SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 45

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| NEWS AMERICA MARKETING FSI L.L.C., | : | |
| Plaintiff, | : | Index No.: 601044/09 |
| -against- | : | DECISION AND ORDER |
| VALASSIS COMMUNICATIONS, INC., | : | Motion Sequence 010 |
| Defendants. | : | |

**MELVIN L. SCHWEITZER, J.:**

Defendant Valassis Communications, Inc. (Valassis) moves pursuant to CPLR 3211 to dismiss plaintiff's First Amended Complaint (FAC), which states a sole cause of action for commercial defamation.

**Background**

This action concerns a dispute between two competitors in the business of selling space in "Free Standing Insert" (FSI) coupon booklets to companies that package goods to consumers. These coupon booklets are inserted into Sunday newspapers and are used by consumers across the country.

Plaintiff News America Marketing FSI L.L.C. (News America) distributes its booklets under the name "Smart Source." Its chief competitor, Valassis, distributes its booklets under the name "Red Plum." On February 1, 2009, Valassis stopped distributing its Red Plum booklets in Sunday newspapers in favor of sending the booklets to consumers through direct mail, also characterized by the derisive term "junk mail." Valassis' decision to use junk mail led to the creation of the consumer advocacy website www.bringbackthecoupons.com (the website), a

public electronic forum for the exchange of information about Valassis' decision to discontinue inserting its coupons in newspapers. On the website, consumers allegedly threatened to stop using Red Plum coupons if they were sent by junk mail, and to stop purchasing from manufacturers who advertised by means of Valassis' junk mail.

News America alleges that Valassis, concerned about this reaction by consumers, attempted to redirect consumer anger away from it and toward News America by allegedly publishing false statements on the website about News America. The statements, which appeared as two posts on a comment thread, alleged that News America deceptively created the Bring Back the Coupons website to foment a consumer uprising against Valassis. News America alleges, to the contrary, that it had no role whatsoever in creating or controlling the website. Valassis employees allegedly made these false statements through the use of two aliases, "Max" and "Jane." "Max" posed as a concerned consumer, and "Jane" posed as an advertising executive claiming to have worked with both News America and Valassis for more than twenty years.

Max's entire post reads as follows:

> Don't be a corporate pawn.
> I too feel your pain, at least the pain of all the "real"
> people that have posted on here.
> But, did you know who created this web site? News America
> Marketing, the suppliers of Smart Source! I've heard about
> some low tactics, but pretending to be concerned about
> consumers with a grass-roots effort in an effort to discredit your competition.
> Urrrggghhh! Can't we even have an honest consumer
> uprising without finding out we are just shills for the
> man? Hey, News America—don't enlist me to fight your
> battles and don't pretend to care about us when you
> obviously have ulterior motives.
> Everyone, continue to post if you want, but just be aware

of who owns this blog! No wonder they had so much info on the clients, newspapers, etc. Sneaky!
But, continue to spread the word–let's get coupons back in the newspaper. I will do my part–I am just not going to support a company that tries to use me!
Max

Nine minutes after "Max's" post appeared on the website, the post by "Jane" appeared:

Max,
Why doesn't this surprise me. I have worked with both News America and Valassis for years. While neither company's sales staff can be considered angels, the News America crew can be particularly ruthless.
I remembered this posting in DM News from quite some time ago I had save in my email.
In its introduction in the lawsuit, Valassis said that News America COO Paul Carlucci shows his sales force a vignette frm The Untouchables that shows Al Capone beating one of his enemies to death with a baseball bat that Valassis claims the scene is a metaphor for the business practices that News America expects of its sales force and employees to illegally leverage its market dominance in the in-store advertising and promotions market to gain an unfair advantage in the coupon market, the documents said.
Jane

Following the publication of these statements, the actual owners of the website discovered that the postings originated from a server in Livonia, Michigan, which was registered to Valassis. In a separate action between the parties in state court in Michigan, Valassis produced a web server log report which revealed that several Valassis employees accessed the website at the same time the statements by "Max" and "Jane" were posted. Valassis apparently no longer disputes that these posts originated from within Valassis. News America contends that the statements posted by Valassis under the pseudonyms "Max" and "Jane" are defamatory and, because they impugn its business integrity, constitute defamation *per se*.

**Discussion**

When reviewing a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court decides whether the facts alleged in the plaintiff's complaint fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]. The court reads the facts alleged in the complaint as true and accords them every favorable inference. *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. If the plaintiff's allegations state a cognizable theory, the defendant's motion to dismiss must be denied. *Moore v Bronx-Lebanon Hosp.*, 50 AD3d 286 [1st Dept 2008].

Defamation arises from "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]. The elements of an action for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Id.* A plaintiff will successfully plead a cause of action for defamation if "the contested statements are reasonably susceptible of a defamatory connotation." *Equinox Mgmt. Group, Inc. v Guardian Life Ins. Co. of America*, 28 AD3d 246, 247 [1st Dept 2006]. This is a legal question for courts to resolve in the first instance. *James v Gannett Co.*, 40 NY2d 415, 419 [1976]. The court places the contested words in the context of the entire communication in which they appear to determine whether they are defamatory. *Id.* If the statements are "not reasonably susceptible of a defamatory meaning, they are not actionable

and cannot be made so by a strained or artificial construction [internal quotation marks and citation omitted]." *Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 [1997].

