UNITED STATES COURT OF APPEALS for the SIXTH CIRCUIT

KENNETH M. SEATON d/b/a GRAND RESORT HOTEL AND CONVENTION CENTER	)	
Appellant,	)	
v.	)	**Case No. 12-6122**
TRIPADVISOR, LLC,	)	
Appellee.	)	

APPELLANT'S BRIEF

Appeal from United States District Court, Eastern District of Tennessee

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Counsel for the Appellant respectfully requests oral argument. It is submitted that oral argument will help illuminate the parties' positions and aid this Honorable Court in reaching a decision.

JURISDICTIONAL STATEMENT

The Complaint of the Appellant Kenneth M. Seaton d/b/a Grand Resort Hotel and Convention Center (hereinafter "Mr. Seaton") was originally filed in the Circuit Court for Sevier County, Tennessee, but the case was subsequently removed by the Appellee TripAdvisor, LLC (hereinafter "TripAdvisor") to the United States District Court for the Eastern District of Tennessee, at Knoxville, which had subject matter jurisdiction pursuant to 28 U.S.C. § 1332, as there was complete diversity of the parties and the amount in controversy exceeded $75,000. (Complaint, R. 1-1, Page ID # 4-6; Notice of Removal, R. 1, Page ID # 1-3).

The Order issued by the District Court on August 22, 2012, granted TripAdvisor's Rule 12(b)(6) Motion to Dismiss and dismissed all of Mr. Seaton's claims, thus serving as a final order by disposing of all claims in dispute in the District Court. (Order, R. 25, Page ID # 266-282). A Judgment was entered by the District Court Clerk on August 22, 2012, dismissing with prejudice the action of Mr. Seaton. (Judgment, R. 26, Page ID # 283).

Mr. Seaton timely filed a Notice of Appeal as to the Order and Judgment on September 17, 2012. (Notice of Appeal, R. 27, Page ID # 284).

STATEMENT OF ISSUES

1. Whether the District Court erred in determining as a matter of law that Mr. Seaton failed to state a claim for defamation and false light invasion of privacy?

2. Whether the District Court erred in denying Mr. Seaton's Motion to Amend Complaint?

STATEMENT OF CASE

On October 11, 2011, Mr. Seaton filed a Complaint in the Circuit Court for Sevier County, Tennessee alleging causes of action against TripAdvisor, including defamation and false light invasion of privacy. (Complaint, R. 1-1, Page ID # 5-6, pp. 2-3; Order, R. 25, Page ID # 271, p. 6). The Complaint asserted that TripAdvisor had published a list on its website that defamed and cast in a false light the Grand Resort Hotel and Convention Center (hereinafter "Grand Resort Hotel") by naming it the "dirtiest hotel in America," which was a false and misleading statement. (Id.) The case was removed by TripAdvisor to the United States District Court for the Eastern District of Tennessee, at Knoxville, pursuant to 28 U.S.C. 1441(a) and 1446 *et seq*. (Notice of Removal, R. 1, Page ID # 1-3).

TripAdvisor filed a Rule 12(b)(6) Motion to Dismiss, along with a supporting Memorandum of Law, on January 6, 2012. (Motion to Dismiss, R. 7, Page ID # 39-40; Memo of Law, R. 8, Page ID # 41-64). TripAdvisor asserted that the Complaint failed to state a claim because the "2011 Dirtiest Hotels" was a Constitutionally protected statement of opinion. (Memo of Law, R. 8, Page ID # 272-274, pp. 7-9.) On March 31, 2012, Mr. Seaton filed a Response to the Motion to Dismiss, with supporting exhibits and also a Motion to Amend Complaint. (Response, R. 15, Page ID # 82-103; Motion to Amend, R. 16, Page ID # 200-201).

TripAdvisor filed a Reply Memorandum on May 14, 2012. (Reply Memo, R. 19, Page ID # 221-234).

The District Court issued an Order on August 22, 2012, granting TripAdvisor's Motion to Dismiss and thereby dismissing with prejudice all of Mr. Seaton's claims. (Order, R. 25, Page ID # 266-282). The District Court held that the "2011 Dirtiest Hotels" list could not be understood by a reasonable person to be an assertion of objective fact, but was instead rhetorical hyperbole, which could not be defamatory as a matter of law. (Id.). Mr. Seaton timely filed a Notice of Appeal on September 17, 2012, appealing the District Court's ruling in its final Order to the United States Court of Appeals for the Sixth Circuit. (Notice of Appeal, R. 27, Page ID # 284).

STATEMENT OF FACTS

Mr. Seaton owns and operates the Grand Resort Hotel as a sole proprietorship in Pigeon Forge, Tennessee, and has been in the hotel, restaurant, and convention business since 1982. (Complaint, R. 1-1, Page ID # 4, p. 1). Since its opening, the Grand Resort Hotel had established itself as a valuable business, gaining the confidence and goodwill of the public, including the many tourists who visit the Great Smoky Mountains area in and around the city of Pigeon Forge. (Id., Page ID # 5, p. 2).

