IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

KENNETH M. SEATON d/b/a GRAND RESORT HOTEL AND CONVENTION CENTER, Plaintiff, - against - TRIPADVISOR, LLC, Defendant.	3:11-cv-00549

DEFENDANT TRIPADVISOR, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

S. Russell Headrick
Meghan H. Morgan
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
265 Brookview Centre Way, Suite 600
Knoxville, Tennessee 37919

James Rosenfeld
Samuel Bayard
DAVIS WRIGHT TREMAINE, LLP
1633 Broadway, 27th Floor
New York, New York 10019

Attorneys for TripAdvisor, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Defendant TripAdvisor, LLC ("TripAdvisor") respectfully moves the Court to enter an Order under Federal Rule of Civil Procedure 12(b)(6) dismissing the Complaint of plaintiff Kenneth M. Seaton d/b/a Grand Resort Hotel and Convention Center ("Seaton" or "Plaintiff") for failure to state a claim upon which relief can be granted.[1]

PRELIMINARY STATEMENT

This lawsuit arises out of the collection by TripAdvisor, the operator of a travel research website located at www.tripadvisor.com, of user reviews and opinions of hotels, and its presentation of that information in the form of an online feature titled "2011 Dirtiest Hotels." Plaintiff's hotel held the top spot on that list, which incorporated a photograph and a quote from TripAdvisor users about each listed establishment, as well as a link to each hotel's page on Tripadvisor.com. Unhappy with his hotel's number one ranking, Seaton now seeks to shoot the messenger, suing TripAdvisor for libel and seeking $10 million in damages. His claim fails, however, because TripAdvisor's "Dirtiest Hotels" feature is a statement of opinion, protected by the First Amendment to the United States Constitution and Article 1, Section 19 of Tennessee's Constitution.

To be defamatory under Tennessee law, a statement must assert objectively verifiable facts, capable of being proven true or false. In its 2011 Dirtiest Hotels feature, TripAdvisor aggregated inherently subjective user reviews, which courts have consistently found to be constitutionally protected opinion. Determining which hotel is the "dirtiest" is a matter of personal judgment that depends on the perceptions, criteria and standards of each individual

[1] The Complaint fails to identify the specific claim under which Plaintiff seeks relief. However, it uses the word "defaming" (¶ 7), indicating an intent to assert a libel claim. TripAdvisor addresses that claim here, and, for the stated reasons, it fails. To the extent Plaintiff seeks to assert any other claims, Defendant respectfully submits pursuant to Federal Rule of Civil Procedure 12(e) that this Court should require Plaintiff to amend the Complaint, to the extent that doing so would not be futile because of the impediments to liability outlined in this brief.

guest. No one can prove or disprove this type of assessment. Consequently, courts have repeatedly dismissed defamation claims brought by disgruntled recipients of bad reviews, like Seaton. The First Amendment and Tennessee's constitutional free speech provision require the same result here.

Permitting claims by poorly-ranked subjects of reviews and surveys would not only promote frivolous litigation, it would chill dissemination of reviews, which – individually and in the aggregate – are an invaluable resource to consumers. The value of consumer websites, and a great benefit of the Internet, is that sites like TripAdvisor gather, synthesize and organize the individual views and feedback of a multitude of reviewers in a form that, albeit subjective, is tremendously useful to its users. In short, they distill the wisdom of the crowd. It is this core, vital function that Plaintiff's lawsuit threatens to chill. However, the law precludes his lawsuit, and the Complaint should be dismissed in its entirety for failure to state a claim.[2]

---

[2] While this argument is the most amenable of TripAdvisor's defenses to Rule 12(b)(6) resolution, Seaton's claim is fatally flawed on at least three other, wholly independent grounds, which will be established if this case proceeds past this stage. First, TripAdvisor's speech is entirely immune from liability under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1), which protects providers of interactive computer services like TripAdvisor from claims that seek to hold them liable as the publishers or speakers of third-party content. *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). The immunity applies regardless of whether sites exercise traditional editorial functions, which include aggregating, organizing or summarizing user content as TripAdvisor did here. *See Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *6-7 (N.D. Cal. Oct. 26, 2011); *Gentry v. eBay*, 121 Cal. Rptr. 2d 703, 717-18 (Cal. Ct. App. 2002). Second, even if the Hotel's designation as America's "dirtiest" were a statement of objective, verifiable fact – which (as discussed at Part II *infra*) it is not – Seaton cannot carry his burden of establishing falsity. It is axiomatic that substantial truth, not literal truth, is all that is required to defeat a libel claim. "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (internal citation and quotation omitted). The "gist" here, which is that the hotels on the "Dirtiest" list were rated by their guests as extremely dirty establishments, is true and will be established if necessary. Third, since Seaton, a hotel magnate who has been very much in the public eye in Eastern Tennessee, is unquestionably a

