UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROCA LABS, INC.,

Plaintiff,

v.

CONSUMER OPINION CORP. and OPINION CORP.,

Defendants.
_____/

Case No: 8:14-cv-2096-T-33EAJ

OPPOSITION TO PLAINTIFF'S MOTION TO FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Defendants oppose Plaintiff Roca Labs, Inc.'s ("Roca's") Motion to for Leave to File its Second Amended Complaint.

1.0 Introduction

The initial Complaint in this case was unsupportable and frivolous. But as Roca Labs has switched from attorney to attorney, as each lawyer succeeds one who, evidently, drew the line at *some* point, the downward spiral has been unmistakable. By all indications, Roca Labs has finally hit bottom, and found counsel willing to breach that wall of professionalism on which our system depends and to proceed as irrationally as Roca Labs' principals command, regardless of ethics, much less professional self-respect.

This Court recently declined the well-earned opportunity to put an end to the nonsense imposed on it by ruling on defendants' pending motion for summary judgment. Regrettably, but in an exercise of judicial indulgence, the Court granted leave to Roca Labs, then on its *fifth* attorney, to amendment its Complaint. As Defendants were at pains to point out to the Court

in opposing the granting of that leave, this new pleading cured none of the initial Complaint's problems, but simply amounted to 354-paragraph tantrum. Now, however, Roca Labs -- evidently convinced that this Court has no limits on its patience, dignity or indulgence -- has doubled down on its irrationality. Granted a furlong, Roca Labs now demands a marathon, submitting a meandering document of no value whatsoever. Roca Labs now wants to force this Court and these Defendants to try and make sense of a 738 paragraph, 35 count "Complaint" which makes a complete mockery the mandate of Fed. R. Civ. P. 8 that pleadings consist of a "short and plain statement."

Roca Labs' litigation strategy is directly opposed to Fed. R. Civ. P. 1, as it is the antithesis of how to "secure the just, speedy, and inexpensive determination of every action and proceeding." Its original Complaint was lengthy, convoluted, and baseless. The proposed First Amended Complaint was worse than the first. Its proposed Second Amended Complaint, however, is a monstrosity. This proposed pleading is an insult to this Court and to the administration of justice, and defendants respectfully urge the Court to invoke justice and to reign in, finally, a party and its counsel who have taken every liberty imaginable and are now working well into the territory of unimaginable.

Defendants' sole protection against Roca Labs' abusive litigation tactics is this Court's supervision of its docket. Defendants respectfully implore the Court to exercise its power to maintain the dignity and, frankly, decency, of proceedings taking place under its auspices and to draw the line now and here by denying Roca Labs' motion.

2.0 Analysis

2.1 Plaintiff's Motion for Leave to Amend Should be Denied

A motion seeking leave to amend will be denied upon proof of undue delay, bad faith, or dilatory motive by the movant; its repeated failure to cure deficiencies; undue prejudice to the

opposing party; or futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). We have all of the above, in spades, in this case.

The Second Amended Complaint is not offered to cure any deficiency related to jurisdictional defects, or to the sufficiency of the claims. Instead, this proposed Second Amended Complaint is even further deficient than the prior iterations. The Second Amended Complaint is *less* coherent and supportable than would be expected even from the most psychologically unstable pro se litigant. Taking the relevant factors in turn, Defendants demonstrate below that Plaintiff's Motion for Leave to File its Second Amended complaint cannot be justified under the law.

2.2 Amendment is futile

Roca Labs previously sought leave to amend its Complaint, months after claiming it would but taking no action to do so in the time allowed by the scheduling order. Instead, Roca Labs conducted discovery, proceeded with its opposition to summary judgment, and then in the very last hours of the very last day to seek leave to amend, convinced the Court to allow it amend its way out of summary judgment. Once given leave to file its First Amended Complaint, however, it filed something entirely different from the pleading described in its motion. Roca now comes to the Court seeking to file a 738-paragraph Second Amended Complaint, in a clear abuse of the Court's good will.