TripAdvisor is a company doing business in the United States and worldwide through its internet website located at www.TripAdvisor.com. (Order, R. 25, Page ID # 267, p. 2). TripAdvisor's business consists of providing travel related information, including research information, reviews and reports regarding hotels, resorts, restaurants, and other businesses of interest to travelers worldwide. (Id.). TripAdvisor proclaims, on its website, that it provides "the world's most trusted travel advice" and adheres to rules and regulations of fairness in rating and reporting on hotels or other businesses. (Complaint, R. 1-1, Page ID # 4-5, pp. 1-2). TripAdvisor is a popular resource for travel information, with millions of visitors to its website. (Order, R. 25, Page ID # 278, p. 13). Users of the TripAdvisor website can post comments or reviews in addition to reading the website content.

(Id., Page ID # 267, p. 2). TripAdvisor creates and publishes various lists, reports, and rankings of businesses on its website, including one well-known report known as the "Dirtiest Hotels" list which was created and published annually for several years, before being discontinued following its 2011 publication. (Id., Page ID # 268, p. 3). The "Dirtiest Hotels" feature consisted of a list of ten hotels or resorts, ranked numerically one through ten with the number one position denoting the "dirtiest" hotel. (Id.).

In January of 2011, TripAdvisor published its "2011 Dirtiest Hotels" list, naming the ten "dirtiest" hotels or resorts in the United States, and ranking Mr. Seaton's Grand Resort Hotel in the number one position on the list, declaring it "the dirtiest hotel in America." (Complaint, R. 1-1, Page ID # 5, p.2; Order, R. 25, Page ID # 268, p. 3). TripAdvisor released the list through its website and various media outlets, including CNN, ABC, NBC, and other local media. (Complaint, R. 1-1, Page ID # 6, p. 3).

Mr. Seaton subsequently filed suit on October 11, 2011 in the Circuit Court of Sevier County, Tennessee. (Complaint, R. 1-1, Page ID # 4, p. 1). Mr. Seaton asserted, inter alia, that TripAdvisor had published false and misleading statements and had used grossly distorted ratings and misleading information to unfairly single out and defame his business, and advise consumers to refrain from doing business

with the Grand Resort Hotel. (Id., Page ID # 4-5, pp. 1-2).

TripAdvisor removed the case from Sevier County Circuit Court to the United States District Court for the Eastern District of Tennessee, at Knoxville. (Notice of Removal, R. 1, Page ID # 1-3). TripAdvisor then filed a Rule 12(b)(6) Motion to Dismiss, asserting that Mr. Seaton's Complaint failed to state a claim because the "2011 Dirtiest Hotels" list was an inherently subjective rating or review that could not be proven true or false, and was thus not an assertion of fact that could be defamatory. (Memo of Law, R. 8, Page ID # 54-58, pp. 8-12). The "2011 Dirtiest Hotels" list was, according to TripAdvisor, a Constitutionally protected statement of opinion. (Id., Page ID # 53-55, pp. 7-9).

Mr. Seaton filed a Response to the Motion to Dismiss setting forth two arguments: (1) the allegations in the Complaint satisfied the federal pleading standard established by ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544 (2007) and ***Ashcroft v. Iqbal***, 556 U.S. 662 (2009), and (2) the "2011 Dirtiest Hotels" list, when considered in context and with accompanying statements by TripAdvisor, could reasonably be understood as making an assertion of fact and was defamatory. (Response, R. 15, Page ID # 82-83, pp. 1-2). Mr. Seaton pointed out that TripAdvisor had included additional content and statements on its website and other media displaying the "2011 Dirtiest Hotels" list that provided context to the

publication in which the list would be understood as asserting a statement of fact. (Id., Page ID # 89, p. 7).

The "2011 Dirtiest Hotels" list, dated January 25, 2011, was published in various formats on the TripAdvisor website; one version was accompanied by the following statements which were prominently displayed above the actual "2011 Dirtiest Hotels" list: (1) "World's Most Trusted Travel Advice"; (2) "TripAdvisor lifts the lid on America's Dirtiest Hotels"; (3) "Top 10 U.S. Grime-Scenes Revealed, According to Traveler Cleanliness Ratings"; (4) "Now in its sixth year, and true to its promise to share the whole truth about hotels to help travelers plan their trips, TripAdvisor names and shames the nation's most hair-raising hotels."; and (5) "This year, the tarnished title of America's dirtiest hotel goes to Grand Resort Hotel & Convention Center, in Pigeon Forge, Tennessee." ("2011 Dirtiest Hotels" list, R. 15-2, Page ID # 106-109). Mr. Seaton asserted that when considered in light of these statements, the "2011 Dirtiest Hotels" list could reasonably be construed as an assertion of verifiable fact, and thus could be defamatory. (Id.).

