 283).

This appeal followed. (Notice of Appeal, R. 27, PageID # 284).

STATEMENT OF FACTS

Seaton is the sole proprietor of the Grand Resort Hotel and Convention Center (the "Hotel"), in Pigeon Forge, Tennessee. (Order, R. 25, PageID # 267).

TripAdvisor is an Internet company "in the business of providing travel research information, including reviews, reports, opinions, surveys, and other information regarding hotels, resorts, restaurants, or other similar businesses of interest" to travelers. (*Id.*, PageID # 267). "Visitors to TripAdvisor's website use its forums to exchange information relating to travel issues. TripAdvisor users are further encouraged to post comments and reviews and to answer surveys regarding hotels, resorts, restaurants, or other such places of interest." (*Id.*, PageID # 267).

On January 25, 2011, TripAdvisor published a feature which ranked the ten "Dirtiest Hotels" in the United States in 2011, "as reported by travelers on TripAdvisor" (the "Dirtiest Hotels Ranking" or the "Ranking"). (Roche Decl., Ex. A, R. 8-2, PageID # 66). The Ranking was based on traveler reviews of the hotels posted on TripAdvisor's website. (Order, R. 25, PageID # 268). TripAdvisor "does not inquire about, investigate or consider any hotels except those receiving comments or reviews on TripAdvisor." (*Id.*, PageID # 268).

At the top of the Ranking, above the heading "2011 Dirtiest Hotels" and TripAdvisor's owl logo, were buttons which allowed users to find out about hotels, flights, restaurants and other travel destinations, or to "Write a Review." (Roche

Decl., Ex. A, R. 8-2, PageID # 66). The body of the feature ranked the ten "Dirtiest Hotels," providing each establishment's name and location, a representative quote from a user review (for the Hotel: "There was dirt at least ½" thick in the bathtub which was filled with lots of dark hair") and a user-provided image for each (in the Hotel's case, a photograph of a ripped bedspread), and the percentage of reviewers who "do not recommend this hotel," based on a number of factors not limited to cleanliness. (*Id.*, PageID # 66). Information on the other nine hotels on the Ranking was equally as harsh as the information about Seaton's Hotel (*e.g.*, excerpts from user reviews stating "Hold your nose for the garbage smell" and "Camp out on the beach instead."). (*Id.*, PageID # 66). Each listing linked to the hotel's full page on TripAdvisor's website (Order, R. 25, PageID # 269), from which all user reviews of the establishment, good and bad, are accessible.

TripAdvisor also published an online press release (the "Press Release") about the Dirtiest Hotels Ranking, which contained TripAdvisor's owl logo and trademarked tagline "World's Most Trusted Travel Advice." (Shelton Aff., Ex. 1, R. 15-2, PageID # 106-09). It also contained the headlines "TripAdvisor lifts the Lid on America's Dirtiest Hotels" and "Top 10 U.S. Grime Scenes Revealed, According to Traveler Cleanliness Ratings." (*Id.*, PageID # 106). Summary lead-ins stated, among other things, "Now in its sixth year, and true to its promise to

share the whole truth about hotels to help travelers plan their trips, TripAdvisor names and shames the nation's most hair-raising hotels," and "This year, the tarnished title of America's dirtiest hotel goes to Grand Resort Hotel and Convention Center . . . ." (*Id.*, PageID # 106).[1]

Displeased with the Ranking, Seaton filed this lawsuit, seeking $5 million in compensatory damages and $5 million in punitive damages. (Cplt. ¶¶ 7-11, R. 1-1, PageID # 6). Seaton alleges that the publication was maliciously designed to harm the Hotel's reputation, and that it was based on "unsubstantiated rumors and grossly distorted ratings and misleading statements." (*Id.*, PageID # 5-6). However, neither the complaint, nor the proposed amended complaint, nor any of Seaton's papers identify with specificity *any* allegedly false and defamatory statements made by TripAdvisor users in reviews of the Hotel. Indeed, Seaton specifically disclaims any challenge to the user reviews themselves, stating that "the defamation allegation in this case is solely directed at the libelous content created entirely by TripAdvisor, i.e., the '2011 Dirtiest Hotels' list . . . ." (App. Brief, at 36). The District Court construed Seaton's complaint as alleging claims for defamation and false light invasion of privacy. (Order, R. 25, PageID # 271).

[1] The District Court ruled that copies of the Dirtiest Hotels Ranking and the Press Release would be considered on the motion to dismiss without conversion to summary judgment because they were referred to in and central to the allegations in the complaint. (Order, R. 25, PageID # 270-71) (citing *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997)).

SUMMARY OF ARGUMENT

This appeal presents the question whether an online "top ten" list based on an aggregation of consumer reviews can be objectively false. The District Court correctly held that TripAdvisor's comparative Ranking of Seaton's Hotel was a non-actionable, constitutionally protected statement of opinion, not a provable or disprovable statement of fact. Seaton therefore failed to state a defamation or false light claim based on the Ranking. The District Court correctly held that none of his proposed amendments could do so either. TripAdvisor respectfully urges this Court to affirm.

To state a claim for defamation or false light under Tennessee law, a plaintiff must allege that the defendant has asserted objectively verifiable factual statements that are capable of being proven true or false. This requirement is compelled by the First Amendment and Tennessee's constitutional free speech provision (Article I, Section 19). Here, Seaton has failed to allege any such statements. His claim is based on a comparative ranking of hotels, which is in turn based on subjective traveler reviews. TripAdvisor disclosed these individual reviews on its website and Seaton expressly disclaims any intention of challenging them as false and defamatory. Any reasonable reader of TripAdvisor's website would know both that the Ranking is based on TripAdvisor member reviews, and that those reviews are largely expressions of personal judgment, not fact.

Reviewing a hotel depends on the perceptions, criteria and standards of each individual guest. In similar contexts, courts have repeatedly dismissed defamation claims brought by disgruntled targets of bad reviews, ratings or rankings. In appealing the District Court decision, Seaton has completely failed to address this long line of controlling authority—indeed, he does not even mention the lead Sixth Circuit case on point, *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007).

Following this line of authority and recognizing the ubiquity of rankings, grades and critiques on everything "[f]rom law schools to restaurants, from judges to hospitals," the District Court found that "a reasonable person would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact; the reasonable person, in other words, knows the difference between a statement that is 'inherently subjective' and one that is 'objectively verifiable.'" (Order, R. 25, PageID # 277). The Dirtiest Hotels Ranking, it held, was in the "inherently subjective" category; a reasonable person would not believe "that TripAdvisor's article reflected anything more than the opinions of TripAdvisor's millions of online users." (*Id.*, PageID # 278).

One of the great benefits of the Internet is that sites like TripAdvisor distill the wisdom of the crowd. They gather, synthesize and organize the individual views of millions of Internet users in a form that, albeit subjective, is tremendously

useful to consumers. While Seaton's lawsuit targets one particular ranking, permitting claims like his would threaten to chill this useful and popular function of the Internet. The District Court correctly rejected Seaton's attempt to impose liability based on TripAdvisor's synthesis of its users' opinions.

Plaintiff's motion to amend was also properly denied. The proposed amended complaint purported to augment Seaton's factual allegations and allege additional state law claims also based solely on the Dirtiest Hotels Ranking. But no factual allegations could alter the District Court's analysis of whether the Ranking, on its face, is fully protected, non-actionable opinion; the District Court could and did resolve this question of law correctly by examining the Ranking in the context in which it was published. Nor could any other claims have fared better, as settled United States Supreme Court precedent prohibits a plaintiff from circumventing the First Amendment's free speech protections by merely recasting a defamation claim as a different tort.

The Court should affirm the decision of the District Court dismissing the complaint and denying leave to amend. Seaton did not and cannot plead any viable claim based on TripAdvisor's survey-based rankings of America's "Dirtiest Hotels."

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT SEATON FAILED TO STATE A DEFAMATION OR FALSE LIGHT CLAIM

Disposing of this case at the motion to dismiss stage was not only correct but required by the U.S. and Tennessee Constitutions and Tennessee defamation law. As the District Court found, the Dirtiest Hotels Ranking consists of constitutionally protected opinion, not objectively verifiable fact. Seaton therefore cannot not state a defamation or false light claim.

A. Dismissal at the Pleadings Stage Was Appropriate

This Court reviews the grant of a motion to dismiss *de novo*. *Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 384 (6th Cir. 2009).

While TripAdvisor agrees with Seaton that this review is guided by the pleading standards articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), those cases require Seaton's complaint to do more than simply "tell a coherent story." (App. Brief, at 25). Rather, it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted); *see also Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009). Where, as here, the well-

pleaded facts do not "plausibly give rise to an entitlement to relief," dismissal is appropriate. *Iqbal*, 556 U.S. at 679.

Supreme Court precedent establishes a strong preference for early disposition of cases implicating freedom of speech. Recognizing that meritless lawsuits have a pernicious effect on speech rights, the Supreme Court has observed that "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution [of a lawsuit], unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). Because "the costs of a successful defense can be the same or greater than what the damage awards would have been," *Suzuki Motor Corp. v. Consumers Union of U.S.*, 330 F.3d 1110, 1143 (9th Cir. 2003), courts have observed that publishers of expressive works "will tend to become self-censors" unless they "are assured of freedom from the harassment of lawsuits." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). Accordingly, courts routinely grant motions to dismiss claims asserting speech-based torts where it is possible to do so based on an examination of the works at issue. *See, e.g.*, *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) (affirming Rule 12(b)(6) dismissal of defamation claim based on opinion grounds); *Levin v. McPhee*, 119 F.3d 189, 191, 197 (2d Cir. 1997) (same); *Remick v. Manfredy*, 238 F.3d 248, 260-63 (3d Cir. 2001) (same).