Defendant here argues that the posts by "Max" and "Jane" cannot be defamatory as a matter of law because they are opinions, which are absolutely protected under New York law and cannot form the basis of an action for defamation. *Immuno A.G. v Moor-Jankowski*, 77 NY2d 235, 256 [1991]. The difference between fact and opinion is not always obvious at first glance and depends on "what the average person hearing or reading the communication would take it to mean." *Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986]. To help courts separate fact from opinion, the Court of Appeals has provided the following test:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal...readers and listeners that what is being read or heard is likely to be opinion, not fact." *Gross v New York Times Co.*, 82 NY2d 146, 153 [1993].

Applying these factors, the court finds that several of the statements made by Max constitute actionable fact. First, Max's post is not ambiguous. It is precise and imports the clear–and allegedly false–meaning that News America owned and operated the Bring Back the Coupons website to provide a forum for generating negative publicity about Valassis. Second, the assertions in Max's post are objectively verifiable. Whether or not News America created and maintained the Bring Back the Coupons website can be proven true or false, as can other statements made by Max, including whether News America "enlist[ed]" Max to fight its battles or whether News America was "pretending to be concerned consumers with a grassroots effort all in an effort to discredit [its] competition." Third, the context and social setting where these

statements appeared signal to an average reader that they are likely to be fact and not opinion. This Court simply finds no merit in Defendant's argument that the statement "[D]id you know who created this web site? News America Marketing, the suppliers of Smart Source!" can be understood by an average reader to be anything but an objectively verifiable fact. Given the tone of the posts and their context on a consumer advocacy website, this and other statements by Max and Jane signal to an average reader that they are credible and should be taken at face value as objective fact.

Defendant's interpretation of the relevant case law is unpersuasive. Defendant relies on *Immuno AG. v Moor-Jankowski*, 77 NY2d 235 [1991] for the proposition that courts should not "isolate particular phrases" to obtain a defamatory meaning where the context of the entire statement militates against such an interpretation. *Immuno* advises courts to begin their analysis with the "content of the whole communication, its tone and apparent purpose." *Id.* at 250. Examining the tone and purpose of the disputed language convinces this court that several of the statements are facts. The purpose of the Bring Back the Coupons website was to provide a legitimate public forum for concerned consumers to exchange information about Valassis' decision to distribute its coupons through junk mail. The tone of the posts by Max and Jane reflects, on the one hand, the outrage felt by a consumer who has purportedly discovered that he is merely a "shill[] for the man" and, on the other hand, the resignation of an advertising executive who, after dealing with the "particularly ruthless" crew at News America for years, is purportedly too jaded to be surprised by their underhanded business tactics. Read in the full context of the Bring Back the Coupons website, several of the disputed statements are unambiguous factual assertions claiming that News America deceptively owned the website to

manipulate consumer sentiment against Valassis. A reader does not need to undertake a "hypertechnical parsing" of Max's post to conclude that its plain language and full context communicate the defamatory content which supports the gravamen of plaintiff's Complaint. *Gross* at 156.

Defendant's reliance on *Gross v New York Times Co.*, 82 NY2d 146 [1993] is likewise misplaced. In *Gross*, the court found that an average reader would understand the comments at issue in that case, which appeared in a thoroughly researched newspaper article to be fact, which the court found to be capable of a defamatory connotation. *Id.* at 155-56. The court contrasted the disputed comments in that case with ones which might be made in the heat of a debate, characterizing those comments as "a mere rhetorical flourish or the speculative accusation of an angry but ill-informed citizen." *Id.* at 155. A plain reading of the disputed statements here, taken in the full context of the consumer advocacy website on which they appeared, support a finding that they are actionable fact.[1] According to the Complaint, the posts were not made spontaneously or by ill-informed citizens but were deliberately made by News America's chief competitor "through a concerted campaign aimed at redirecting anger toward News America and away from Valassis." FAC ¶16. Like the disputed statements in *Gross*, the statements that News America owned the Bring Back the Coupons website on a legitimate pubic forum gives the impression that they were "the product of some deliberation, not of the heat of the moment." *Id.* at 156.

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[1]The defendant also argues that the statements made by Max and Jane are not actionable because they are hyperbolic and therefore not susceptible to proof. The court disagrees. The disputed statements lack the humorous context, satiric exaggeration, or absurdity that characterizes hyperbolic language. *See e.g. Milford Plaza Associates v Hearst Corp.*, 200 AD2d 363 [1st Dept 1994].