Mr. Seaton's proposed Amended Complaint included supplemental facts and asserted claims for defamation/libel, false light invasion of privacy, tortious interference with prospective business relationships, and trade libel/injurious falsehood. (Amended Complaint, R. 16-1, Page ID # 202-216). The proposed

Amended Complaint alleged that TripAdvisor, as provider of the "world's most trusted travel advice," published its "2011 Dirtiest Hotels" list with the obvious implication to a reasonable person that the Grand Resort Hotel was the dirtiest hotel in the United States, the dirtiest hotel of the ten hotels listed on the "2011 Dirtiest Hotels" list, and/or one of the dirtiest hotels in the United States. (Id.). The proposed Amended Complaint also pointed out that the Grand Resort Hotel was viewed favorably by the local Department of Health at that time, in complete contradiction to its "dirtiest hotel" ranking. (Id.).

Upon consideration of the matter, the District Court held that the "2011 Dirtiest Hotels" list constituted "unverifiable rhetorical hyperbole" that a reasonable person would not view as an assertion of objective fact, and thus the list could not be defamatory as a matter of law. (Order, R. 25, Page ID # 277, p. 12). The District Court concluded that although TripAdvisor numerically ranked the hotels on its list, and cited reviews as support for the rankings, it was still a statement of opinion rather than an objective statement of fact. (Id.). The District Court also denied Mr. Seaton's Motion to Amend Complaint, concluding that the proposed amendments would be futile. Accordingly, the District Court granted TripAdvisor's Motion to Dismiss, denied Mr. Seaton's Motion to Amend Complaint, and dismissed Mr. Seaton's Complaint. (Id., Page ID # 288, p. 13).

Mr. Seaton timely filed an appeal of the District Court's ruling, bringing the matter before the United States Court of Appeals for the Sixth Circuit. (Notice of Appeal, R. 27, Page ID # 284).

SUMMARY OF ARGUMENT

Mr. Seaton submits that the District Court erred in holding that the "2011Dirtiest Hotels" list created and published by TripAdvisor could not be defamatory, and thus dismissing the Complaint and denying the Motion to Amend Complaint. The District Court erred in finding that TripAdvisor's "2011 Dirtiest Hotels" list, which named Mr. Seaton's Grand Resort Hotel as the dirtiest hotel in America, could reasonably be viewed only as unverifiable rhetorical hyperbole, and thus could not be defamatory as a matter of law. Mr. Seaton argues that the District Court failed to consider the "2011 Dirtiest Hotels" list in proper context and to fully appreciate the additional commentary and text published in conjunction with the "2011 Dirtiest Hotels" list in which TripAdvisor exclaimed that the content of its feature was accurate and verifiable and could be trusted and that the "Dirtiest Hotels" list "revealed the whole truth." In light of this context, the "2011 Dirtiest Hotels" list could reasonably be interpreted as asserting a fact, or an opinion based in fact, and could be defamatory. Therefore, Mr. Seaton's Complaint satisfied the federal pleading standard by stating "enough facts to state a claim to relief that is plausible on its face." See ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 570 (2007). This Honorable Court must construe the Complaint in the light most favorable to Mr. Seaton, accept its allegations as true, and draw all reasonable

inferences in favor of Mr. Seaton. TripAdvisor published and presented the list as an accurate, reliable, and factual ranking of hotels which could be trusted as truthful information for the public to use in making their hotel decisions. When fully considered in the proper context, the "2011 Dirtiest Hotels" list could be defamatory, and thus the District Court erred in dismissing the Complaint. For these same reasons, the District Court was also in error in denying Mr. Seaton's Motion to Amend Complaint as futile.

ARGUMENT

I. The District Court Erred in Granting TripAdvisor's Motion to Dismiss and Dismissing Mr. Seaton's Claims for Defamation and False Light Invasion of Privacy.

A. Standard of Review

The Sixth Circuit reviews *de novo* the grant of a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6). ***Pulte Homes, Inc. v. Laborers' Int'l Union of N. Am.***, 648 F.3d 295, 301 (6th Cir. 2011). Under Rule 12(b)(6), the Sixth Circuit must assume the plaintiff's factual allegations are true and, construing the complaint in the light most favorable to the non-moving party, determine whether the complaint states a valid claim for relief. ***Paige v. Coyner***, 614 F.3d 273, 277 (6th Cir. 2010). To defeat a Rule 12(b)(6) motion, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level … on the assumption that all of the allegations in the complaint are true." ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 555 (2007) (citations omitted).

B. Mr. Seaton's Complaint States Plausible Claims Against TripAdvisor for Defamation and False Light Invasion of Privacy

The District Court held that the Complaint failed, as a matter of law, to state a claim for either defamation or false light invasion of privacy because the "2011 Dirtiest Hotels" list at issue was not capable of being understood as defamatory. A reasonable person, the District Court stated, would not understand TripAdvisor's

ranking of the Grand Resort Hotel as the dirtiest hotel in America as asserting a statement of fact, but would instead view it as "clearly unverifiable hyperbole." (Order, R. 25, Page ID # 277, p. 12). Accordingly, the District Court found that Mr. Seaton could not establish the elements of either a defamation or false light invasion of privacy claim at trial.