B. Under the United States and Tennessee Constitutions, Statements Not Capable of Objective Verification Cannot Form the Basis of a Libel or False Light Claim

Seaton's defamation and false light claims are fundamentally constrained by the First Amendment of the United States Constitution and Article 1, Section 19 of the Tennessee Constitution.[2] In *Milkovich v. Lorain Journal Co.*, the United States Supreme Court refused to create a "wholesale defamation exemption for anything that might be labeled 'opinion,'" but recognized that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." 497 U.S. 1, 18, 20 (1990). It also recognized constitutional protection for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual," including "loose, figurative, or hyperbolic language." *Id.* at 20-21. This Court has followed suit. *See Compuware*, 499 F.3d at 529 ("[A] viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts.").

Tennessee common law comports with these First Amendment principles, holding that statements not capable of being proven true or false cannot form the basis of a defamation or false light claim. *See, e.g.*, *Farmer v. Hersch*, No.

[2] The free speech and press protections contained in Art. 1, § 19 are construed to have a scope "at least as broad" as those afforded by the First Amendment. *Leech v. Am. Booksellers Assoc.*, 582 S.W.2d 738, 745 (Tenn. 1979).

W2006-01937-COA-R3-CV, 2007 WL 2264435, at *5 (Tenn. Ct. App. Aug. 9, 2007) ("Mere hyperbole or exaggerated statements intended to make a point are not actionable defamatory statements."); *Hibdon v. Grabowski*, 195 S.W.3d 48, 63 (Tenn. Ct. App. 2005) ("[S]tatements that cannot 'reasonably [be] interpreted as stating actual facts about an individual' because they are expressed in 'loose, figurative, or hyperbolic language,' and/or the content and tenor of the statements 'negate the impression that the author is maintaining an assertion of actual fact' about the plaintiff are not provably false and, as such, will not provide a legal basis for defamation.") (quoting *Milkovich*, 497 U.S. at 17, 21); *Shamblin v. Martinez*, No. M 2010-00974-COA-R3-CV, 2011 WL 1420896, at * 6 (Tenn. Ct. App. Apr. 13, 2011) ("rhetorical hyperbole and matters of opinion which cannot be reasonably interpreted as stating actual facts about Plaintiffs" did not support defamation or false light claims); *Gallagher v. E.W. Scripps Co.*, No. 08-2153-STA, 2009 WL 1505649, at *13 (W.D. Tenn. May 28, 2009) (rhetorical hyperbole does not support false light claim).[3]

[3] Seaton's discussion of whether the Ranking is defamatory (App. Brief, at 22-23) conflates two distinct and independent requirements of a defamation claim: (1) that a statement is defamatory, and (2) that it state or imply a verifiable fact. "Defamatory" means "holding the plaintiff up to public hatred, contempt or ridicule" or carrying "an element of disgrace." *Brown v. Mapco Exp., Inc.*, No. W2011–01751–COA–R3–CV, 2012 WL 3590379, at *10-11 (Tenn. Ct. App. Aug. 22, 2012). A statement that that may injure the plaintiff's reputation, like an insult or "vigorous epithet," *Milkovich*, 497 U.S. at 17, is nonetheless constitutionally protected if it does not assert or imply a provably false fact. *See, e.g.*, *Hopkins v.*

The determination of whether a statement would be understood by reasonable readers as fact or protected opinion is a threshold question of law for the Court, based on review of the publication in suit. *See Ogle v. Hocker*, 279 F. App'x 391, 397 (6th Cir. 2008) (courts decide "whether a reasonable fact-finder could interpret [the publication] as containing false assertions of fact"); *Riley v. Harr*, 292 F.3d 282, 291 (1st Cir. 2002) ("[C]ourts treat the issue of labeling a statement as verifiable fact or as protected opinion as one ordinarily decided by judges as a matter of law."); *Hammer v. City of Osage Beach*, 318 F.3d 832, 842 (8th Cir. 2003) (same); *Rodriguez v. Panayiotou*, 314 F.3d 979, 985-86 (9th Cir. 2002) (same); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (same).[4]

This Court generally determines whether an allegedly defamatory statement is protected opinion under *Milkovich* with reference to (1) the common usage or meaning of the allegedly defamatory words themselves, whether they are commonly understood to be loose, figurative, or hyperbolic words; (2) the degree

---

Lapchick, 129 F.3d 116, 117 (4th Cir. 1997) (statement that plaintiff is "racist" may be "unflattering, annoying and embarrassing" but it "does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric"); *Covino v. Hagemann*, 627 N.Y.S.2d 894, 899 (N.Y. Sup. Ct. 1995) ("The case law is replete with examples of pejorative accusations, otherwise tending to harm one's professional or business reputation, found to have been protected opinion.").

[4] "The rule against allowing unverifiable statements to go to the jury is, in actuality, merely one of many rules in tort law that prevent the jury from rendering a verdict based on speculation. An obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits no method of verification." *Ollman*, 750 F.2d at 981-82.

to which the statements are verifiable, *i.e.*, whether the statement is objectively capable of proof or disproof; (3) the immediate context in which the statement occurs; and (4) the broader social context into which the statement fits. *Ogle*, 279 F. App'x at 397 (quoting *Joliff v. NLRB*, 513 F.3d 600, 611-12 (6th Cir. 2008)). As discussed below in Sections I.C. and I.D, all of these factors favor TripAdvisor in this case: the Dirtiest Hotels Ranking (1) uses loose and hyperbolic language; and (2) compiles subjective user reviews and prepares comparative rankings based on these reviews which could not possibly be proven or disproven. This is fully supported both by (3) the immediate context of the website (which compiles, links to and aggregates subjective consumer reviews); and (4) the broader social context (*i.e.*, the ways in which consumers perceive such ratings and rankings, particularly on consumer review sites on the Internet).

C. Ratings, Rankings and Reviews Are Inherently Subjective

Seaton argues that the Ranking is defamatory without even mentioning—let alone distinguishing—the long line of case law, in this Court and elsewhere, holding that ratings, rankings and reviews are inherently subjective and therefore constitutionally protected opinion. *See, e.g.*, *Compuware*, 499 F.3d at 529 (credit rating of company held to be non-actionable opinion); *Aviation Charter, Inc. v. Aviation Research Grp.*, 416 F.3d 864, 868-71 (8th Cir. 2005) (safety rating of airline company held to be non-actionable opinion); *Jefferson Cnty. Sch. Dist. No.*

R-1 v. Moody's Investors. Servs., Inc., 175 F.3d 848, 856, 858 (10th Cir. 1999) (credit rating of school district held to be non-actionable opinion); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 221-22, 227-29 (2d Cir. 1985) (statements in restaurant review such as the "sweet and sour pork contained more dough (badly cooked) than meat," "the green peppers . . . remained still frozen on the plate," and the "pancakes [were] . . . the thickness of a finger" were protected opinion because "the statements are incapable of being proved false"; only statement that restaurant "served Peking Duck in one dish instead of the traditional three" was factual); *Browne v. Avvo*, 525 F. Supp. 2d 1249, 1252 n.1 (W.D. Wash. 2007) (numerical ratings of lawyers held to be non-actionable opinion); *Wheeler v. Neb. State Bar Ass'n*, 508 N.W.2d 917, 924 (Neb. 1993) (judicial performance evaluation based on lawyer surveys held to be non-actionable opinion); *Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 240-43 (Mo. Ct. App. 2011) (letter grade of "C" given to business in online report held to be non-actionable opinion); *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc.3d 974, 980 (N.Y. Sup. Ct. 2004) (ratings and review of restaurant in *Zagat's* guidebook held to be non-actionable opinion), *aff'd*, 21 A.D.3d 826 (N.Y. App. Div., 1st Dep't 2005).[5]

[5] *See also Hammer v. Amazon.com*, 392 F. Supp. 2d 423, 430-31 (E.D.N.Y. 2005) (dismissing defamation claim based on bookseller's failure to remove consumer reviews of author's books from its website because reviews were non-actionable

This Court has recognized that even when ratings are derived from *objective* considerations but are ultimately *subjective* evaluations, they are protected opinion. In *Compuware Corp. v. Moody's Investors Services*, which Seaton altogether ignores, Moody's issued a creditworthiness report for Compuware Corporation, giving it a junk-grade rating and making several specific statements about its financial condition. 499 F.3d at 523-24. This Court stated that each such analysis "considers several objective factors, but is ultimately derived from the subjective weighing of those factors." *Id*. at 522. It affirmed summary judgment for Moody's as to specific factual statements regarding the plaintiff's financial condition on actual malice grounds, and held that "the *credit rating itself* . . ., as opposed to the facts and implications in the report," was constitutionally protected opinion. *Id*. at 529 (emphasis in original). The Court of Appeals explained:

> A Moody's credit rating is a predictive opinion, dependent on subjective and discretionary weighing of complex factors. We

---

opinion); *ZL Techs. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 795-99 (N.D. Cal. 2010) (ranking of technology firm as "niche" player, the lowest ranking possible on defendant's scale, held to be non-actionable opinion), *aff'd*, 443 F. App'x 547 (9th Cir. 2011); *Kronenberg v. Baker & McKenzie LLP*, 692 F. Supp. 2d 994, 998 (N.D. Ill. 2010) (lawyer performance-review ratings and comments held to be non-actionable opinion); *Search King, Inc. v. Google Tech., Inc.*, No. Civ. 02-1457-M, 2003 WL 21464568, at *2-5 (W.D. Okla. May 27, 2003) (Google page-ranking of websites held to be non-actionable opinion); *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434, 1435-36 (S.D.N.Y. 1985) (finding commentary by architecture critic absolutely privileged, noting "one's opinion of another, however unreasonable or vituperative, since [it] cannot be subjected to the test of truth or falsity… [is] entitled to absolute immunity from liability") (citations omitted).

