IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

McGEORGE CAMPING CENTER, INC., **Plaintiff,** **vs.** **AFFINITY GROUP, INC., ET AL.,** **Defendants.**	**No. 3:08-cv-0038 (HEH)**

MOTION TO DISMISS BY DEFENDANT AFFINITY GROUP, INC.

Defendant Affinity Group, Inc. ("Affinity"), by and through undersigned counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Local Civil Rule 7(A), hereby moves this Court for an order dismissing the Complaint against it for failure to state a claim upon which relief may be granted. As grounds for its motion, Affinity states as follows:

1. In this action for defamation and civil conspiracy, Plaintiff McGeorge Camping Center, Inc. ("MCCI") – the owner of a recreational-vehicle dealership – seeks $1.6 million in damages for reputational injuries that MCCI purports to have sustained as a result of certain comments published by six individuals ("the Individual Defendants") on "The Open Roads Forum," an interactive computer message board appearing on Affinity's RV.NET website.

2. It is evident from the pleadings that MCCI cannot obtain the relief it seeks from Affinity – even if all well-pleaded allegations are accepted as true and viewed in the light most favorable to the plaintiff – for two separate and equally dispositive reasons.

3. *First*, Section 230 of the federal Communications Decency Act of 1996 ("CDA") pre-empts and precludes any cause of action that seeks to impose tort liability on a website operator for injuries resulting from statements published on the website by third parties.

4. CDA Section 230 states, in relevant part, that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," 47 U.S.C. § 230(e)(3). Affinity is without question an "interactive computer service" provider, within the meaning of the CDA, because its RV.NET website – and, more specifically, its "Open Roads Forum" message board – "enables computer access by multiple users to a computer server," 47 U.S.C. § 230(f)(2), and MCCI's claims against Affinity in this action unquestionably seek to recover for damages that were purportedly caused by statements "provided by another information content provider," 47 U.S.C. § 230(c)(1).

5. Because MCCI's Complaint seeks to hold Affinity liable for alleged reputational damage caused by the postings made by the Individual Defendants on the RV.NET message board, the claims against Affinity are barred by Section 230.

6. *Second*, even if Section 230 of the CDA were not applicable to MCCI's claims, the allegations of the Complaint are insufficient to support a finding of liability for defamation or civil conspiracy against Affinity.

7. Each of the message-board comments that allegedly support the defamatory "sting" that MCCI asserts – namely, that the company was responsible for the favorable postings about its dealership on RV.NET – is, on its face, an expression of opinion that is protected as a matter of Virginia constitutional law. None of the comments suggest that the authors have

knowledge of the identities of the two pseudonymous users who published favorable comments about MCCI; to the contrary, each makes clear that it is, at most, a supposition or guess about who is responsible for the pro-MCCI testimonials. Because none of the allegedly defamatory message-board comments can reasonably be interpreted as stating actual facts, they are expressions of opinion and cannot support a claim for defamation, even if Affinity could be deemed legally responsible for the content posted by users of the RV.NET message board.

8. Moreover, the Complaint is devoid of any allegation that the challenged statements were made with "actual malice," as is required for a defamation (or civil conspiracy) recovery when, as here, the purportedly defamatory remarks do not make substantial danger to reputation apparent. On its face, then, the Complaint fails to state a claim upon which relief may be granted.

9. Finally, MCCI's claim for civil conspiracy fails because the Complaint contains only conclusory allegations of conspiracy, devoid of any factual details that would support such a finding, and thus cannot support a judgment pursuant to Virginia Code § 18.2-500.

WHEREFORE, and for the reasons more fully set forth in the accompanying memorandum, Affinity respectfully requests that the Court grant its motion to dismiss.

Dated: January 23, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of January 2008, I caused a true and correct copy of the foregoing MOTION TO DISMISS BY DEFENDANT AFFINITY GROUP, INC. to be served by the Court's Electronic Case Filing system on counsel for Plaintiff, as follows:

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McGEORGE CAMPING CENTER, INC., **Plaintiff,** **vs.** **AFFINITY GROUP, INC., ET AL.,** **Defendants.**	**No. 3:08-cv-0038 (HEH)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY DEFENDANT AFFINITY GROUP, INC.

Defendant Affinity Group, Inc. ("Affinity"), by and through undersigned counsel and pursuant to Local Civil Rule 7(F), respectfully submits this memorandum of points and authorities in support of its Motion to Dismiss the Complaint, filed contemporaneously herewith.