STATEMENT OF FACTS

Seaton, who has operated the Grand Resort Hotel and Convention Center (the "Hotel"), in Pigeon Forge, Tennessee, since 1982, brings this lawsuit to seek redress for negative publicity it received on TripAdvisor, a travel website. Complaint ("Cplt."), ¶¶ 1, 3, 7-11. Specifically, the Complaint alleges that on January 25, 2011, TripAdvisor published "a survey which concluded that the Plaintiff . . . was the dirtiest hotel in America." *Id.*, ¶ 7. Seaton alleges 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.*, ¶¶ 7-11. It appears to assert a defamation claim (*see supra* note 1), and seeks $5 million in compensatory damages and $5 million in punitive damages.

Beyond these cursory allegations, the Complaint is more notable for what it does *not* say than for what it does say. It does *not* identify any allegedly false or misleading statements, other than the survey's conclusion that the Hotel is "the dirtiest hotel in America." It does *not* explain the supposed distortions or flaws in TripAdvisor's survey methodology. It does *not* provide the details, participants, methods or motivation of TripAdvisor's alleged plot to ruin the Hotel's reputation. It does *not* set forth the basis for Plaintiff's multi-million dollar damages claim. It essentially complains that the survey reached the wrong result, and alleges without a scintilla of support that TripAdvisor must have conducted its survey with malicious intent to do Plaintiff harm and should accordingly be ordered to pay an astronomical damages award.

---

public figure, the actual malice standard applies. He cannot establish, as he must, that TripAdvisor knew or recklessly disregarded the alleged falsity of its statements. Should the Court deny this motion, TripAdvisor will establish at least these three additional grounds for dismissal.

The "Dirtiest Hotels" feature itself, which is central to Plaintiff's claim and appropriately considered on this motion,[3] provides a bit more detail. The feature explained at the top of the "Dirtiest Hotels" list that the information collected there was "as reported by travelers on TripAdvisor." Above that appeared buttons which allowed users to find out about hotels, flights, restaurants, etc. or to "Write a Review." The body of the feature listed 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, the image appeared to be a ripped bedspread), and the percentage of reviewers who "do not recommend this hotel." Information on the other nine hotels on the list was equally harsh (*e.g.*, excerpts from user reviews stating "Hold your nose for the garbage smell" and "Camp out on the beach instead."). By contrast, to the left of the "Dirtiest" list was a link to a very different feature – a list called "Travelers' Choice 2011" – which stated: "The very best hotels, as chosen by millions of real travelers."

---

[3] In ruling on a motion to dismiss, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Weiner, D.P.M. v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (citations and internal quotation marks omitted). Therefore, a district court may consider such documents without converting the motion into one for summary judgment. *Weaver v. The Prudential Ins. Hosp. Corp.*, 763 F. Supp. 2d 930, 937 (M.D. Tenn. 2010); *Gallagher v. The E.W. Scripps Co.*, No. 08-2153-STA, 2009 U.S. Dist. LEXIS 45709, at *16 (W.D. Tenn. May 28, 2009). Although the "Dirtiest Hotels" page has been taken down from the TripAdvisor site, a true and correct copy is annexed to the Declaration of Cindy Roche, dated January 6, 2012 ("Roche Decl."), which is submitted herewith as Exhibit 1.

ARGUMENT

I.

THE COURT MAY DISMISS PLAINTIFF'S CLAIM AT THE PLEADING STAGE

The Court may and should dismiss Plaintiff's Complaint in its entirety, particularly in light of the exacting pleading standards enunciated by recent Supreme Court decisions and the vital free speech interest at stake in this case.

A. Rule 12(b)(6) Standard After *Twombly* and *Iqbal*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (internal quotation marks omitted); *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629-630 (6th Cir. 2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S.Ct at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). In applying this standard, the Court need not credit conclusory allegations or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). *See also 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); *Raeth v. Nat. City Bank*, 755 F. Supp. 2d 899, 901 (W.D. Tenn. 2010) (same). Conclusory legal assertions flatly contradicted by the publication at issue do not permit a reasonable inference of liability and therefore do not satisfy the plausibility standard. Where, as here, the well-pleaded facts do not "plausibly give rise to an entitlement to relief," dismissal is appropriate. *Iqbal*, 129 S.Ct. at 1950.