Recently, in *Cohen v Google, Inc.*, 25 Misc 3d 945 [2009], the court considered, and rejected, the similar argument that comments appearing on a "web blog" are by their nature opinion and cannot therefore support an action for defamation. The case is instructive. In *Cohen*, the plaintiff petitioned the court to provide her with the identity of an anonymous blogger who posted allegedly defamatory statements about her on his web log. Opposing the motion, the anonymous blogger argued that web blogs are, by their nature, a forum for personal opinion and that the context of web blogs prevents anything posted on them from being construed as fact. The court rejected that argument, concluding that "The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions." *Cohen* at 951-52, *citing In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (Va.Cir.Ct.). The same reasoning applies here. A writer of defamatory statements is not automatically shielded from liability merely because those statements appear on the comments section of a website.

Statements that appear to be pure opinion on their face, moreover, actually may be a "mixed opinion" if the speaker or writer implies the 'opinion' is based on undisclosed facts which are defamatory. *Steinhilber v Alphonse*, 68 NY2d 283 [1986]. Jane's statement that News America is "particularly ruthless," which she bases on having "worked with both News America and Valassis for years," is a mixed statement of fact and opinion which contains an actionable defamatory connotation. Although several of the other statements in issue, such as the description of News America's "low tactics," are grounded in opinion, Max's statements that attribute the ownership and operation of the website to News America, and Jane's mixed

statement of fact and opinion, carry defamatory connotations which, if proven to be untrue, could establish defendant's liability for defamation. Because plaintiff's allegations must be taken as true for purposes of a motion to dismiss, they are sufficient to sustain plaintiff's cause of action for defamation.

Defendant also argues that the FAC should be dismissed because News America has failed to plead special damages. News America replies that the alleged defamation is defamation *per se*, which makes pleading special damages unnecessary. Whether language is susceptible to a defamatory *per se* meaning is a question to be resolved by the court in the first instance. *Golub*, 89 NY2d at 1076. Where the plaintiff in a defamation action is a business, language may be susceptible to a defamatory connotation if it "disparages some aspect of [the plaintiff's] business in such a manner as directly to prejudice the successful conduct...of that business." *Greyhound Secs., Inc. v Greyhound Corp.*, 11 AD2d 390 [1st Dept 1960]. Proof of special damages is not required where the alleged defamatory statements impute dishonest or unethical business practices or that the plaintiff was engaged in deception. *See Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434 [1st Dept 1995]; *Ruder & Finn v Seaboard Surety Co.*, 52 NY2d 663 [1981] (a party in a commercial context need not allege special damages if the alleged defamatory statement "impugns the basic integrity or creditworthiness of a business."). News America alleges that Valassis published statements that attribute dishonest business practices to News America. This is similar to cases where a company is falsely accused of committing fraud or profiting by deceiving consumers. Because defendant's statements impugn the business integrity of News America, they squarely fall into the category of defamation *per se*. Accordingly, the plaintiff is not required to plead special damages.

Next, defendant argues that because it is a public figure, the plaintiff has failed to allege facts supporting actual malice or falsity. Under both federal and state Constitutional law, a plaintiff in a defamation action who is a public figure, which includes corporations, bears the burden of proving that the alleged defamatory statement was published with actual malice, which is knowledge of the statement's falsity or reckless disregard for its truth. *New York Times v Sullivan*, 376 US 254 [1964]; *Abernathy & Closther v Buffalo Broadcasting Co., Inc.*, 176 AD2d 300 [2d Dept 1991]. It is premature, however, to require a plaintiff to show evidentiary facts to support allegations of malice on a motion to dismiss. *Arts4All, Ltd., v Hancock*, 5 AD3d 106 [1st Dept 2004]; *Alianza Dominicana, Inc. v Luna*, 229 AD2d 328 [1st Dept 1996]. To withstand a motion to dismiss under CPLR 3211(a)(7), it is sufficient that plaintiff has pleaded actual malice, which plaintiff has done in its Complaint. FAC ¶ 23. Whether the plaintiff can prove actual malice may only be determined following the completion of discovery. *Alianza Dominicana* at 30.

Defendant's remaining arguments in favor of dismissal are also without merit. Defendant is not immune from liability for defamation under the Communications Decency Act, 47 U.S.C.A. § 230 (c)(1). Valassis is alleged to be the source of the defamatory statements, not the "interactive computer service" that merely hosted or published them, which, in this case, would be the Bring Back the Coupons website. Finally, plaintiff sufficiently alleges Valassis' liability under a theory of respondeat superior. The Complaint alleges that the Valassis employees who posted the defamatory statements were acting within the scope of their employment. FAC ¶¶ 17-21. Whether or not the employees actually acted within that scope is a factual determination to be made at a later stage in this litigation. *See Riviello v Waldron*, 47 NY2d 297 [1979]; *Wright v*

*La Brake*, 267 AD2d 578 [3d Dept 1999]. At this early pleading stage, plaintiff's allegations of respondeat superior are sufficient to defeat defendant's motion to dismiss.

The court concludes that several of the statements posted by Valassis to the Bring Back the Coupons website are unambiguous statements of fact that are reasonably susceptible of a defamatory connotation. This is sufficient to sustain a cause of action for commercial defamation.

**Conclusion**

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 1, 2010

ENTER:

J.S.C.