> find no basis upon which we could conclude that the credit rating itself communicates any provably false factual connotation. Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation.

Id.

The Eight Circuit came to a similar conclusion in *Aviation Charter*, where defendant Aviation Research Group/US ("ARGUS") had published a report in which it assigned the lowest of four possible safety ratings to the plaintiff charter airline company. 416 F.3d at 866-67. The plaintiff sued ARGUS for defamation and deceptive trade practices based on the report and statements about the report in a newspaper article. *Id.* at 867-68. The court held that, "although ARGUS's comparison relied in part on objectively verifiable data, the interpretation of those data was ultimately a subjective assessment, not an objectively verifiable fact." *Id.* at 870. The court reasoned that "[b]ecause ARGUS's comparative rating is not 'a provably false statement of fact,'" the plaintiff's defamation and deceptive trade practices claims failed as a matter of law. *Id.* at 871, 872.

Compilations of *subjective* information—like survey results—are entitled to even more robust constitutional protection than that provided to subjective assessments based on objectively verifiable data—like financial indicators (as in *Compuware*) or safety measures (as in *Aviation Charter*)—because they are even further from the realm of provably false facts. For example, in *Wheeler v.*

Nebraska State Bar Association, a judge sued the state bar association, claiming that its judicial performance evaluation, which was based on lawyer surveys and used a 1-to-5 rating system, was false and defamatory and caused him to lose an election. 508 N.W.2d at 919-20. The judge alleged that many of the responses to the survey were "invalid and vindictive," and that the bar association failed to investigate their truthfulness or ensure a fair process. *Id.* at 919. The plaintiff also alleged that "the bar association told the public that the survey's results were "fair, valid, and solidly based upon the facts of the judge's judicial performance." *Id.* In affirming dismissal of the judge's defamation claim for failure to state a claim, the Nebraska Supreme Court wrote:

> Ratings by their very nature will reflect the philosophy of those doing the rating and are nothing more than expressions of subjective evaluations concerning a judicial candidate's qualifications. There is simply no objective method to determine the rating an individual judge should receive in any given performance category; therefore, by their very subjective nature, ratings cannot imply a provably false factual assertion.

Id. at 924. The court underscored that aggregating subjective ratings was protected: "It may be that Wheeler was in reality a good judge; but if so, he was nonetheless perceived by those who rated him to be otherwise. The raters had a right to their subjective views, and the bar association had a right to publish those collective impressions." *Id.*

Despite these holdings extending constitutional protection to compilations of both objective data and subjective evaluations, Seaton argues that the Ranking is not protected speech under the U.S. Constitution, relying on *Milkovich*, *Battle v. A&E Television Networks, LLC*, 837 F. Supp. 2d 767 (M.D. Tenn. 2011), and *Revis v. McClean*, 31 S.W.3d 250 (Tenn. Ct. App. 2000). (App. Brief, at 34-35). He emphasizes language in *Battle* and *McClean* stating that an opinion may be actionable if it implies the existence of undisclosed defamatory facts. (*Id.* at 35). But Seaton does not identify any specific "undisclosed defamatory fact" in his complaint or his brief, nor could he.

TripAdvisor plainly disclosed that the Ranking was based on user reviews, and readers could link through to these reviews on the website. TripAdvisor thus disclosed the underlying facts (or, more precisely, opinions) upon which the Ranking was based and Seaton has expressly disclaimed any intention of challenging them as false and defamatory. *See Phantom Touring*, 953 F.2d at 729-31 (holding that statements in theater column were non-actionable opinion when structure and tone of language were subjective and columnist provided "full disclosure of the facts underlying his judgment—none of which have been challenged as false"); *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 704-05 (D. Md. 2000) (dismissing defamation claim as arising from protected opinion based on facts disclosed through hyperlinks to underlying website), *aff'd*, 11 F. App'x 99

(4th Cir. 2001); *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43 (N.Y. App. Div., 1st Dep't 2011) (ruling that email which provided hyperlinks to supporting websites did not imply it was based on undisclosed facts); *Redmond v. Gawker Media, LLC*, No. A132785, 2012 WL 3243507, at *6 (Cal. Ct. App. Aug. 10, 2012) (unpublished) (article on technology weblog was "completely transparent" when the "sources upon which the authors rely for their conclusions are specified, and the article incorporates active links to many of the original sources").

In addition, neither *Milkovich*, *Battle*, nor *Revis* dealt with the unique context of rankings, ratings and consumer reviews. In *Milkovich*, the Court found that the defendant's newspaper column clearly implied that the plaintiff committed the crime of perjury, 497 U.S. at 22, and in *Battle*, the plaintiff challenged statements and scenes in a television show that implied she was smuggling drugs into prison to her inmate husband. 837 F. Supp. 2d at 775-76. Because the implications in these cases could be proven true or false, the courts rejected the defendants' opinion arguments. *Revis*, moreover, involved statements made in the context of a labor dispute and affirmed summary judgment dismissing the case on opinion grounds. *See* 31 S.W. 3d at 252-53. None of these cases provides insight into whether the Dirtiest Hotels Ranking states or implies provably false facts about Seaton.

D. TripAdvisor's Dirtiest Hotels Ranking Is Constitutionally Protected Opinion, Not Objectively Verifiable Fact

The principles articulated above compel the conclusion that TripAdvisor's ranking of America's "dirtiest hotels" is constitutionally protected opinion. The Ranking, taken as a whole and correctly viewed in context, reflects the inherently subjective collective judgment of TripAdvisor's members about which hotels are "dirtiest." The Ranking's inherent subjectivity is compounded because the ratings of TripAdvisor's users are subjective expressions of dissatisfaction about cleanliness, a subjective attribute in its own right. Regardless of whether TripAdvisor uses numerical rankings or claims that its travel advice is "trusted," the Dirtiest Hotels Ranking is ultimately the expression of subjective judgment, not of objectively verifiable facts that could support a defamation or false light claim.

1. The Dirtiest Hotels Ranking is a Comparative Evaluation Based on Consumer Opinions

As established above in Section I.C., courts generally find ratings, rankings and reviews to be inherently subjective. The same result is warranted here. Both the immediate context and the broader social context of the Dirtiest Hotels Ranking make it obvious to a reasonable reader that TripAdvisor is expressing a comparison of the ten listed hotels based on its website users' opinions. The Ranking is organized in "top ten" format, a quintessential format for comparative rankings. *Cf. Myers v. Boston Magazine Co.*, 403 N.E.2d 376, 380 (Mass. 1980)

("The 'Best and Worst' format invites the reader to test his opinions against the author's."). On the website, the page specifically stated that the information was "as reported by travelers on TripAdvisor." (Roche Decl., Ex. A, R. 8-2, PageID # 66). The Ranking itself further signaled its user-generated character, featuring a quote from a user review, a "thumbs-down" icon with a statement of how many "reviewers do not recommend this hotel" (*id.*), and a link to each hotel's full page on TripAdvisor's website (Order, R. 25, PageID # 269), which provided access to all the user reviews for that hotel. The Press Release reinforces the impression using colorful, hyperbolic language in its headline: "Top 10 U.S. Grime-Scenes Revealed, *According to Traveler Cleanliness Ratings*." (Shelton Aff., Ex. 1 R. 15-2, PageID # 106 (emphasis added)).[6] Based on this context, the District Court was correct that a reasonable person would not confuse this "ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact." (Order, R. 25, PageID # 277).

The case for constitutional protection is even stronger here than in *Compuware* and *Aviation Charter*, where the subjective evaluations were based on

[6] The user cleanliness ratings upon which the Dirtiest Hotels Ranking is based are subjective and lacking in factually verifiable content. As any visitor to TripAdvisor's website can observe, when consumers write a review of a hotel, they are given the option to check one to five circles for "Cleanliness": one for "Terrible"; two for "Poor"; three for "Average"; four for "Very Good"; and five for "Excellent." *See* http://www.tripadvisor.com/.

objectively verifiable data. The user reviews upon which the Ranking is based are inherently subjective statements of opinion, and a reasonable reader would understand them to be so, especially when considering the larger social context of sharing views and information on the Internet. While not all statements in consumer reviews are automatically protected, courts have recognized that subjective expressions of consumer dissatisfaction with a product or service are not subject to objective verification and thus are constitutionally protected opinion.

In *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc.3d 1248(A), No. 117024/08, 2009 WL 2915273 (N.Y. Sup. Ct. Sept. 11, 2009), for example, a disgruntled former student posted negative comments about the "Swiss Finance Academy" on the consumer complaint website, RipOff Report. The court dismissed the plaintiff's defamation claims against the student, holding that the student's postings were constitutionally protected opinion. *Id.* at *5.[7] The court reasoned that "the website, when viewed in its full context, reveals that [the student] is a disgruntled consumer and that his statements reflect his personal opinion based upon his personal dealing with plaintiff. They are *subjective expressions of consumer dissatisfaction* with plaintiff and the statements are not actionable because they are [the student's] personal opinion." *Id.* (emphasis

[7] The Court also dismissed the claims against the website, based on the immunity for third-party content under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1). *Milewski*, 2009 WL 2915273 at *7.

added). *See also Hammer*, 392 F. Supp. 2d at 430-31 (defamation claims against bookseller website dismissed because negative consumer reviews of author's books were non-actionable opinion).