B. Free Speech Provisions of the U.S. and Tennessee Constitutions Favor Early Disposition of this Case

Supreme Court precedent establishes a strong preference for the early disposition of cases implicating freedom of speech. Recognizing that meritless lawsuits have a pernicious effect on speech rights, the United State 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 decide motions to dismiss claims based on speech-based torts where it is possible to do so based on examination of the works at issue. *See, e.g.*, *Gallagher v. The E.W. Scripps Co.*, No. 08-2153-STA, 2009 U.S. Dist. LEXIS 45709, at *12, 14-17, 20-42 (W.D. Tenn. May 28, 2009) (granting motion to dismiss defamation and false light claims after reviewing challenged article and court documents central to claims; grounds for dismissal included substantial truth, fair report privilege, and non-actionable opinion); *ZL Techs. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 796-801 (N.D. Cal. 2010) (granting motion to dismiss defamation claim after reviewing challenged reports and concluding that they consisted of non-actionable opinion), *aff'd,* 433 Fed. Appx. 547 (9th Cir. 2011); *NXIVM Corp. v. Sutton*, No. 06-cv-1051, 2007 U.S. Dist. LEXIS 46471, at *18, 21-39 (D.N.J. June 27, 2007) (granting motion to dismiss product disparagement claim after reviewing website articles and concluding that statements were non-actionable opinion); *Wheeler v. Neb. St. Bar Ass'n*, 508 N.W.2d 917, 924

(Neb. 1993) (affirming dismissal on demurrer of defamation claims because survey responses were non-actionable opinion).

* * *

Disposing of this case at the motion to dismiss stage is not only appropriate but is required by both the U.S. and Tennessee Constitutions. As demonstrated below, when stripped of legal conclusions and implausible speculation, the Complaint fails to plead facts that "plausibly give rise to an entitlement to relief."

II.

TRIPADVISOR'S "DIRTIEST HOTELS" LIST IS CONSTITUTIONALLY PROTECTED OPINION

The First Amendment and Article 1, Section 19 of the Tennessee Constitution[4] bar lawsuits such as this one, which chill free speech. "'The freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.'" *Hustler Magazine v. Falwell,* 485 U.S. 46, 50-51 (1988) (*quoting Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984)). "'Because the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of ... First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability.'" *Windsor v. The Tennessean*, 654 S.W.2d 680, 684 (Tenn. Ct. App. 1983) (*quoting Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 12 (1970)). Plaintiff's claims target constitutionally protected opinion, warranting dismissal of the Complaint.

[4] 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).

A. Free Speech Provisions of the U.S. and Tennessee Constitutions Protect Statements That Are Not Sufficiently Factual to Be Proven True or False

Both the First Amendment and Tennessee's constitutional free speech provision bar defamation claims challenging statements that either do not assert facts or are not sufficiently factual to be proven true or false. In *Milkovich v. Lorain Journal Co.*, the United States Supreme Court recognized constitutional protection for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual," noting the difference between a "subjective assertion" and "an articulation of an objectively verifiable event." 497 U.S. 1, 22 (1990); *Compuware Corp. v. Moody's Invs. Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (defamation claims cannot be based on statements of opinion that "do not contain a provably false factual connotation" and "cannot reasonably [be] interpreted as stating actual facts") (internal quotation marks omitted); *Shamblin v. Martinez*, No. M 2010-00974-COA-R3CV, 2011 WL 1420896, at * 6 (Tenn. Ct. App. Apr. 13, 2011) (ruling that "the balance of the Statement contains rhetorical hyperbole and matters of opinion which cannot be reasonably interpreted as stating actual facts about Plaintiffs"). Accordingly, "the connotation resulting from a statement must be 'sufficiently factual to be susceptible to being proved true or false' in order to be actionable." *Stilts v. Globe Int'l, Inc.*, 950 F. Supp. 220, 223 (M.D. Tenn. 1995), *aff'd*, 91 F.3d 144 (6th Cir. 1996) (quoting *Milkovich*, 497 U.S. at 21). Similarly, "statements utilizing words in a loose, figurative manner or as imaginative expression, such as 'rhetorical hyperbole,' are not properly subject to a defamation action." *Id.* (quoting *Milkovich*, 497 U.S. at 17). *See also 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).