An analysis of whether Mr. Seaton's Complaint states plausible claims must begin with an understanding of the law of defamation and false light invasion of privacy. In general, a claim for common law defamation may be based upon written words, which is known as libel, or based upon spoken words, which is known as slander. ***Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.***, 876 S.W.2d 818, 820 (Tenn. 1994). Libel, which was criminal in its origin, has been recognized as the greater wrong because of the "**deliberate malignity displayed by reducing the offensive matter to writing**." ***Id.*** at 821 (quoting *Williams v. Karnes*, 23 Tenn. 9, 11 (1843)) (emphasis added).

Under Tennessee law, to assert a prima facie case of defamation, a plaintiff must establish that (1) the defendant published a statement, (2) with knowledge that the statement was false and defaming to the other, or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement. ***Sullivan v. Baptist Mem'l Hosp.***, 995 S.W.2d 569, 571 (Tenn. 1999).

The related tort of false light invasion of privacy, recognized under Tennessee law, requires the following elements: (1) publicity, (2) that places the plaintiff in a false light, (3) that is highly offensive to a reasonable person, and (4) that was made with the knowledge that the statement was false or with recklessness as to the falsity of the statement. ***West v. Media Gen. Convergence, Inc.***, 53 S.W.3d 640, 643-44 (Tenn. 2001). The District Court observed that both defamation and false light invasion of privacy claims "require a plaintiff to allege that the defaming party communicated a false or misleading statement of fact, or statement of opinion that implies having a basis in defamatory facts." (Order, R. 25, Page ID # 274, p. 9; citing *Steele v. Ritz*, 2009 App. LEXIS 843, *9 (Tenn. Ct. App., Dec. 16, 2009)).

In a case alleging defamation, the preliminary determination is "whether the article is **Capable of being … understood [as defamatory]**", and this is a question of law to be determined by the court. ***Memphis Publishing Co. v. Nichols***, 569 S.W.2d 412, 419 (Tenn. 1978) (emphasis added). As further explained in ***Memphis Publishing***, "[w]hether the … article published by the defendant … was, in fact, understood by readers in its defamatory sense is ultimately a question for the jury." ***Id.*** In other words, "it is for the jury to determine whether the statement was understood by its intended audience to be defamatory." ***Battle v. A & E Television Networks, LLC***, No. 3:11-CV-0013,

2011 WL 3205359 at *3 (M.D. Tenn. July 27, 2011). In addition, "whether a statement is true or not is generally a matter for the jury." ***Battle***, 2011 WL 3205359 at *6.

At this early stage, "when the court is called upon to determine whether a statement is capable of carrying a defamatory meaning, '**[t]he court does not decide whether a statement was actually defamatory, but only whether a reasonable fact-finder could interpret it as containing false assertions of fact**.'" ***Battle***, 2011 WL 3205359 at *8 (quoting *Ogle v. Hocker*, 279 Fed. Appx. 391, 397 (6th Cir. 2008)) (emphasis added). Further, "[i]n determining whether a statement is capable of a defamatory meaning, the '[a]llegedly defamatory statements should be judged within the context in which they are made,' and given their usual meaning, 'as a person of ordinary intelligence would understand them in light of the surrounding circumstances.'" ***Battle***, 2011 WL 3205359 at *3 (quoting *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000)). Importantly, "[a] trial court is permitted to determine that a statement is not defamatory as a matter of law … only when it can say that the statement is not reasonably capable of **any defamatory meaning** and cannot be reasonably understood in **any defamatory sense**." ***Battle***, 2011 WL 3205359 at *6 (quoting *Biltcliffe v. Hailey's Harbor, Inc.*, No. 2003-02408-COA-R3-CV, 2005 WL

2860164, at *4 (Tenn. Ct. App. Oct. 27, 2005)) (emphasis added).

With all of these well-settled principles in mind, it is respectfully submitted that the District Court erred in determining that TripAdvisor's "2011 Dirtiest Hotels" list could not reasonably be interpreted as defamatory and thus finding that Mr. Seaton's Complaint failed to state causes of action for defamation or false light invasion of privacy. Mr. Seaton respectfully submits that this Honorable Court, in conducting its *de novo* review of this matter, must view the "2011 Dirtiest Hotels" list not in isolation but in the context in which it was published and presented by TripAdvisor to its intended audience.

In conducting a *de novo* review, this Honorable Court must be mindful of the "plausibility" standard for asserting causes of action, as explained by the United State Supreme Court in the recent decisions of ***Twombly*** and ***Iqbal***. *See* ***Twombly***, 550 U.S. at 555-57, 570; ***Iqbal***, 129 S.Ct. at 1949-50. Under this standard, a complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" ***Iqbal***, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570) ("only enough facts to state a claim to relief that is plausible on its face" are required). Facial plausibility occurs "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." ***Iqbal***, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). A complaint meets the plausibility standard if it tells a coherent story. *See* ***Swanson v. Citibank, N.A.***, 614 F.3d 400, 404 (7th Cir. 2010) (complaint need only tell "a story that holds together").