Moreover, reasonable readers expect to find opinions—not facts—when reading anonymous or pseudonymous Internet posts like the reviews found on TripAdvisor's website. In such a context, a reviewer "must be given the constitutional 'breathing space' appropriate to the genre." *Moldea v. New York Times Co.*, 22 F.3d 310, 315 (D.C. Cir. 1994) (emphasizing that allegedly defamatory statements appeared in a book review column, where readers expect reviewers to express opinions). Users of the Internet have come to expect "casual, emotive, and imprecise speech." *Sandals*, 86 A.D.3d at 43 (internal quotation marks omitted). As one court stated, "'readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts . . . . [T]he anonymity . . . makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than fact.'" *Tener v. Cremer*, No. 104583/10, 2012 N.Y. Misc. LEXIS 3721, at *12-13 (N.Y. Sup. Ct. July 16, 2012) (quoting *Sandals*, 86 A.D.3d at 44).[8]

[8] *See also Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1148-49 (Cal. Ct. App. 2012) (finding statements made on consumer website non-actionable in part because statements were made "on Internet Web sites which plainly invited the sort of

In another case on point, the owners of a restaurant sued the publisher of the *Zagat Survey of New York City Restaurants* ("*Zagat's*") over a negative restaurant review that was included in its guidebook. *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc.3d 974 (N.Y. Sup. Ct. 2004), *aff'd*, 21 A.D.3d 826 (N.Y. App. Div., 1st Dep't 2005). The *Zagat*'s review rated the restaurant's food a "9" on a scale of 0 to 30 and gave its décor and service a "15." 4 Misc.3d at 975. The review also included statements: "God knows 'you don't go for the food,'" and "weary-well-wishers suggest that they 'freshen up the menu and their makeup.'" *Id.* at 975. The *Zagat's* review was based on public opinion surveys, with numerical ratings reflecting the average scores given by survey participants and text based on direct quotes or paraphrasing of participants' comments. *Id.* at 976. Granting the defendant's motion to dismiss, the trial court held that both the numerical ratings and the negative statements in the review were non-actionable opinion. *Id.* at 980. Noting that "surveys and polls are a traditional way to assess opinion," *id.* at 977, the court reasoned that the statements quoted in the review "express a viewpoint and are subjective in nature," and that the numerical ratings

---

exaggerated and insulting criticisms of businesses and individuals which occurred here"); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 696 (Cal. Ct. App. 2012) ("[B]ecause Rogers's alleged defamatory statements appeared in a section of the Craigslist Web site entitled 'Rants and Raves,' the reader of the statements should be predisposed to view them with a certain amount of skepticism, and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts.").

likewise are "quintessential opinion, no different from rating a film zero to five out of five stars." *Id.* at 980. The court concluded "that the words and ratings at issue reflect *the collected subjective judgments of individual consumers*, which a reasonable reader would conclude . . . is an opinion of each consumer and worthy of constitutional protection, rather than a statement of fact." *Id.* (emphasis added and internal quotation marks omitted). The appeals court affirmed, holding that "[t]he allegedly libelous statements can only be construed as statements of opinion and thus are constitutionally protected." 21 A.D.3d at 827.

Like the *Zagat's* rating in *Themed Restaurants, Inc.*, reasonable readers would understand from the Dirtiest Hotels Ranking itself and from the TripAdvisor website as a whole, which is self-evidently geared towards publishing user-generated reviews and opinions, that the Ranking represents "the collected subjective judgments of individual consumers" and not an assertion of verifiable fact. 4 Misc.3d at 980. Further, a reasonable reader would view the pseudonymous online reviews upon which the Dirtiest Hotels Ranking is based as "subjective expressions of consumer dissatisfaction," *Milewski*, 2009 WL 2915273, at *5, and "would view [their] assertions with some skepticism and tend to treat its contents as opinion rather than fact," *Sandals*, 86 A.D.3d at 44. The District Court correctly concluded that a reasonable person could not "believe that

[the Ranking] reflected anything more than the opinions of TripAdvisor's millions of online users." (Order, R. 25, PageID # 278).

2. The Dirtiest Hotels Ranking Evaluates Cleanliness, Which Is a Subjective Trait

The fact that the ratings in TripAdvisor's Dirtiest Hotels Ranking involved cleanliness also supports the conclusion that the Ranking is subjective. Ultimately, whether or not a hotel is "clean" or "dirty," or whether one is "dirtier" than another, is a subjective impression that depends on the perceptions and standards of the hotel visitor in question and cannot be proven true or false. Just as one man's trash is another man's treasure, one reviewer's fleabag hotel is another's diamond in the rough—as is readily evident from the wide range of reviews on almost any listing, whether on TripAdvisor, Yelp, Amazon or any other consumer review site. Denominating one hotel in the country with the superlative form—"dirtiest"—is even more subjective and harder to verify. *Cf. Dodds v. ABC*, 145 F.3d 1053, 1066 (9th Cir. 1998) (Statement or implication in television broadcast that judge was "one of the three worst judges in the country" was "opinion rather than the type of factual assertion that can be proved to be demonstrably false"); *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170, 171-72 (D.N.J. 1982) (holding that review stating that gambling book was "#1 fraud ever" was non-actionable opinion).

The Nebraska Supreme Court faced the precise issue of whether an establishment's cleanliness or dirtiness is a matter of opinion in *"K" Corp. v. Stewart*, 526 N.W. 2d 429 (Neb. 1995). In that case, a member of a health club wrote a letter that complained about the "cleanliness of the club," noting that "any casual observer of the public rooms, locker rooms or exercise areas can easily note poor sanitary conditions and [*sic*] generally below the minimum acceptable standards of most members." *Id.* at 433. The letter also expressed concern over "a notice from the Omaha Board of Health concerning the pool and hot tub." *Id.* Noting that "statements which cannot be interpreted as stating actual facts are entitled to First Amendment protection," *id.* at 435, the Nebraska Supreme Court held that the defendant's statements about the cleanliness of the club were "nothing more than subjective evaluations" and, thus, protected opinion. *Id.* By way of contrast, the court held that the statement about the notice from the Board of Health was not protected because it "can only be understood to mean that the pool and hot tub were *found by the board* to have been unclean," *id.* (emphasis added), a statement of fact which could be verified. Here, the rankings reflected in the "Dirtiest Hotels" list are based on an aggregation of the subjective views of a multitude of consumers about what meets their own "minimum acceptable standards" of cleanliness, and the Dirtiest Hotels Ranking contains no assertion of

verifiable fact similar to the statement regarding the Board of Health notice in *Stewart.*

Moreover, as illustrated above, other cases involving negative ratings have involved even more concrete characteristics, such as the *safety* of an airline, *Aviation Charter*, 416 F.3d at 866-67, and the *creditworthiness* of a technology company, *Compuware*, 499 F.3d at 523-24. In both cases, the courts concluded that the ratings in question, while based on objective criteria, were constitutionally protected opinion. *Aviation Charter*, 416 at 871-72; *Compuware*, 499 F.3d at 529. This case presents an even stronger case for First Amendment protection because the Dirtiest Hotels Ranking does not even purport to be based on objective criteria, but rather on the personal opinions of TripAdvisor users.

3. The District Court Viewed the Dirtiest Hotels Ranking In its Full Context

Seaton argues that the District Court failed to view the Dirtiest Hotels Ranking in its full context, pointing to statements in the Press Release[9] that, in Seaton's view, "presented [the Ranking] as an accurate, reliable, and factual list and ranking of hotels which could be relied upon by the general public . . . in considering hotels or making travel plans." (App. Brief at 28; *id.* at 19 (same)).

[9] The statements in question are quoted at pages 7-8 in the Statement of Facts above.

Contrary to Seaton's argument, the District Court's decision plainly took these statements into consideration. The Court quoted them in full on page three of the Order and stated on page 6 that it would "consider the online pages cited by Plaintiff and Defendant." (Order, R. 25, PageID # 268, 271). Moreover, the District Court evaluated and rejected Seaton's argument that "in sharp contrast to typical hyperbole . . . [the] list is put forth with an actual numerical ranking, with comments suggesting the rankings are actual, verifiable, and factual." (*Id.*, PageID # 276-77).

The District Court did not engage in lengthy analysis on this point, but it did not need to, because these statements do not convey to a reasonable person that the Ranking is objectively verifiable. In fact, they reinforce the hyperbolic, opinionated nature of the ranking. Much of the language is obvious rhetorical hyperbole—e.g., "lifts the lid," "Top-Ten Grime Scenes," "names and shames," "tarnished title." It signals to the reasonable reader, by its hyperbolic tone, that what follows is opinion.

The other statements and slogans Seaton relies on at most suggest to the reader the TripAdvisor provides trusted advice. But "trusted" advice imparts the advisor's opinion or judgment at least as often as it provides verifiable facts. Whether it is a list of the top restaurants, universities or lawyers, a ranking is "trusted," not because it is necessarily factual, but because the source's judgment is

trusted. TripAdvisor's tagline, "World's Most Trusted Travel Advice," signals to a reasonable reader that subjective *advice*, not verifiable fact, is being transmitted. TripAdvisor connects travelers with other travelers, providing a forum for them to share—and for TripAdvisor to organize—their opinions on travel destinations. Collectively, this "wisdom of the crowd," also reflected in TripAdvisor's wise owl logo that appears at the top of the Ranking and the Press Release (Roche Decl., Ex. A, R. 8 2, PageID # 66), can be trusted and useful to consumers without necessarily being objectively verifiable.