INTRODUCTION

Through this civil action, Plaintiff McGeorge Camping Center, Inc. ("MCCI") – the owner of a recreational-vehicle dealership in Ashland, Virginia – seeks $1.6 million in damages for reputational injuries that MCCI purports to have sustained as a result of certain comments published by six individuals ("the Individual Defendants") on "The Open Roads Forum," an interactive computer message board appearing on Affinity's RV.NET website. *See* Compl. ¶¶ 26-32.[1] MCCI alleges that these message-board postings by the Individual Defendants give rise to a claim of defamation *per se* under Virginia law to the extent they suggest that other comments on the website were published by associates of MCCI masquerading as satisfied

[1] As explained in Affinity's Notice of Removal [Dkt. No. 1], MCCI's inclusion of a seventh individual as a co-defendant may be disregarded under the doctrine of fraudulent joinder.

customers. *See* Compl. ¶¶ 13-20; 26-29. That suggestion, the Complaint alleges, amounts to a "direct[] and improper[]" accusation that MCCI is engaging in a type of "fraud." *Id*. MCCI also asserts a companion cause of action for "civil conspiracy," under Virginia Code § 18.2-500, arising from the same core facts and based on a theory that the defendants collaborated to impugn the corporation. *See* Compl. ¶¶ 30-32.

Regardless of whether there is any merit to MCCI's claims against the persons who published the allegedly harmful comments using Affinity's Internet message-board service, MCCI cannot obtain a recovery *from Affinity* for damages caused by those comments because federal law "plainly immunizes" website operators from any liability resulting from "information that originates with third parties." *See Zeran v. AOL, Inc.*, 129 F.3d 327, 328 (4th Cir. 1999). Furthermore, MCCI's defamation claim is facially deficient, and its statutory conspiracy claim fails as a matter of law for the separate reason that the Complaint lacks sufficient allegations to support a finding (or even an inference) that Affinity and its co-defendants engaged in concerted action, as Virginia law requires. *See Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) (Hudson, J.). Accordingly, and for the reasons that follow, Affinity respectfully requests that the Court dismiss MCCI's Complaint for failure to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6).

ARGUMENT

Rule 12(b)(6) of the Federal Rules of Civil Procedure entitles the movant-defendant to dismissal of a complaint when it appears from the face of the pleading that the plaintiff cannot obtain the relief it seeks, even if all well-pleaded allegations are accepted as true and are viewed in the light most favorable to the plaintiff. *See Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Thus, for a complaint to survive a motion to dismiss under Rule 12(b)(6), its

factual allegations must be sufficient to at least "raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Here, MCCI's Complaint against Affinity fails to satisfy this threshold requirement for two independent reasons. *First*, Section 230 of the federal Communications Decency Act of 1996 ("CDA") pre-empts and precludes any cause of action that, as in this case, seeks to impose tort liability on a website operator for injuries resulting from statements published on the website by third parties.[2] *Second*, even if Section 230 of the CDA were not applicable to MCCI's claims, the allegations of the Complaint are insufficient to support a finding of liability for defamation or civil conspiracy against any of the defendants, let alone against an intermediary such as Affinity.

A. Section 230 of the CDA Precludes MCCI's Claims Against Affinity

CDA Section 230 states, in relevant part, that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," 47 U.S.C. § 230(e)(3). As the United States Court of Appeals for the Fourth Circuit has explained:

> By its plain language, *§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service*. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. *Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.*

[2] *See Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 530 (D. Md. 2006) ("A motion to dismiss may be used to test whether a defendant has statutory immunity.").

Zeran, 129 F.3d at 330 (emphasis added).[3] In *Zeran*, the court of appeals affirmed the dismissal of defamation-like claims against AOL that arose out of postings made by third parties on an AOL "bulletin board" service. In doing so, the court concluded that Congress had "made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Id*. at 330-31.[4]