As explained by the Supreme Court, a plaintiff must only plead "plausible grounds to infer" unlawful conduct by a defendant or "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of unlawful conduct. ***Twombly***, 550 U.S. at 556. There must be sufficient factual allegations in the complaint "to raise a right to relief above the speculative level." ***Twombly*** at 555. A complaint is simply required to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." ***Twombly*** (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The Supreme Court was not fashioning a "heightened" pleading standard beyond the requirements of Fed. R. Civ. P. 8(a)(2). *See* ***Twombly***, 550 U.S. at 570. The requirements of Rule 8(a)(2) merely provide for a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In fact, the Supreme Court made clear that a plaintiff is still not required to plead "detailed factual allegations" or "heightened fact pleading of specifics." ***Twombly***, 550 U.S. at 555, 570.

Indeed, courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." ***White v. United States***, 601 F.3d 545, 551 (6th Cir. 2010) (citation omitted). The bottom line is that ***Twombly*** and ***Iqbal*** do not require a plaintiff to "prove his case on the pleadings." ***Speaker v. U.S. Dept. of Health and Human Servs.***, 623 F.3d 1371, 1386 (11th Cir. 2010). Moreover, "Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable.'" ***Watts v. Florida Int'l Univ.***, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 556).

In determining the sufficiency of the Complaint, Mr. Seaton, as the non-moving party, is entitled to a number of legal presumptions. While conducting a *de novo* review, this Honorable Court must still "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." ***Jones v. City of Cincinnati***, 521 F.3d 555, 559 (6th Cir. 2008) (citation omitted). Furthermore, the construction of a complaint in favor of the non-moving party must be liberal. ***Miller v. Currie***, 50 F.3d 373, 377 (6th Cir. 1995). Finally, determining whether a complaint states a plausible claim is a context-specific task that requires the reviewing court to draw on its "judicial experience and common sense." ***Iqbal***, 129

S.Ct. at 1950.

Applying the teachings of ***Twombly*** and ***Iqbal***, Mr. Seaton submits that the Complaint satisfies the federal pleading requirements of Rule 8(a)(2) by providing enough facts to raise a plausible inference that TripAdvisor defamed and placed in a false light Mr. Seaton's Grand Resort Hotel with its "2011 Dirtiest Hotels" list. As touted in ***Twombly*** and ***Iqbal***, this Honorable Court must read the story told in the Complaint through a lens of common sense and judicial experience. The Complaint tells a plausible story of how TripAdvisor acted negligently or with reckless disregard for the truth in creating, publishing, and distributing its "2011 Dirtiest Hotels" list to millions of people through its website and other media outlets, declaring the Grand Resort Hotel as the dirtiest or one of the dirtiest hotels in America, and thus leaving Mr. Seaton, who had previously earned and enjoyed an excellent reputation with many customers, to suffer extensive losses, both to his reputation and economic damages, because of the defamatory statement. (Complaint, R. 1-1, Page ID # 5, p. 2).

As further alleged, TripAdvisor published the "2011 Dirtiest Hotels" list which proclaimed the Grand Resort Hotel as the dirtiest hotel in America and published this list on the TripAdvisor website which is a well-known source of information for travelers worldwide when making travel plans and considering or

comparing hotels. (Id.). TripAdvisor also released the list through other various media such as CNN, ABC, NBC, and other local media. (Id.).

TripAdvisor, in publishing the list, presented it as an accurate, reliable, and factual list and ranking of hotels which could be relied upon by the general public, including TripAdvisor users, in considering hotels or making travel plans. (Id., Page ID # 5-6, pp. 2-3). In doing so, TripAdvisor clearly overstated the accuracy, reliability, or level of trust that could be placed in the "2011 Dirtiest Hotels" list due to the flawed methodology or arbitrary nature used in creating the list of which TripAdvisor knew, should have known, or was reckless or negligent in disregarding the truth of the statement. (Id., Page ID # 6, p. 3). The publication of the "2011 Dirtiest Hotels" list resulted in damages to Mr. Seaton and his business both in damaged reputation and in economic losses. (Id., Page ID # 5-6, pp. 2-3).

In conducting a *de novo* review, this Honorable Court must also examine and consider the alleged defamatory nature of the "2011 Dirtiest Hotels" list in the context of the entire publication, rather than in isolation. ***Suarez Corp. v. CBS, Inc.***, 23 F.3d 408, 1994 WL 142785, at *5 (6th Cir. 1994). "[T]he words of the publication should not be considered in isolation, but rather within the context of the entire article and the thoughts that the article through its structural implications and connotations is calculated to convey to the reader to whom it is addressed."

Connaughton v. Harte Hanks Communications, Inc., 842 F.2d 825, 840 (6th Cir. 1988), *aff'd on other grounds*, 491 U.S. 657 (1989).