"Most Trusted" is a common tagline, from "CNN: The Most Trusted Name in News" to "Craftsman: America's Most Trusted Tool Brand" to "Eagle Daily Investor: The World's Most Trusted Financial Advisors." This language only denotes a trusted source for the product or service in question, and, in any event, is commercial puffery that readers would not rely on in any literal sense. *See Demetriades v. Yelp, Inc.*, BC484055, slip op. at 9, 18-19 (Cal. Sup. Ct., Jan. 25, 2013) (Addendum B) (holding that consumer review website's statements about its review filter, including "most trusted," "remarkable filtering process," "most trustworthy," and "most unbiased and accurate information you will be able to

find," were "puffery and opinions about the filter and its results and not representations of fact").[10]

The District Court also viewed the Ranking and Press Release in their larger social context, considering them in light of the Court's "judicial experience and common sense." (App. Brief at 26 (quoting *Iqbal*, 556 U.S. at 679)). Drawing on its own experience, the Court concluded that the Ranking is "of the genre of hyperbole that is omnipresent. From law schools to restaurants, from judges to hospitals, everything is ranked, graded, ordered and critiqued." (Order, R. 25, PageID # 277). Applying the "reasonable person" standard with common sense and the hand of experience, the District Court concluded: "A reasonable person would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact; the reasonable person, in other words, knows the difference between a statement that is 'inherently subjective' and one that is 'objectively verifiable.'" (*Id.*, PageID # 277). The District Court plainly considered the full context into which the Ranking fits, both within and beyond TripAdvisor's website.

---

[10] *See also City of Monroe Employees v. Bridgestone*, 399 F. 3d 651, 671 (6th Cir. 2005) (holding that "statements of self-praise," including that defendant sold "the best tires in the world," was non-actionable puffery in securities fraud context); *In re Heartland Payments Sys., Inc.*, 834 F. Supp. 2d 566, 592 (S.D. Tex. 2011) (holding that defendants' slogans —"The Highest Standards" and "The Most Trusted Transactions"— were "puffery" on which the plaintiff "could not reasonably rely" in fraud and negligent misrepresentation case).

4. The Dirtiest Hotels Ranking is Subjective Regardless of Whether TripAdvisor Cites Numerical Rankings

Seaton also points to the fact that each of the Dirtiest Hotels has a numerical ranking (App. Brief, at 31) and a percentages of reviewers who, for a variety of reasons, cleanliness being only one, recommend against staying at the hotel (App. Brief, at 30). The District Court correctly ruled that "neither the fact that Defendant numbers its opinions one through ten, nor that it supports its opinions with data, converts its opinions to objective statements of fact. Any reasonable person can distinguish opinions based on reasons from facts based on reasons—just because TripAdvisor states its reasons for including Grand Resort on its list does not make the assertion one of objective fact."[11] (Order, R. 25, PageID # 277).

Even if a subjective rating is based on *objective* criteria, it is constitutionally protected if the basis is set forth and not factually false; where, as here, the underlying criteria simply reflect the rater's aggregation of *subjective* reviews, the constitutional protection even more clearly applies. Indeed, Seaton does not challenge any of the underlying third-party user reviews as false and defamatory—nor could he given both their subjective nature and the protection afforded

[11] Seaton contends that because the percentages of reviewers who do not recommend the hotel does not correspond with their position on the Ranking, this suggests that the rankings are skewed. But this is a comparison of apples and oranges. Plaintiff does not and cannot explain why the lack of correlation between two completely different measures—how reviewers rated a hotel's cleanliness and whether they would recommend the hotel overall—calls the Ranking into question.

TripAdvisor for the third-party content posted by its users under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1).[12] And far from signaling the presence of verifiable fact, a numerical ranking is "quintessential opinion, no different from rating a film zero to five out of five stars." *Themed Restaurants*, 4 Misc.3d at 980.

Because the Ranking is not subject to being objectively proven true or false and is constitutionally protected opinion, the Complaint fails to state a claim for defamation or false light.[13]

---

[12] *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) (affirming grant of motion to dismiss on Section 230 grounds of claims based on content of consumer reviews). Contrary to Seaton's suggestion (App. Brief, at 35-36), TripAdvisor did not argue that Section 230 provided a grounds for dismissal of its list of hotel rankings on a Rule 12(b)(6) motion; it simply mentioned in a footnote that it intended to establish this defense if the case proceeded past the motion to dismiss stage. (Mem., R. 8, PageID # 48 n.2). Moreover, the Section 230 cases Seaton cites are easily distinguishable. Here, Seaton alleges no facts—and there are none—showing that TripAdvisor requires, encourages, or solicits illegal or defamatory content, so it could not be held liable as an "information content provider" for the content of its users as in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), or *Jones v. Dirty World Entertainment Recordings, LLC*, 766 F. Supp. 2d 828 (E.D. Ky. 2011).

[13] An independent but equally dispositive basis for dismissal of the false light claim is that a plaintiff may not base such a claim on harm to a corporation. The Tennessee Supreme Court has held that a false light claim is a claim for invasion of personal privacy and, as such, it "cannot attach to corporations and other business entities." *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001). Seaton (who sues in his "d/b/a" capacity as proprietor of the Hotel) therefore cannot base such a claim on the alleged harm to his business arising from the publication of the Ranking. And Seaton cannot plausibly allege independent

II. THE DISTRICT COURT CORRECTLY HELD THAT AMENDMENT WOULD BE FUTILE

Seaton argues that his motion to amend should have been granted "for the same reasons" that he claims his defamation and false light claims were meritorious—"because the '2011 Dirtiest Hotels' list can reasonably be interpreted in a manner that is defamatory." (App. Brief, at 38; *id.* at 39 (asserting that if the Court holds that the Ranking "could be defamatory," it should not only reverse as to the motion to dismiss but as to the motion to amend)). He argues that trade libel is predicated on a false statement of fact regarding plaintiff's business; that tortious interference requires improper means, "which could include defamation"; and that, based on the same arguments put forth in support of reversing the dismissal of the defamation and false light claims (and not based on any separate arguments), his new claims should go forward. (*Id.* at 40-41). All of this amounts to a concession of what his pleadings make clear—that his proposed amended claims do nothing more than reiterate his original claims, based on the Dirtiest Hotels Ranking, and that all of the original and proposed claims therefore rise or fall together.

---

personal harm because TripAdvisor's publication of the Dirtiest Hotels Ranking concerned the Hotel and did not mention Plaintiff in his individual capacity. *See In re Comshare, Inc. Secs. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999) ("[A] federal court of appeals is not restricted to ruling on the district court's reasoning, and may affirm a district court's grant of a motion to dismiss on a basis not mentioned in the district court's opinion.").

The District Court correctly held that amendment would be futile because Seaton's proposed amendments do not alter the conclusion that the Ranking is constitutionally protected opinion, that Seaton merely attempts to repackage his original claims and fails to cure their constitutional defects, and that his trade libel and tortious interference claims independently fail as a matter of law.[14]

A. A District Court May Deny Leave to Amend Based on Futility Alone

While Seaton adequately states the standard of review on appeal of denial of a motion to amend based on futility, *see Dubuc v. Green Oak Township*, 312 F.3d 736, 743 (6th Cir. 2002), he misstates the underlying standard on a motion to amend, arguing that "the court should balance" the relevant factors, including futility, undue delay, lack of notice, bad faith and others. (App. Brief, at 38). In fact, when amendment is futile, no balancing is required. While motions for leave to amend are commonly granted, "a motion to amend a complaint should nevertheless 'be denied if the amendment . . . would be futile.'" *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 633 (6th Cir. 2009) (quoting *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995)). *See also Campbell v. BNSF Ry.*, 600 F.3d 667, 677 (6th Cir. 2010) (affirming denial of motion for leave to amend on futility grounds); *Kottmyer v. Maas*, 436 F.3d 684, 692 (6th Cir. 2006) (same).

[14] Seaton does not appeal the District Court's dismissal of his proposed amendment insofar as he had sought to state claims against Expedia, Inc. and TripAdvisor Holdings, LLC.

"An amendment is futile if it would not survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Campbell*, 600 F.3d at 677 (citing *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000)).

B. "Additional Specificity" Will Not Save Seaton's Original Claims

Seaton argues that he sought to amend in part "to expound upon and add additional specificity" to his original claims (App. Brief, at 37), in order "to better explain and illuminate the conduct at issue for the benefit of the parties and the court." (App. Brief, at 39). Whether a statement constitutes non-actionable opinion or verifiable fact is appropriately determined by the Court as a matter of law on a motion to dismiss under Rule 12(b)(6), based on a review of the challenged statement on its face and consideration of its full context. Seaton's proposed amended complaint did not—and could not—contain any additional material factual allegations relating to the language of the Dirtiest Hotels Ranking or its context that were not already before the District Court on the motion to dismiss. (Am. Cplt. ¶¶ 5-15, R. 16-1, PageID # 203-09). Neither his brief on appeal nor his motion to amend in the District Court explain how the proposed "additional specificity" would impact the determination of whether the Dirtiest Hotels Ranking contains objectively verifiable statements of fact about Seaton. Thus, as the District Court held, the proposed amended defamation and false light claims would be futile because they do not, and cannot, alter the dispositive

conclusion that TripAdvisor's Dirtiest Hotels Ranking is constitutionally protected opinion.

C. The Proposed Claims Impermissibly Replead Defamation

The District Court held that Seaton's proposed trade libel/injurious falsehood claim was futile because this claim, like the defamation and false light claims, requires publication of a false statement of fact. (Order, R. 25, PageID # 280). Likewise, the District Court held that Seaton could not "rely solely upon its defamation claim as proof of Defendant's 'improper means'" for his proposed tortious interference claim because "Defendant did not make any false statement of fact concerning Plaintiff." (Order, R. 25, PageID # 281). Seaton admits that these claims are based solely on the Dirtiest Hotels Ranking (Motion to Amend, R. 16, PageID # 200) and nowhere identifies any independent basis for them under Tennessee law. (*See* App. Brief, at 40 (arguing only that the Ranking "can reasonably be seen as asserting a false statement of fact, or opinion based in fact, and thus can be defamatory under the law")). For the reasons stated above, the District Court correctly held that the Dirtiest Hotels Ranking is constitutionally protected opinion, and therefore amendment would be futile.