The claims asserted by MCCI against Affinity are precisely the sort that the Fourth Circuit rejected in *Zeran* as being incompatible with the congressional policy choice reflected in Section 230. Affinity is without question an "interactive computer service" provider, within the meaning of the CDA, because its RV.NET website (and, more specifically, its "Open Roads Forum" message board) "enables computer access by multiple users to a computer server." *See* 47 U.S.C. § 230(f)(2). Indeed, MCCI concedes as much. *See* Compl. ¶ 3 ("RV.NET is a network of websites owned and operated by ["Affinity"]. . . . RV.NET hosts forums to which posts are published."). MCCI's claims, moreover, seek to recover for damages that were purportedly caused by statements "provided by another information content provider," 47 U.S.C. § 230(c)(1) – *i.e.*, that "originat[ed] with . . . third-party user[s]" of Affinity's interactive computer service, *Zeran*, 129 F.3d at 330. *See* Compl. ¶¶ 4-10, 13-15, 17-20 (asserting that the

[3] Although the Supreme Court struck down many other portions of the CDA on constitutional grounds in *Reno v. ACLU*, 521 U.S. 844 (1997), Section 230 was not affected.

[4] Numerous other federal courts have agreed with the reasoning of *Zeran* and have adopted its interpretation of Section 230. *See, e.g.*, *Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-419 (1st Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003); *Green v. AOL, Inc.*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. AOL, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1044-47 (N.D. Cal. 2004); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001); *Morrison v. AOL, Inc.*, 153 F. Supp. 2d 930, 933-34 (N.D. Ind. 2001); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).

Individual Defendants used RV.NET's message board and authored the allegedly harmful comments). Simply put, because MCCI's Complaint seeks to hold Affinity liable for alleged reputational damage caused by the postings made by the Individual Defendants on the RV.NET message board, the claims against Affinity are barred by Section 230.[5]

The result is the same whether the cause of action is styled as defamation, civil conspiracy, or something else. *See Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("Section 230 immunity should be broadly construed. . . . [It] extends beyond publisher liability in defamation law to cover any claim that would treat [a website operator] 'as the publisher.'"); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (application of Section 230 is not limited to defamation claims); *Doe v. Bates*, No. 5:05-CV-91, 2006 WL 3813758, at *1, *3 (E.D. Tex. Dec. 27, 2006) (Section 230 provides "immunity from all private civil liability," including claim against website operator for "civil conspiracy"). As the First Circuit recently explained in *Lycos*, a case involving another interactive computer service provider, "*Congress intended that, within broad limits, message board operators would not be held responsible for the postings made by others on that board*. No amount of artful pleading can avoid that result." 478 F.3d at 418 (affirming dismissal of claims for securities fraud and cyberstalking against publisher of financially oriented message boards) (emphasis added). *See also Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex.

[5] Importantly, Section 230 does not foreclose otherwise valid claims arising from Internet-based speech; it simply shields against the imposition of liability in cases such as this, where the plaintiff seeks to recover damages from a defendant who merely serves as a conduit for allegedly harmful statements. Those who "post information in Internet forums remain accountable under all applicable federal and state laws," notwithstanding Section 230. *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004).

2007) ("No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities.").

In light of this clear and controlling precedent, Affinity respectfully requests that the Court enter an order dismissing MCCI's claims against it as barred by Section 230 of the CDA.

B. MCCI Otherwise Fails to State a Claim Against Affinity

All apart from the application of the CDA's immunity provision to the claims against Affinity, MCCI's Complaint suffers from additional defects requiring dismissal.

As an initial matter, each of the message-board comments that allegedly support the defamatory "sting" that MCCI asserts – namely, that the company was responsible for the favorable postings about its dealership on RV.NET – is, on its face, an expression of opinion that is protected as a matter of Virginia constitutional law. *See Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985) ("[A]rticle 1, section 12 of the Constitution of Virginia protect[s] the right of the people to . . . write[] or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander.").[6] Because of this opinion privilege, it is well-settled in Virginia that a claim of defamation can be based only on false *factual* assertions, *i.e.*, statements that can "'reasonably be interpreted as stating actual facts.'" *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003) (citation omitted). In this case, none of the allegedly defamatory message-board comments by the Individual Defendants can be construed as asserting any facts. Indeed, none of the comments suggest that the Individual Defendants have knowledge of the identities of the two pseudonymous users ("cmcardoza" and "tylerwitty," Compl. ¶¶ 12, 16) who posted favorable comments about MCCI. To the contrary,

[6] *See also Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132-33, 575 S.E.2d 858, 861 (2003) ("Whether an alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by a court instead of a jury.").