In deciding that the "2011 Dirtiest Hotels" list could only be reasonably interpreted as rhetorical hyperbole, the District Court failed to consider the full context, including the additional text and statements accompanying the list, as it was presented on the TripAdvisor website. In one version of the "2011 Dirtiest Hotels" list, the following statements were prominently displayed along with it on the feature: (1) "World's Most Trusted Travel Advice"; (2) "TripAdvisor lifts the lid on America's Dirtiest Hotels"; (3) "Top 10 U.S. Grime-Scenes Revealed, According to Traveler Cleanliness Ratings"; (4) "Now in its sixth year, and true to its promise to share the whole truth about hotels to help travelers plan their trips, TripAdvisor names and shames the nation's most hair-raising hotels."; and (5) "This year, the tarnished title of America's dirtiest hotel goes to Grand Resort Hotel & Convention Center, in Pigeon Forge, Tennessee." ("2011 Dirtiest Hotels" list, R. 15-2, Page ID # 106-109). The additional statements that accompanied the "2011 Dirtiest Hotels" list were obviously meant to bolster the credibility of the list, rather than delineate it as opinion or rhetorical hyperbole. Taken as a whole, the message conveyed was that the "2011 Dirtiest Hotels" list revealed the truth and was factually accurate – that these hotels were extremely dirty or the dirtiest in America.

While TripAdvisor asserts that the "2011 Dirtiest Hotels" list was created based solely upon customer reviews posted on its website, Mr. Seaton submits that the published list itself (the version attached as an exhibit to TripAdvisor's Motion to Dismiss, R. 8-1, Page ID # 65-66) calls this assertion into serious question. Mr. Seaton points out that the percentage of negative reviews attributed to each of the ten hotels on the "2011 Dirtiest Hotels" list does not correlate to each hotel's one through ten ranking, exposing the flawed methodology or arbitrary manner by which the list was created. For example, according to the list, the Grand Resort Hotel, which received the number one ranking, had 87% of reviewers recommend against staying at the hotel, while the Palm Grove Hotel and Suites in Virginia, which received the number nine ranking, had 88% of reviewers recommend against staying at the hotel. Another example is that the Hotel Carter in New York was ranked number four on the list, yet only 72% of reviewers recommended against staying at the hotel.

The additional comments and assertions by TripAdvisor accompanying both versions of the "2011 Dirtiest Hotels" list provide the proper context necessary for this Honorable Court to fully consider and determine whether the "2011 Dirtiest Hotels" list could reasonably be interpreted as making false assertions of fact, and thus is capable of being defamatory. TripAdvisor's claim that the list was merely

opinion, and would be understood only as opinion by any reasonable person, is clearly contradicted and dispelled when the text and commentary that accompanied the "2011 Dirtiest Hotels" list are considered. Not only could a reasonable person interpret the list as making assertions of fact, but TripAdvisor actually implores its readers to do just that, as the company publishing the "world's most trusted travel advice" will now "share the whole truth about hotels."

In publishing its "2011 Dirtiest Hotels" list, TripAdvisor was obviously implying to a reasonable person that the Grand Resort Hotel was the dirtiest hotel in the United States, the dirtiest hotel of the ten hotels on the "Dirtiest Hotels" list, and/or one of the dirtiest hotels in the United States. A reasonable person reading TripAdvisor's "2011 Dirtiest Hotels" list would not dismiss the message about the dirtiest hotels in making their hotel and travel plans. A reasonable person would understand that whether a hotel is filthy or not is a measurable fact. Furthermore, the "2011 Dirtiest Hotels" list cannot be considered, as TripAdvisor suggests, as "loose, figurative . . . or rhetorical hyperbole" because, in sharp contrast to typical hyperbole, such as extravagant advertising slogans, or "puffery," the "2011 Dirtiest Hotels" list is put forth with an actual numerical ranking, with comments suggesting that the rankings are actual, verifiable, and factual. Although the District Court dismissed the Complaint, the District Court noted that Mr. Seaton's argument was

"compelling." (Order, R. 25, Page ID # 276, p. 11).

While there are many facts that Mr. Seaton will have to prove at a later stage of litigation, there is simply nothing in Fed. R. Civ. P. 8 or the interpretation of the plausibility pleading standard in ***Twombly*** and ***Iqbal*** that requires Mr. Seaton to prove his case at the pleading stage. TripAdvisor has been provided fair notice regarding Mr. Seaton's claim that it defamed and placed in false light the Grand Resort Hotel in the creation, publication, and distribution of the "2011 Dirtiest Hotels" list, which highlights the fact that TripAdvisor acted negligently or recklessly in performing no investigation of its false assertions of fact. Moreover, because the "2011 Dirtiest Hotels" list is capable of being understood by a reasonable person in a defamatory sense as a matter of law, TripAdvisor enjoys no protection under either the United States or Tennessee Constitution, as will be discussed further below.

A *de novo* review reveals that TripAdvisor's "2011 Dirtiest Hotels" list is capable of being understood as defamatory by a reasonable person and that Mr. Seaton stated plausible claims for defamation and false light invasion of privacy in the Complaint. Therefore, it is respectfully submitted that the District Court's dismissal of Mr. Seaton's claims at this early stage and on this limited record should be reversed by this Honorable Court. Mr. Seaton respectfully submits that

TripAdvisor should not be permitted to publish its own libelous content with impunity, and should answer for its abuse in this case. A ruling in favor of TripAdvisor would allow TripAdvisor to become more impenetrable and more dangerous than ever in "**a lawless no-man's land on the Internet**." *See* ***Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC***, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc) (emphasis added).