The District Court's refusal to allow Seaton to repackage his failed defamation claims is consistent with longstanding First Amendment doctrine preventing plaintiffs from pleading around the stringent requirements of the First

Amendment. In *Hustler v. Falwell*, 485 U.S. 46 (1988), the Supreme Court held that the First Amendment barred not only the Reverend Jerry Falwell's defamation claim arising from a satirical feature in *Hustler* magazine, which a jury found could not "reasonably be understood as describing actual facts" about the plaintiff, but also his intentional infliction of emotional distress claim arising from the same publication. *Id.* at 49, 54-57. Even if the defendant's conduct could be considered "outrageous," the emotional distress claim was barred by the First Amendment. *See id.* at 57.

Following the Supreme Court's lead, this Circuit and courts nationwide have found that where the targeted speech is constitutionally protected (whether on opinion or actual malice grounds), plaintiffs may not raise other tort claims arising from the same facts, including trade libel, false light and tortious interference. *See, e.g.*, *Compuware*, 499 F.3d at 529 (plaintiff may not "use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim'") (quoting *Falwell*, 485 U.S. at 671); *Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) ("[a] party may not skirt the requirements of defamation law by pleading another, related cause of action"; rejecting unjust enrichment claim "derivative" of defamation claim).[15] In short, the First

[15] *See also Jefferson Cnty. School Dist.*, 175 F.3d at 856-57 (intentional interference with contractual and business relations and antitrust claims); *Deupree v. Iliff*, 860 F.2d 300, 304 (8th Cir. 1988) (intentional infliction of emotional

Amendment protects statements of opinion, no matter the claim. Seaton fails to address *Falwell* or any of its progeny.

Seaton's proposed trade libel and tortious interference claims are duplicative of his failed defamation claim, and therefore the District Court correctly held that amendment would be futile.

D. Even If They Were Not Duplicative, the Proposed Claims Fail on Their Own Merits

Seaton also fails to address several non-constitutional grounds on which this Court may affirm the District Court's denial of leave to amend, all of which were also raised below.

1. Seaton's Proposed Allegations Are Insufficient to State a Claim for Tortious Interference

To state a claim for tortious interference with prospective business relationships, a plaintiff must allege: (1) an existing business relationship with

---

distress); *Presidio Enter., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 685 (5th Cir. 1986) (state consumer protection statute); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 973 (3d Cir. 1985) (interference with contractual relations); *Rinsley v. Brandt*, 700 F.2d 1304, 1309-10 (10th Cir. 1983) (false light); *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1082 (C.D. Cal. 1998) (trade libel, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage); *Nichols v. Moore*, 396 F. Supp. 2d 783, 798 (E.D. Mich. 2005) (false light and intentional infliction of emotional distress), *aff'd*, 477 F.3d 396 (6th Cir. 2007); *Themed Restaurants*, 21 A.D.3d at 826-27 (negligence and trade libel); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1100-14 (Cal. Ct. App. 2001) (trade libel and tortious interference with economic advantage); *Ireland v. Edwards*, 584 N.W.2d 632, 640-41 (Mich. Ct. App. 1998) (intentional infliction of emotional distress and false light).

specific third parties; (2) defendant's knowledge of that relationship (and not mere awareness of the plaintiff's general business dealings with others); (3) defendant's intent to interfere with the business relationship; (4) defendant's improper motive or means; and (5) resulting damages. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). Here, the proposed amended complaint fails to state a tortious interference claim on multiple grounds, rendering the claim futile.

On the element of intent to interfere with a business relationship, Seaton's proposed amended complaint alleges only that, in publishing the Dirtiest Hotels Ranking, TripAdvisor "intended to cause the breach or termination of the business relationships enjoyed by the Plaintiff" and "intended to and did damage and destroy the confidence, goodwill and reputation enjoyed by the plaintiff." (Order, R. 25, PageID # 281 (quoting Am. Cplt. ¶ 28)). As the District Court correctly held, these "legal conclusions, unsupported by any factual allegations" do not satisfy the *Iqbal* standard on a motion to dismiss under Rule 12(b)(6). (*Id.*, PageID # 281). *See Iqbal*, 556 U.S. at 678 (court need not credit conclusory allegations or "'naked assertion[s]' devoid of 'further factual enhancement.'"); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009) ("We need not accept as true legal conclusions or unwarranted factual inferences, and [c]onclusory allegations or legal conclusions masquerading as factual allegations

will not suffice.") (citations and internal quotation marks omitted). Seaton does not challenge this ruling on appeal, *see* Mem. at 39-41, effectively conceding that his proposed amended complaint could not survive a motion to dismiss. *See Anton v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 634 F. 3d 364, 368 n.2 (6th Cir. 2011) ("'[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.'") (quoting *United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006)).

The proposed tortious interference claim has two other fatal flaws which it was unnecessary for the District Court to reach. First, the allegations of generalized, existing relationships with "individuals, groups, or companies who vacation or travel to the area frequently" and prospective relationships with "travelers to the area" (Am. Cplt., ¶ 26, R. 16-1, PageID # 211), are insufficient to satisfy the pleading requirement that the plaintiff identify *specific* existing or prospective business relationships with third parties. *See Overnite Transp. Co. v. Teamsters Local Union No. 480*, No. M2002-02116-COA-R3-CV, 2004 WL 383313, at *13 (Tenn. Ct. App. Feb. 27, 2004) (dismissing tortious interference claim with respect to existing business relationships when complaint did not identify specific third parties and only referred to general categories of persons), *aff'd*, 172 S.W.3d 507 (Tenn. 2005).

Second, the proposed amended complaint fails to allege TripAdvisor's knowledge of those unspecified business relationships. The allegation that TripAdvisor "was fully cognizant of the on-going business relationships that the Plaintiff enjoyed as well the prospective business relationships reasonably anticipated [at the Hotel]" (Am. Cplt., ¶ 27, R. 16-1, PageID # 211), like Seaton's allegations of intent, is a conclusory allegation that fails to meet the *Iqbal* standard. And, in any event, it alleges only "mere awareness of the plaintiff's general business dealings with others" that is inadequate to satisfy the knowledge element, as stated by the Tennessee Supreme Court. *See Trau-Med*, 71 S.W.3d at 701.

2. Failure to Adequately Allege Direct and Immediate Pecuniary Harm Renders the Trade Libel Claim Futile

To state a claim for trade libel or injurious falsehood, a plaintiff must plead specific pecuniary losses resulting "directly and immediately" from the alleged falsehood. *See* Restatement (Second) of Torts §§ 623A, 633 (1977), *cited in Wagner v. Fleming*, 139 S.W.3d 295, 301-302 (Tenn. Ct. App. 2004) (recognizing injurious falsehood cause of action in Tennessee). Seaton's proposed amended complaint alleges only in general, conclusory fashion that TripAdvisor's alleged "wrongful disparagement" of the Hotel "has caused and will continue to cause damages. . . ." (Am. Cplt., ¶ 32, R. 16-1, PageID # 212-13). There are no supporting *factual* allegations in the complaint or the proposed amended complaint of itemized, specific pecuniary losses (or even of specific lost customers)

whatsoever, much less any allegations of losses having resulted "directly and immediately" from TripAdvisor's publication of the "Dirtiest Hotels" list. For example, the proposed injurious falsehood claim fails to allege a specific dollar loss in revenues following publication of the Ranking, as compared to revenues prior to publication. Nor are there factual allegations to support that any such losses could be attributed "directly and immediately" to publication of the Ranking, as opposed to other factors, such as a declining economy or unanticipated severe weather. Seaton's proposed injurious falsehood claim therefore cannot survive a motion to dismiss under the *Iqbal* standard.

The District Court's denial of Seaton's motion to amend should be affirmed for the reasons stated by the District Court and the additional reasons set forth herein.

CONCLUSION

Seaton's complaint directly targets constitutionally protected opinion: the Dirtiest Hotels Ranking is a comparative evaluation of hotel cleanliness based on the inherently subjective views and feedback of TripAdvisor's users about hotels they have visited. Because Seaton's claims arise from statements that are not capable of being objectively proven true or false, they fail to "plausibly give rise to an entitlement to relief," *Iqbal*, 556 U.S. at 679, and were appropriately dismissed by the District Court. Because Seaton's proposed amended complaint fails to rescue his fatally defective defamation and false light claims or provide the basis for any viable new claims, amendment would be futile. This Court should therefore affirm both the District Court's dismissal of Seaton's claims with prejudice and its denial of his motion to amend.

Dated: New York, New York
February 20, 2013

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

/s/ James Rosenfeld

Laura R. Handman
James Rosenfeld
Samuel M. Bayard

1633 Broadway, 27th Floor
New York, New York 10019
Tel: (212) 489-8230
Fax: (212) 489-8340
laurahandman@dwt.com
jamesrosenfeld@dwt.com
samuelbayard@dwt.com

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
S. Russell Headrick (BPR No. 005750)
Meghan H. Morgan (BPR No. 024619)

265 Brookview Centre Way, Suite 600
Knoxville, Tennessee 37919
Tel: (865) 549-7200
Fax: (865) 525-8569
rheadrick@bakerdonelson.com
mhmorgan@bakerdonelson.com

Attorneys for TripAdvisor LLC

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11,332 words of text as calculated by the word-processing program used to prepare it, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Sixth Circuit Rule 32(b)(1).