each of the Individual Defendants makes clear that he or she is offering, at most, a supposition or guess about who is responsible for the pro-MCCI testimonials. *See* Compl. ¶¶ 14 ("Could be a salesman[.]"); 15 ("does not sound right"); 17 ("I guess I am just a skeptic[,] but it seems fishy."); 18 ("This could be McGeorge[.]"); 19 ("Sounds fishy to me."); 20 ("[Y]ou're probably right. Sounds like a TROLL post. I[n] M[y] H[umble] O[pinion]."). Such statements, being obviously "relative in nature and depend[ent] largely upon the [authors'] viewpoint," *Fuste*, 265 Va. at 132, 575 S.E.2d at 861, are simply not susceptible to defamation claims. *See, e.g.*, *Lapkoff v. Wilks*, 969 F.2d 78, 80, 82 (4th Cir. 1992) (statement by automobile finance officer to car dealer that the finance officer "'wouldn't trust [the dealer's salesman] any farther than [he] could throw him'" held to be nonactionable opinion under Virginia law because "it is a relative statement completely dependent on [the speaker's] obvious bias") (citation omitted). Accordingly, even if Affinity somehow could be deemed legally responsible for the content of the RV.NET message-board postings, none of the identified comments are actionable.

Second, the Complaint is devoid of any allegation that the challenged statements were made with "actual malice" (that is, with "'knowledge that it was false or with reckless disregard of whether it was false or not'"), as is required for a defamation recovery – *or* for a recovery for civil conspiracy[7] – when, as here, the purportedly defamatory remarks do not "make[] substantial danger to reputation apparent." *See Gazette Inc. v. Harris*, 229 Va. 1, 15,

[7] Any claim seeking recovery for reputational injury, regardless of its label, must satisfy the same fault requirements as a defamation claim. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Zeran v. AOL, Inc.*, 958 F. Supp. 1124, 1133 n.19 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997).

325 S.E.2d 713, 725 (1985).[8] On its face, then, the Complaint fails to state a claim upon which relief may be granted.

Finally, MCCI's claim for civil conspiracy fails because the Complaint lacks sufficient allegations to support a judgment pursuant to Virginia Code § 18.2-500. *See Bay Tobacco, LLC*, 261 F. Supp. 2d at 499 ("[I]n order to survive a motion to dismiss, Plaintiff must at least plead the requisite concert of action and unity of purpose in more than 'mere conclusory language.'") (quoting *Lewis v. Gupta*, 54 F. Supp. 2d 611, 618 (E.D. Va. 1999)); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 703-04 (E.D. Va. 2007) ("[E]ven assuming plaintiff had alleged an actionable underlying claim . . . [w]here, as here, there are only vague, conclusory allegations of conspiracy, the claim fails at the threshold."); *Johnson v. Kaugars*, 14 Va. Cir. 172, 176, No. LM-152-3, 1988 WL 619378, at *3 (Richmond Oct. 31, 1988) ("[I]t is not enough merely to state that a conspiracy took place. There should be some details of time and place and the alleged effect of the conspiracy.").

Because "[n]o conspiracy can exist without an agreement," civil actions for conspiracy under Section 18.2-500 must be dismissed where, as here, "there is no allegation [in the Complaint] that the co-conspirators formally or actually met or verbally agreed to engage in such conduct" and where "the court cannot even infer an agreement" from the facts alleged in the pleadings. *Johnson*, 14 Va. Cir. at 176, 1988 WL 619378, at *4. "It is not enough for plaintiff merely to track the language of the conspiracy statute without alleging the fact that the alleged co-conspirators did, in fact, agree to do something the statute forbids." *Id*. at 177, 1988 WL 619378, at *4. That, however, is all that MCCI has done in this case. There are no facts alleged

[8] *See also Almy v. Grisham*, 273 Va. 68, 81, 639 S.E.2d 182, 189 (2007) (a claim for civil conspiracy under Virginia law cannot be maintained unless the plaintiff *also* has a valid claim for the "underlying tort").

to support even an *inference* that there was an agreement of any sort among the defendants. *Cf. Bell Atlantic Corp.*, 127 S. Ct. at 1966 ("[A] naked assertion of conspiracy . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'") (citing *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)). Accordingly, MCCI has failed to state a claim for civil conspiracy against Affinity.

CONCLUSION

For each and all of the foregoing reasons, Affinity respectfully requests that the Court grant its motion to dismiss and enter an order dismissing all claims against it pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: January 23, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

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