C. TripAdvisor's "2011 Dirtiest Hotels" List Is Not Protected Speech under the Constitutions and Is Not Entitled to Immunity under the Communications Decency Act

An issue not addressed by the District Court, but raised by the parties, was whether the "2011 Dirtiest Hotels" list was Constitutionally protected speech. The District Court did not reach this issue, finding it moot, based on the determination that the list could not be defamatory. However, Mr. Seaton would urge this Court to hold that the "2011 Dirtiest Hotels" list is not Constitutionally protected speech.

The First Amendment of the U.S. Constitution provides in pertinent part: "Congress shall make no law … abridging the freedom of speech, or of the press…." U.S. Const. amend. I. Article I, Section 19 of the Tennessee Constitution reads in pertinent part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable

> rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

Tenn. Const. art. I, § 19. TripAdvisor relies upon these provisions to argue that the "2011 Dirtiest Hotels" list is Constitutionally protected opinion.

However, as recognized by the United States Supreme Court, as well as Tennessee courts, opinions are not automatically deemed to be Constitutionally protected because "expressions of 'opinion' may often imply an assertion of objective fact." ***Battle***, 2011 WL 3205359, at *7 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990)). Courts have correctly recognized that expressions of opinions can imply knowledge of underlying facts and be defamatory, depending upon how the statements are made, published, or presented. ***Id.*** As the U.S. Supreme Court in ***Milkovich*** explained:

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990). Therefore, even if a statement is opinion, it can be defamatory if "a reasonable fact-finder could interpret it as containing false assertions of fact." ***Battle***, 2011 WL 3205359, at *8 (citing *Ogle v. Hocker*, 279 Fed. Appx. 391, 397 (6th Cir. 2008) (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991)). There is no

constitutional value in false statements of fact. ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 339-40 (1974), *appeal after remand* 680 F.2d 527 (7th Cir. 1982), *cert. denied* 459 U.S. 1226 (1983). Moreover, regardless of intent, "[w]ords which are substantially true can nevertheless convey a false meaning…." ***Pate v. Service Merchandise Co.***, 959 S.W.2d 569, 574 (Tenn. Ct. App. 1996).

In ***Revis v. McClean***, 31 S.W.3d 250 (Tenn. Ct. App. 2000), the Court of Appeals recognized:

> **Opinions are not automatically protected by the United States Constitution**, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), but some states still hold that statements of opinion alone are not actionable. *See* 50 Am.Jur.2d *Libel and Slander* § 161. The *Restatement* (followed by the Supreme Court in *Milkovich*) position is **that an opinion may be actionable if the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion**. *Restatement (2d) of Torts* § 566.

Id. at 253 (emphasis added). Again, opinions are not automatically protected under the Constitution because "**expressions of 'opinion' may often imply an assertion of objective fact**." ***Battle,*** 2011 WL 3205359 at *7 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990)) (emphasis added).

In addition to arguing that it is entitled to Constitutional protection, TripAdvisor also insists that its "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 publishers or speakers of third-party content." (Memo of Law, R. 8, Page ID # 48, p. 8, fn. 2). In response, Mr. Seaton submits that the "grant of immunity" afforded under Section 230 of the Communication Decency Act ("CDA") "applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content." ***Fair Housing Council***, 521 F.3d at 1162 (quoting 47 U.S.C. § 230(f)(3)). In fact, the immunity afforded under the CDA is "**not absolute and may be forfeited if the site owner … makes actionable postings itself**." ***Jones v. Dirty World Entertainment Recordings, LLC***, 766 F.Supp.2d 828, 836 (E.D. Ky. 2011) (relying on *Fair Housing Council*) (emphasis added).

As previously shown, TripAdvisor clearly created and developed the offending material, and thus cannot hide behind such a statutory grant of immunity. TripAdvisor created a new actionable message in its production and publication of the "2011 Dirtiest Hotels" list and therefore TripAdvisor's plea that Mr. Seaton is seeking to "shoot the messenger" should ring hollow. Mr. Seaton takes no issue with TripAdvisor allowing users to post legitimate, individual reviews on its website. Rather, the defamation allegation in this case is solely

directed at the libelous content created entirely by TripAdvisor, i.e. the "2011 Dirtiest Hotels" list, for which TripAdvisor enjoys no immunity under the CDA. As previously noted, the CDA "**was not meant to create a lawless no-man's-land on the Internet**." ***Fair Housing Council***, 521 F.3d at 1164 (emphasis added).