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Times New Roman font.

/s/ James Rosenfeld

DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th floor
New York, New York 10019
Tel: (212) 489-8230
Fax: (212) 489-8340

Attorneys for Defendant-Appellee TripAdvisor LLC

February 20, 2013

CERTIFICATE OF SERVICE

I, James Rosenfeld, attorney for Defendant-Appellee TripAdvisor LLC, hereby certify that I have this day electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following:

John T. Milburn Rogers
John Rogers Law Group
102 South Main Street
Greeneville, TN 37743
(423) 638-7000

Sidney Gilreath
Gilreath & Associates
550 Main Avenue, Suite 600
Knoxville, TN 37902
(865) 637-2442

Attorneys for Plaintiff-Appellant Kenneth M. Seaton d/b/a Grand Resort Hotel and Convention Center

/s/ James Rosenfeld

DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th floor
New York, New York 10019
Tel: (212) 489-8230
Fax: (212) 489-8340

Attorneys for Defendant-Appellee TripAdvisor LLC

February 20, 2013

ADDENDUM A: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry #	Description of Document	Page ID # Range
1	Notice of Removal	1-3
1-1	Complaint	4-7
7	Motion to Dismiss the Complaint by TripAdvisor LLC	39-40
8	Defendant TripAdvisor LLC's Memorandum of Law in Support of Its Motion to Dismiss	41-64
8-1	Declaration of Cindy Klein Roche	65
8-2	Exhibit A to Klein Declaration (2011 Dirtiest Hotels page)	66
15	Plaintiff's Response to Defendant's Motion to Dismiss	82-103
15-1	Affidavit of Todd A. Shelton	104-105
15-2	Exhibit 1 to Shelton Affidavit (2011 Dirtiest Hotels press release)	106-109
16	Motion to Amend the Complaint	200-01
16-1	Amended and Restated Complaint	202-215
19	Defendant TripAdvisor LLC's Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Complaint	221-234
20	Defendant TripAdvisor LLC's Memorandum of Law in Opposition to Plaintiff's Motion to Amend the Complaint	235-252
25	Order Granting Defendant's Motion to Dismiss	266-282
26	Judgment	283
27	Notice of Appeal	284

ADDENDUM B: *DEMETRIADES V. YELP, INC.*, BC484055 (CAL. SUP. CT., JAN. 25, 2013)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JAMES DEMETRIADES, Plaintiff, vs. YELP, INC., Defendant.	Case No.: BC484055 [TENTATIVE] RULINGS/ORDERS

Defendant's Special Motions to Strike are GRANTED.

Defendant's Demurrers are OFF CALENDAR.

I.

INTRODUCTION

James Demetriades ("Plaintiff") commenced action against Yelp, Inc. ("Defendant"). Plaintiff's First Amended Complaint (FAC) alleges causes of action for: (1) untrue or misleading

advertising (Bus. & Prof. C. §§17500, et seq.); and (2) unfair business practices (Bus. & Prof. C. §§17200, et seq.) Plaintiff alleges that Defendant falsely represents the efficacy and ability of its system for filtering comments and reviews.

Defendant filed two special motions to strike. After the filing of the first motion, Plaintiff filed a FAC. The second motion is therefore addressed to the FAC. Defendant argues that the complaints should be stricken because they target speech concerning matters of public interest and speech protected by the First Amendment. Defendant then argues that Plaintiff will not be able to establish a likelihood of prevailing on the merits because Plaintiff lacks standing, because the claims are barred by the Communications Decency Act, and because the alleged misrepresentations are mere puffery that could not have deceived a reasonable consumer.

In Opposition, Plaintiff argues that Defendant fails to comprehend that this lawsuit is concerned with misrepresentations Yelp made regarding its filter and not the comments that were posted on Yelp concerning Plaintiff's restaurants. Plaintiff then argues that the conduct at issue does not arise from a protected activity because the FAC falls within the commercial speech exception and the public interest exception. Plaintiff next argues that it can establish a probability of prevailing on the merits. Plaintiff states that

he has standing because he is the sole owner of the LLC that owns the restaurants and paid for the advertising. Plaintiff further argues that the CDA does not apply because the statements at issue are not third party statements posted on Defendant's website. Finally, Plaintiff argues that the statements are not mere puffery but instead are statements of fact, and that, even if they are opinions, they are still actionable because Defendant held itself out as an expert regarding the filtering process.

In Reply, Defendant argues that the commercial speech exception does not apply because the statements were not statements of fact, because Defendant's primary business is not selling advertising, and because the misrepresentations did not relate to the advertising. Defendant next argues that the public interest exception does not apply because Plaintiff clearly did not file this lawsuit solely for the public interest. Defendant further argues that Plaintiff lacks standing because the injury was to the LLC, not to him. Defendant further argues that the claims will also fail because they are protected by the CDA and because the statements are not actionable.

//

//

//

II.

DISCUSSION

A. Generally

In a motion to strike under CCP §425.16, the court engages in a two-part analysis: (1) the court decides whether defendant has made a threshold showing that the challenged cause of action arises from a protected activity; and (2) if such a showing has been made, the burden then shifts to plaintiff to demonstrate a probability of prevailing on the merits of his or her claims. Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53. The purpose of this statute is to respond to lawsuits that chill citizens from exercising their political rights to free speech and activities.

B. Arising From Prong

A defendant has the initial burdening of showing a cause of action arises from a protected activity. CCP §425.16(e)[1]. Martinez v. Metabolife Inter. Ins. (2003) 113 Cal.App.4th 181,

[1] Section 425.16(e) provides:

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

186; Fox Searchlight Pictures Inc. v. Paladino (2001) 89 Cal.App.4th 294, 304. Specifically, courts decide whether moving parties have made a prima facie showing that the attacked claims arise from a protected activity, including defendants' right of petition, or free speech, under a constitution, in connection with issues of public interest. Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 278; Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 671; Equilon Ent., supra, 29 Cal.4th at 67; Gov. Gray Davis Committee v. Amer. Taxpayers Alliance (2002) 102 Cal.App.4th 449, 458-59; Weil & Brown, Cal. Prac. Guide: Civ. Pro Before Trial (The Rutter Group 2006) ¶7:244.1; CCP §425.16(e).

In determining whether the burden has been satisfied, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324, 329. Moving parties can satisfy their burden by showing (1) statements made before legislative, executive or judicial proceedings, or made in connection with matters being considered in such proceedings, or (2) statements made in a public forum, or other conduct in furtherance of the exercise of the constitutional rights of petition or free speech, in connection with issues of public interest. CCP §425.16(e); Equilon Ent., supra, 29 Cal.4th at 66. The motion must be

supported by declarations stating facts upon which the liability or defense is based. CCP §425.16(b).

Defendant met its initial burden in establishing that the alleged statements and alleged misrepresentations arise from a protected activity. Statements regarding the filtering of reviews on a social media site such as yelp.com are matters of public interest and are therefore protected. A public interest involves more than mere curiosity, a broad and amorphous interest, or private information communicated to a large number of people, and instead concerns a substantial number of people, some closeness between the statements and the public interest, and a focus upon the communications as being the interest and not upon a private controversy. McGarry v. Univ. Of San Diego (2007) 154 Cal.App.4th 97, 110. "Consumer information ..., at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest." Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 898. The statements were also made in a public forum. Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41 n.4 ("Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute.")

Plaintiff's opposition does not discuss whether the alleged statements qualify as protected speech concerning a matter of public interest pursuant to CCP §425.16. Instead, Plaintiff

argues that the protections of the anti-SLAPP statute do not apply because of the commercial speech exception and public interest exception found in CCP §425.17. "The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it—i.e., the plaintiff." Simpson Strong-Tie Company, Inc. v. Gore (2010) 49 Cal.4th 12, 26.

The commercial speech exception in CCP §425.17(c) provides:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

"Code of Civil Procedure section 425.17, subdivision (c), simply does not provide… that every case arising from statements uttered by a commercial enterprise are exempted from the anti-SLAPP statute's purview." Mendoza v. ADP Screening and Selection Services, Inc. (2010) 182 Cal.App.4th 1644, 1652.

As recently stated by the Court of Appeals, the commercial special exception requires establishing all of the following elements:

> Section 425.17, subdivision (c) exempts a cause of action arising from commercial speech from the anti-SLAPP law when '(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17[, subdivision] (c)(2) [i.e., an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer].'

Hawran v. Hixson (2012) 209 Cal.App.4th 256, 270, citing Simpson Strong-Tie, supra, 49 Cal.4th at 30. "The commercial speech exemption, like the public interest exemption, 'is a statutory exception to section 425.16' and 'should be narrowly construed.'" Simpson Strong-Tie, supra, 49 Cal.4th at 22.

Plaintiff failed to show that the commercial speech exception applies. Even if Plaintiff has met its burden to establish that Defendant is primarily engaged in the business of selling advertising, Plaintiff failed to show that the alleged misrepresentations arise from a statement of fact about that business's operations, goods, or services. First, the alleged misrepresentations concern the filtering process for reviews and do not relate to the selling of advertising. Second, Plaintiff failed to show that the alleged misrepresentations are statements of fact instead of opinions and puffery. A review of the statements[2] shows that these are typical representations made by a business about its product and are not actionable representations of fact. Each statement includes subjective language ("most trusted", "remarkable filtering process", "most trustworthy", "most established sources", "less trustworthy", "rest assured", "most unbiased and accurate information you will be able to find", "always working to do as good a job as possible"). These statements cannot be considered statements of fact sufficient to invoke the commercial speech exception because they are simply not misrepresentations of fact.