The issues in this case are clear-cut. Roca Labs is attempting to impose liability on Opinion Corp. and Consumer Opinion Corp. for statements made on Opinion Corp.'s website by third parties – and for statements that are non-defamatory as a matter of law. This request to amend is done in spite of the other currently-pending lawsuits against those who actually made these statements. Furthermore, these proposed claims are made in spite of the immunity Opinion Corp. and Consumer Opinion Corp. have pursuant to 47 U.S.C. §230. Any amendment to this Complaint would be premised on unrelated allegations or would be so

superfluous as to bring nothing of value to the Complaint. "Leave to amend a complaint is futile when the complaint as amended could still be properly dismissed or be immediately subject to summary judgment for the defendant." *Washington v. Sch. Bd. of Hillsborough County*, 2009 U.S. Dist. LEXIS 114050, 16, 2009 WL 4042938 (M.D. Fla. Nov. 23, 2009). As nothing in the proposed Amended Complaint adds anything of value to this litigation, amendment would be futile. In fact, nothing in this 144-page document, exclusive of exhibits, resolves a single deficiency in the initial Complaint. It raises the same patently frivolous things in nearly four times as many pages.

Nothing in this proposed Second Amended Complaint addresses something not already addressed elsewhere, and addressed frivolously at that. Thus, for example, Roca is attempting to confer liability on Opinion Corp. and Consumer Opinion Corp. for a statement their *counsel* (the undersigned) made on Twitter. ECF 105 at 3; ECF 105-1 at ¶84.[1] Notwithstanding the obvious fact that this utterance was rhetorical hyperbole, even if it were -- as Roca Labs claims -- "defamatory," it could not possibly be attributed to either Opinion Corp. or Consumer Opinion Corp., the defendants in this case. Indeed, this statement forms the basis of a pending suit by Roca Labs against the undersigned personally. *See Roca Labs Inc. v. Marc Randazza*, FLMD Case No.: 8:14-cv-03014-SCB-MAP. Complaint attached here as Exhibit 1. Duplicating claims that Roca Labs has previously filed in other suits is not grounds for amendment here. The Court should draw the line at granting leave for such patently baseless material to be filed as yet another amendment to the Complaint.

Similarly, in its new pleading Roca Labs complains that the web-page "header" of Pissed Consumer's website is "defamatory" because it reports the empirical facts of the number of page views and the number of reviews submitted to pissedconsumer.com. ECF 105-1 at ¶90. However, this preposterous claim is also the subject of a separate suit, filed as a result of a

[1] The statement was, "Some fucker put Roca Labs' shit in my kids' candy bag!"

separate demand letter Roca Labs served on directly Opinion Corp. and Consumer Opinion Corp. *See Opinion Corp. and Consumer Opinion Corp. v. Roca Labs, Inc.*, FLSD Case No.: 9:15-cv-80051-WJZ. Demand letter attached here as Exhibit 2. It is also important to note that Roca Labs did not serve this demand letter on counsel for Opinion Corp. and Consumer Opinion Corp., but instead served it on Opinion Corp. and Consumer Opinion Corp. personally, despite knowing they were represented by counsel. If this demand letter was intended to serve as the basis for a complaint here, in this case, then counsel for Roca Labs has very clearly, and intentionally, violated Florida Rule of Professional Conduct 4-4.2. Alternatively, counsel for Roca Labs may have served that demand letter on Opinion Corp. and Consumer Opinion Corp. with the understanding and intention that those claims remain an entirely separate issue, but Roca Labs cannot now attempt to use that as a basis to amend the Complaint here.

More importantly, to further Opinion Corp. and Consumer Opinion Corp.'s assertion that it is protected under 47 U.S.C. §230 for statements made by third parties on Opinion Corp.'s website, Roca Labs has already sued individuals specifically for the exact same statements it is alleging here to be made by Opinion Corp. and Consumer Opinion Corp. See *Roca Labs, Inc. v. Does 1-11*, Broward County, Florida (Case No.: CACE 14-021978). Complaint attached here as Exhibit 3.