The determination of whether a statement would be understood by reasonable readers as fact or protected opinion is a question of law for the Court. *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) ("Whether a purportedly defamatory statement is a protected opinion or an actionable assertion of fact is a question of law for the court."); *Rodriguez v. Panayioutou*, 314 F.3d 979, 985-86 (9th Cir. 2002) ("The issue of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court to decide."); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) ("[W]e agree with the overwhelming weight of post-*Gertz* authority that the distinction between opinion and fact is a matter of law."); *cf. Memphis Publ'g Co. v. Nichols*, 569 S.W. 2d 412, 419 (Tenn. 1978) ("The preliminary determination of whether the article is *capable* of being [understood as defamatory] is a question of law to be determined by the court.") (emphasis in original). This question may be decided on this motion.

B. Ratings and Reviews Are Inherently Subjective

Recognizing that "[r]atings and reviews are, by their very nature, subjective and debatable," *Browne v. Avvo*, 525 F. Supp. 2d 1249, 1252 n.1 (W.D. Wash. 2007), courts have consistently found ratings and reviews to be constitutionally protected opinion. *See, e.g.*, *Compuware Corp. v. Moody's Invs. Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (credit rating of company held to be non-actionable opinion); *Aviation Charter, Inc. v. Aviation Res. Grp.*, 416 F.3d 864, 868-71 (8th Cir. 2005) (safety rating of airline company held to be non-actionable opinion); *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Invs. Servs., Inc.*, 175 F.3d 848, 856, 858

(10th Cir. 1999) (credit rating of school district held to be non-actionable opinion); *Browne*, 525 F. Supp. at 1251-54 (numerical rating of lawyers held to be non-actionable opinion); *Wheeler*, 508 N.W.2d at 924 (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.*, No. ED 96214, __ S.W. 3d __, 2011 WL 5152855, at *6-10 (Mo. App. Ct. Nov. 1, 2011) (letter grade of "C" given to business in online report held to be non-actionable opinion); *Themed Rests., Inc. v. Zagat Survey, LLC*, 4 Misc.3d 974, 980 (N.Y. Sup. Ct. 2004), *aff'd*, 21 A.D.3d 826 (App. Div. 1st Dep't 2005) (ratings and review of restaurant in *Zagat's* guidebook held to be non-actionable opinion); *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 opinion); *ZL Techs., Inc.*, 709 F. Supp. 2d at 795-99 (ranking of technology firm as "niche" player, the lowest ranking possible on defendant's scale, held to be non-actionable opinion); *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).[5]

[5] *See also Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985) (allegedly libelous statements in review were protected opinion); *Thomas v. Los Angeles Times Commc'ns, LLC*, 189 F. Supp. 2d 1005, 1015-16 (C.D. Cal.) (statements in feature article questioning factual basis of book were protected opinion), *aff'd on other grounds*, 45 Fed. Appx. 801, 803 (9th Cir. 2002); *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); *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 the opinion or vituperative, since [it] cannot be subjected to the test of truth or falsity… [is] entitled to absolute immunity from liability") (citations omitted); *Baker v. Los Angeles Herald Exam'r*, 721 P.2d 87 (Cal. 1986) (statements by television critic criticizing sex education

Even when ratings and reviews are derived from objective considerations but are ultimately subjective evaluations, they are protected opinion. For example, in *Compuware Corp. v. Moody's Investors Services*, 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. The Sixth Circuit 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 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.

Similarly, 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

---

documentary film were protected opinions); *Mashburn v. Collin*, 355 So. 2d 879, 888-89 (La. 1977) (critical review of restaurant was protected opinion).

public that the survey's results were "fair, valid, and solidly based upon the facts of the judge's judicial performance." 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. In a statement that applies with particular salience to Plaintiff's claims here, the court continued: "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.*

Likewise, in *Aviation Charter*, the defendant Aviation Research Group/US ("ARGUS") 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 rating 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.