---

[2] The five alleged misrepresentations are discussed in the Opposition at 6:12 - 7:14.

Plaintiff also argues that the public interest exception of CCP §425.17(b) applies. That section states:

Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

> (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.
>
> (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.
>
> (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

"Section 425.17(b)'s exception applies only to actions brought 'solely in the public interest or on behalf of the general public.' Use of the term 'solely' expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought 'solely' in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception." Club Members For An Honest Election v. Sierra Club (2008) 45 Cal.4th 309, 316-17. "Suits

motivated by personal gain are not exempted from the anti-SLAPP motion." Blanchard v. DIRECTV, Inc. (2004) 123 Cal.App.4th 903, 916.

Plaintiff failed to show that the public interest exception applies because this action is not brought solely in the public interest. Plaintiff's own opposition establishes his intense personal interest in this case because Plaintiff's claims were spurred in part by negative reviews posted by an anonymous user and the filtering of allegedly proper reviews. Plaintiff repeatedly states that he has a significant financial interest in these same restaurants whose reviews have been negatively affected by Yelp's filter. Indeed, Plaintiff seeks an injunction enjoining defendants from "filtering reviews of Users of the Yelp website while falsely advertising to the public that the unfiltered reviews posted on the Yelp website are fair, trustworthy or unbiased." FAC prayer, ¶2b. This prayer shows that Plaintiff's claims are not based solely on the public interest because Plaintiff himself has shown that he has an intensely personal and financial interest in the review filtering process and its resultant reviews for his own restaurants. Therefore, the public interest exception does not apply.

As such, for the above reasons, Defendant met its initial burden in establishing that the protection of CCP §425.16 apply.

C. Probability of Success on the Merits

If moving parties successfully have shifted the burden, then opposing parties must demonstrate a probability of prevailing on the merits of the complaint. Equilon Ent., supra, 29 Cal.4th at 67; Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548; §425.16(b)(1). To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts, which, if credited by the trier of fact, is sufficient to sustain a favorable judgment. Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1435; Navellier v. Sletten (2002) 29 Cal.4th 82, 88; Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 31 (complaint must not be vulnerable to a successful demurrer). Hence, the evaluation includes reviews of the pleadings and moving and opposing declarations. Equilon Ent., supra, 29 Cal.4th at 67; CCP §425.16(b)(2). "The prima facie showing of merit must be made with evidence that is admissible at trial." Salma v. Capon (2008) 161 Cal.App.4th 1275, 1289.

"[A]n action may not be dismissed under this statute if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant." Taus v. Loftus (2007) 40 Cal.4th 683, 729. "The plaintiff need only establish that his or her claim has 'minimal

merit'…to avoid being stricken as a SLAPP." Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291. Further, a plaintiff need not address all alleged theories in order to show that a cause of action has some merit. A.F. Brown Electrical Contractor, Inc. v. Rhino Elec. Supply, Inc. (2006) 137 Cal.App.4th 1118, 1124. The opposing parties' burden as to an anti-SLAPP motion is like that of a party opposing a motion for summary judgment. See, e.g., DaimlerChrysler Motors Co. v. Lew Williams, Inc. (2006) 142 Cal.App.4th 344, 352. Additionally, whether complainants have satisfied their burden is a question of law. Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821.

Plaintiff failed to show that he has a probability of prevailing on the merits because Plaintiff has failed to show that he has standing and because the alleged misrepresentations that form the basis for his claims under the unfair business practices and unfair advertising statutes are opinions and puffery. The elements of a cause of action for false advertising are: (1) defendant intended to dispose of real or personal property or perform services; and (a) defendant publicly disseminated advertising containing an untrue or misleading statement; (b) defendant knew, or should have known, it was untrue or misleading; and (c) it concerned the real or personal property or services or their disposition or

performance; or defendant publicly disseminated advertising with the intent not to sell the property or services at the price stated or as advertised. Bus. & Prof. C. §17500; William L. Stern, Bus. & Prof. C. §17200 Practice (The Rutter Group 2006) ¶4:3. The elements of a cause of action for unfair business practices are: (1) a business practice; (2) that is unfair, unlawful or fraudulent; and (3) authorized remedy. Bus. & Prof. Code §17200; Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 676; Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal.4th 303, 317 (damages cannot be recovered, but instead injunctive relief and restitution compelling defendant to return money); William L. Stern, Bus. & Prof. C. §17200 Practice (The Rutter Group 2005) ¶7:116 et seq.; 5 Witkin, California Pro. (4th ed. 1997) Pleading, §§735. See also Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal.App.4th 1351, 1362 (to be actionable unfair business practices, representations must be likely to deceive a reasonable consumer, and not akin to puffing).

"Proposition 64, which amended Business and Professions Code section 17204 to provide that a private individual has standing to assert a claim under the UCL only if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal.App.4th 798, 812. "Proposition

64 amended the unfair competition law to provide that a private plaintiff may bring a representative action under this law only if the plaintiff has 'suffered injury in fact and has lost money or property as a result of such unfair competition…." Arias v. Superior Court (2009) 46 Cal. 4th 969, 978. Under the UCL, an "'injury in fact' [is a]…'distinct and palpable injury' suffered 'as a result of the defendant's actions.' Alternatively,…another definition of 'injury in fact' [is] as 'an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not conjectural or hypothetical." Peterson v. Cellco Partnership (2008) 164 Cal.App.4th 1583, 1590. See also Hall v. Time Inc. (2008) 158 Cal.App.4th 847, 854-55 ("[A] plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim.") [citations omitted].

Similarly, Plaintiff must also allege that she has lost money or property as a result of such unfair competition. As stated recently by the Supreme Court:

> There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be

> required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.

Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 323.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." CCP §367. Plaintiff filed this lawsuit in his own name. However, as established in Plaintiff's own opposition, the costs incurred in advertising with Defendant were incurred by Multiversal, LLC, which owns Rafters and Red Lantern, the two restaurants in question. Plaintiff attempts to argue that, because he is the sole owner of Multiversal, LLC, he has sufficient standing because he lost money because the LLC lost money. However, Plaintiff's argument essentially seeks to ignore the separate corporate identity of the LLC. ""A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two 'members' [citation] who own membership interests [citation]. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company [citation]." PacLink Communications Intern., Inc. v. Superior Court (2001) 90 Cal.App.4th 958, 963, citing 9 Witkin, Summary of Cal. Law (2001 supp.) Corporations, §43A, p. 346. "[T]he principles of derivative lawsuits applicable to

corporations likewise apply to a limited liability company." PacLink Communications Intern., Inc., supra, 90 Cal.App.4th at 963. See also California Corporations C. §17300.

"Ignoring a corporation's separate existence is a rare occurrence, particularly where it is the shareholders who seek to pierce its veil, and the courts will do so only 'to prevent a grave injustice. [Citations.]'" Seretti v. Superior Nat. Ins. Co. (1999) 71 Cal.App.4th 920, 931. "Individuals are free to operate their business in their own names and accept all its debts and liabilities as their own. Having elected to avail themselves of the benefits of the corporate structure… they cannot be heard to complain of their inability to take personal advantage of a right belonging to the corporation alone." Id. "[T]he individual shareholder may not bring an action for indirect personal losses (i.e., decrease in stock value) sustained as a result of the overall harm to the entity." Bader v. Anderson (2009) 179 Cal.App.4th 775, 788. This prohibition also extends to claims for damages resulting from lost corporate profits:

> Because corporate profits belong to the corporation, and not to its shareholders individually, lost profits are an "'injury to the corporation, or to the whole body of its stock'" (Jones v. H.F. Ahmanson & Co., [(1969) 1 Cal.3d 93, 106]) and therefore are derivative in nature. When corporate lost profits are sought as damages, the gravamen of the complaint is injury to the corporation, not injury to an individual shareholder.

Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal.App.4th 212, 232.

The injury allegedly suffered in this case - expending money to advertise on Yelp's website due to Defendant's false and misleading advertising - are injuries to the LLC, not to Plaintiff. "Because members of the LLC hold no direct ownership interest in the company's assets (Corp. Code, §17300), the members cannot be directly injured when the company is improperly deprived of those assets." PacLink Communications Intern., Inc., supra, 90 Cal.App.4th at 964. The injury is therefore derivative in nature and was only to the LLC. As such, Plaintiff has no standing as an individual because he has suffered no separate and individual injury in fact or lost money. Therefore, his claims fail.

Second, the claims fail because the allegations do not include misrepresentations of fact. To be actionable unfair business practices, representations must be likely to deceive a reasonable consumer, and not akin to puffing. Consumer Advocates, supra, 113 Cal.App.4th at 1362. As discussed above, the alleged misrepresentations are puffery and opinions about the filter and its results and not representations of fact. They are "boasts, all-but-meaningless superlatives," and "claim[s] which no reasonable consumer would take as anything

more weighty than an advertising slogan." Id. at 1361. As such, the statements cannot be actionable because the statements were not likely to deceive a reasonable consumer.

Therefore, for the above reasons, Plaintiff failed to show that he has a probability of prevailing on the merits.

III.

CONCLUSION

Based upon the foregoing, the court orders that:

1) Defendant's Special Motions to Strike are GRANTED.

2) Defendant's Demurrers are OFF CALENDAR.

MOVING PARTY TO GIVE NOTICE TO ALL PARTIES.

NON-COMPLIANCE WITH ANY ORDER HEREIN SHALL EXPOSE THE NON-COMPLIANT PARTY AND/OR COUNSEL TO ANY SANCTIONS AUTHORIZED BY LAW.

IT IS SO ORDERED.

DATED: January 24, 2013

YVETTE M. PALAZUELOS
JUDGE