2.2.1 Defendants are subject to immunity under 47 U.S.C. §230, and therefore, amendment is futile

"The purpose of the CDA is to establish 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Alvi Armani Med., Inc. v. Hennessey*, 629 F. Supp. 2d 1302, 1306 (S.D. Fla. 2008), quoting *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321-1322 (11th Cir. 2006). In order to qualify as a service provider under 47 U.S.C. §230, (1) the defendant must be a provider or user of an interactive computer service; (2) the cause of action must treat the defendant as a publisher or

speaker of information; and (3) the subject information must be provided by another information content provider. *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 2008 U.S. Dist. LEXIS 11632, 26, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008). When the information such as that contained in the aggregation of "customer losses," is simply generated by third party input, 47 U.S.C. §230 immunity still applies. *Levitt v. Yelp! Inc.*, 2011 U.S. Dist. LEXIS 124082, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011).

It is important to note that pissedconsumer.com is Opinion Corp.'s website, and not the website of Consumer Opinion Corp. Therefore, Consumer Opinion Corp. could not be subject to liability for statements contained on the website under any circumstances.

2.2.1.1 Opinion Corp. is a provider of an interactive computer service

Opinion Corp.'s website is undeniably an "interactive computer service" provider as the term has been defined under 47 U.S.C. §230. "An 'interactive computer service' is defined as 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.'" *Batzel v. Smith*, 333 F. 3d 1018, 1030 (9th Cir. 2003), citing 47 U.S.C. §230(f)(2). Here, because multiple users access Opinion Corp.'s website and post reviews and comment on other reviews, Opinion Corp. plainly falls within the definition of "interactive computer service." In fact, this is already something that another court has determined, after factual development. *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011) ("The Court thus adopts the view that a website such as PissedConsumer constitutes an 'interactive computer service'").

2.2.1.2 Roca Labs seeks to treat Opinion Corp. as the speaker or publisher

Roca Labs here seeks to treat Opinion Corp. as the speaker of the statements, either entirely, or as a "co-author" of the allegedly defamatory statements. Roca Labs clearly seeks to

impose liability on Opinion Corp. for the third party reviews posted on its website. The law is clear that such a claim will not lie, and for this reason Roca Labs' proposed amendment is futile.

2.2.1.3 Opinion Corp. did not author any of the reviews

"[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content – are barred by the CDA." *Hopkins v. Doe*, 2011 U.S. Dist. LEXIS 136038, 4, 2011 WL 5921446 (N.D. Ga. Nov. 28, 2011), *citing Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Reviews posted on Opinion Corp.'s website are automatically disseminated on Twitter, but that does not make Defendants "publishers" under the CDA. That falls within the purview of immunity. Defendants' users authored the statements. Dissemination of them (especially through automated means) does not trigger a 47 U.S.C. §230 exception. Disseminating the content to the public is not enough. "A 'provider' of an interactive computer service includes websites that host third-party generated content." *Regions Bank v. Kaplan*, 2013 U.S. Dist. LEXIS 40805, 47, 2013 WL 1193831 (M.D. Fla. Mar. 22, 2013); *citing Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 293 (D.N.H. 2008). And, where dissemination to the public is not enough, dissemination of allegedly defamatory comments to the subject of the alleged defamation is not enough either.

Furthermore, Plaintiff claims that Defendants "co-author" the posts on the website because there is a set form that third-party users must use to submit reviews. This is common argument in 47 U.S.C. §230 cases never works, because it is wrong. The most recent Circuit Court ruling on 47 U.S.C. §230 dispenses with this line of reasoning as follows:

> The website's content submission form simply instructs users to '[t]ell us what's happening. Remember to tell us who, what, when, where, why.' The form additionally provides labels by which to categorize the submission. These tools, neutral (both in orientation and design) as to what third parties submit, do not constitute a material contribution to any defamatory speech that is uploaded.