C. Calling Plaintiff's Hotel "The Dirtiest Hotel in America" Is Not Subject to Objective Verification

As established above, courts generally regard ratings and reviews as inherently subjective and not subject to objective verification. The fact that the ratings in TripAdvisor's "Dirtiest Hotels" list involved cleanliness does not change the analysis. 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.[6]

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," 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

---

[6] Plaintiff cannot avoid this result based on the vague and conclusory nature of his pleadings. He is caught in a so-called "Catch-22" requiring dismissal regardless of *how* his allegations are construed. He avoids alleging that TripAdvisor merely aggregated user reviews, because this would so clearly be immunized by Section 230 of the Communications Decency Act, 47 U.S.C. §230(c)(1). *See* note 2 *supra.* Yet, even if the "dirtiest" designation were TripAdvisor's *own* view, based on the information submitted by users, it is still a subjective conclusion. In other words, regardless of whether TripAdvisor is stating its own or collective opinion, it is stating opinion.

acceptable standards" of cleanliness, and the Dirtiest Hotels list contains no assertion of verifiable fact similar to the statement regarding the Board of Health in *Stewart.*

Moreover, as illustrated in Part II.B, *supra*, 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 rating in question, while based on objective criteria, was constitutionally protected opinion. *Aviation Charter*, 416 at 871, 872; *Compuware*, 499 F.3d at 529. This case presents an even stronger case for First Amendment protection because the "Dirtiest Hotels" list does not even purport to be based on objective criteria, but rather on the personal opinions of TripAdvisor users.

Further, 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*, No. 117024/08, 24 Misc.3d 1248(A), 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 added). *See also Hammer*, 392 F. Supp. 2d at 430-31 (defamation

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

claims against bookseller website dismissed because negative consumer reviews of author's books were non-actionable opinion). The "Dirtiest Hotels" list expressly reveals that it is an aggregation of "subjective expressions of consumer dissatisfaction" with the Hotel, and as such the underlying bases for the list – and the list itself – are entirely subjective, protected opinions.

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 (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 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.

The "Dirtiest Hotels" list is much like the *Zagat's* rating in *Themed Restaurants, Inc.* Reasonable readers would understand from the context of the TripAdvisor website, which is self-evidently geared towards publishing user-generated reviews and opinions, that the "Dirtiest Hotels" list represents "the collected subjective judgments of individual consumers" and not an assertion of verifiable fact. 4 Misc.3d at 980. Moreover, because "dirtiness" in this context is a "subjective expression[] of consumer dissatisfaction," *Milewski*, 2009 WL 2915273, at *5, it is impossible to prove that one hotel is "dirtier" than another, much less that any particular hotel is the "dirtiest," which is the gravamen of Plaintiff's Complaint. *See* Cplt. ¶7 ("The publication stated the Plaintiffs [sic] hotel was not "one of the dirtiest" but "the dirtiest hotel in America."). Any reasonable reader would understand that a traveler providing a rating and review of Plaintiff's hotel on TripAdvisor had not surveyed each and every hotel in the nation to determine which one was in fact the dirtiest, even if "dirty" were capable of objective measurement. Each user gave a subjective opinion of a particular place of lodging, and TripAdvisor assimilated that information into a "Top Ten" list – a format useful to its visitors.

Because the "Dirtiest Hotel" label is not subject to being proven true or false and is constitutionally protected opinion, the Complaint should be dismissed.

CONCLUSION

The Complaint directly targets constitutionally protected opinion: TripAdvisor's "Dirtiest Hotels" designations are subjective assessments based on the subjective views and feedback of its users about hotels they have visited. Because Plaintiff's claims challenge statements that are not capable of being proven true or false, they fail to "plausibly give rise to an entitlement to relief," *Iqbal*, 129 S.Ct. at 1950, and should be dismissed.

Respectfully submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ
By: s/S. Russell Headrick
S. Russell Headrick (BPR No. 005750)
Meghan H. Morgan (BPR No. 024619)
265 Brookview Centre Way, Suite 600
Knoxville, Tennessee 37919
(865) 549-7200 (direct phone)
(865) 525-8569 (direct fax)
E-mail:rheadrick@bakerdonelson.com
mhmorgan@bakerdonelson.com

Attorneys for TripAdvisor, LLC

Of Counsel:
James Rosenfeld (admitted *pro hac vice*)
jamesrosenfeld@dwt.com
Samuel M. Bayard (admitted *pro hac vice*)
samuelbayard@dwt.com
DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th Floor
New York, New York 10019

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, a true and correct copy of the foregoing documents was electronically filed with the United States District Court for the Eastern District of Tennessee, and was served on all counsel by the court's electronic filing notification or via email.

s/S. Russell Headrick
S. Russell Headrick