*Jones v. Dirty World Entm't Recordings, et a*l., 755 F.3d 398, 416 (6th Cir. 2014). The submission form in this case is also clearly neutral, and does not amount to "material contribution" such that could give rise to liability as the publisher of the third-party statements. Simply providing a mechanism for third party users to post their reviews, including categories and forms to complete, does negate 47 U.S.C. §230 immunity. *Xcentric Ventures, LLC*, 2008 U.S. Dist. LEXIS 11632, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008) ("[T]he Court finds that the mere fact that Xcentric provides categories from which a poster must make a selection in order to submit a report on the ROR website is not sufficient to treat Defendants as information content providers"). None of the technical arguments raised by Plaintiff are novel or creative, they have been tried again and again, and no court has ever accepted them without being reversed.

Nothing in Roca Labs' proposed Second Amended Complaint overcomes Section 230 immunity, and Opinion Corp. and Consumer Opinion Corp. are still immune from liability here.

2.3 Defendants Would be Prejudiced

Defendants would incur great prejudice by an amendment of the Complaint at this point. This is a hallmark example of a dilatory tactic. *See Lord v. Fairway Elec. Corp.*, 223 F. Supp. 2d 1270, 1276 (M.D. Fla. 2002) (denying motion to amend when final trail preparations should have been underway). Roca Labs' present motion is only testament to its uncouth litigation strategy – make it as expensive as possible and drag out litigation as possible, without obtaining any resolution, until the other side has no option but to cave to Roca's unjustifiable demands. Notwithstanding the fundamentally unethical quality of this tack, nothing stands between it and success but a diligent judiciary.

In fact, Opinion Corp. and Consumer Opinion Corp. have already been required to bear the considerable expense of filing an opposition to Roca's prior nonsensical motions, including its seeking to extend the deadline by which to file an amended complaint (ECF 79), leave to amend (ECF 82), and multiple iterations of its First Amended Complaint (ECFs 82-89). To

defend their rights, Defendants have had to file a Motion to Strike (ECF 102) because of Roca's improper behavior regarding its attempts at amending its Complaint. Now Defendants are again forced to oppose yet another absurd proposed amendment to the Complaint, this time in excess of 700 paragraphs, and 35 separate counts.

Even if this motion for leave to amend, finally, is the one that is denied, Roca Labs -- unchecked by this Court -- is achieving its litigation goals. The proposed amendment could not possibly contribute to promote factual accuracy or encourage clarity of the record. All it could ever do is increase the cost of litigation and unnecessarily prolong these proceedings, in violation of Fed. R. Civ. P. 11 and 28 U.S.C. §1927. It has done so already.

3.0 Conclusion

Based on the foregoing, Defendants Opinion Corp. and Consumer Opinion Corp. respectfully request that this Court deny Plaintiff's Motion for Leave to File its Second Amended Complaint, as it is without good cause, will result in undue delay, serves an improper purpose, is a dilatory tactic, and the amendment would be futile. Therefore, Defendants Opinion Corp. and Consumer Opinion Corp. request this Court deny Plaintiff's Motion for Leave to File its Second Amended Complaint, allowing the parties to proceed on the Complaint as it was originally filed.

Respectfully Submitted,

Marc J. Randazza

Marc J. Randazza, Esq.
Florida Bar No. 625566
Middle District Re-Admission Pending
RANDAZZA LEGAL GROUP
3625 S. Town Center Drive
Las Vegas, Nevada 89135
Tele: 702-420-2001

Fax: 305-437-7662
Email: ecf@randazza.com

Jason A. Fisher, Esq.
Florida Bar No. 68762
RANDAZZA LEGAL GROUP
2 S. Biscayne Blvd., Suite 2600
Miami, Florida 33131
Tele: 702-420-2001
Fax: 305-437-7662
Email: ecf@randazza.com

Ronald D. Coleman, Esq.
Pro Hac Vice
GOETZ FITZPATRICK LLP
One Penn Plaza, Suite 3100
New York, New York 10119
Tele: 212-695-8100
Fax: 212-629-4013
Email: rcoleman@goetzfitz.com

CASE NO.: 8:14-cv-2096-T-33EAJ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of February 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served upon: James Tanner, Esq.., counsel for Plaintiff, via transmission of Notices of Electronic Filing generated by CM/ECF.

T. Kaan

An employee / agent of
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