II. The District Court Erred in Denying Mr. Seaton's Motion to Amend Complaint as Futile.

A. Standard of Review

The denial of a motion to amend a complaint is generally reviewed for an abuse of discretion. ***Dubuc v. Green Oak Township***, 312 F.3d 736, 743 (6th Cir. 2002); ***Parry v. Mohawk Motors of Michigan, Inc.***, 236 F.3d 299, 306 (6th Cir. 2000). However, when the district court's decision to deny a motion to amend is based on the legal conclusion that the amendment would be futile, the denial is reviewed *de novo*. ***Dubuc***, 312 F.3d at 743; ***Parry***, 236 F.3d at 306. Because the District Court held in this case that Mr. Seaton's proposed Amended Complaint would not withstand a Rule 12(b)(6) motion to dismiss and would thus be futile, this Court must review the denial *de novo*. ***Id.***

B. Mr. Seaton's Proposed Amended Complaint Is Not Futile and Should Have Been Granted

In the District Court, Mr. Seaton sought to amend the original Complaint in order to expound upon and add additional specificity to the claims asserted therein,

along with stating additional claims for relief based upon, and arising out of, the same facts and conduct providing the basis for the original Complaint. However, the District Court denied the Motion to Amend, finding the issue moot based upon the finding that the "2011 Dirtiest Hotels" list could not be defamatory. As already discussed above, Mr. Seaton's position is that the District Court erred because the "2011 Dirtiest Hotels" list can reasonably be interpreted in a manner that is defamatory. Accordingly, for the same reasons discussed above, the Motion to Amend was not moot and should have been granted in the interest of justice.

Rule 15 of the Federal Rules of Civil Procedure provides that "the court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). In considering a motion to amend pleadings, the court should balance several relevant factors, including undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment. ***Miller v. Administrative Office of the Courts***, 448 F.3d 887, 898 (6th Cir. 2006); ***Wade v. Knoxville Utils. Bd.***, 259 F.3d 452, 458 (6th Cir. 2001).

In ruling on, and denying, Mr. Seaton's Motion to Amend, the District Court specifically found that the motion was timely, not made in bad faith, and would not unduly prejudice TripAdvisor. Nevertheless, the District Court denied the motion

as futile, based solely on its determination that the offending statement from which all of the claims arose could not be defamatory, thus concluding that the proposed Amended Complaint would not survive a motion to dismiss brought under Rule 12(b)(6). Mr. Seaton submits that, should this Honorable Court hold that the "2011 Dirtiest Hotels" list could be defamatory, then both the District Court's grant of the motion to dismiss and the District Court's denial of the motion to amend should be reversed.

The District Court characterized Mr. Seaton's proposed Amended Complaint as containing "supplemental facts and more organized legal pleadings." (Order, R. 25, Page ID # 280, p. 15). As these proposed amendments were timely made and were not unduly prejudicial to TripAdvisor, Mr. Seaton asserts that the interest of justice would strongly support granting the amendment, as it would serve to better explain and illuminate the conduct at issue for the benefit of the parties and the Court.

In addition to including supplemental facts, and presenting the defamation and false light invasion of privacy claims in a more organized fashion, the proposed Amended Complaint also asserted two new causes of action: (1) trade libel/injurious falsehood, and (2) tortious interference with prospective business relationships. Trade libel is a claim recognized in Tennessee common law which

includes, as an element, proof of publication of a false statement of fact regarding the plaintiff's business, causing damages to the business. Tortious interference with prospective business relationships, under Tennessee law, is a similar claim in the sense that it requires improper conduct, which could include defamation, resulting in damages to business relationships. As to the trade libel claim, the District Court ruled that Mr. Seaton could not prove publication of a false statement of fact because the "2011 Dirtiest Hotels" list could not reasonably be interpreted as asserting fact, and thus this claim could not survive. (Order, R. 25, Page ID # 280, p. 15). The District Court likewise held the tortious interference with business relationships claim to be unsupportable and futile, based upon the determination that Mr. Seaton could not prove improper intent or improper conduct, both necessary elements for this cause of action. (Id., Page ID # 280-281, pp. 15-16).

Mr. Seaton now urges this Honorable Court to review, and reverse, the District Court's denial of the Motion to Amend Complaint, and the effective dismissal of these two newly asserted causes of action, in light of the arguments asserted herein. Specifically, the offending statement giving rise to this case, the "2011 Dirtiest Hotels" list, can reasonably be seen as asserting a false statement of fact, or opinion based in fact, and thus can be defamatory under the law. The newly asserted claims based on these two causes of action, as set forth in the proposed

Amended Complaint, spell out claims for relief that are plausible on their face, and allow the Court to draw the reasonable inference that TripAdvisor is liable for the misconduct alleged. *See* ***Iqbal***, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). This is sufficient at this stage to survive a motion to dismiss, allowing the case to go forward and providing Mr. Seaton with the opportunity to present his case to a jury.

III. Conclusion

In summary, Mr. Seaton, as the appellant, submits that the District Court erred in dismissing his Complaint, and in denying his Motion to Amend Complaint. In finding that the "2011 Dirtiest Hotels" list could not be defamatory as a matter of law, the District Court failed to properly consider how TripAdvisor created the list, and the full context in which the list was published and presented to the millions of TripAdvisor's website users as part of "the world's most trusted travel advice." Mr. Seaton respectfully submits that the District Court's decision should be reversed and that the case should be remanded back to the District Court for further proceedings.

SIGNED CONCLUSION

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CERTIFICATE OF COMPLIANCE

The appellant, pursuant to the Fed. R. App. P. 32(a)(7)(C), hereby certifies that the following brief contains 8,421 words.

DATED CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document has been filed electronically and will be sent by the operation of the Court's electronic filing system to all parties indicated on the electronic filing system receipt, and all persons or parties not on the electronic filing receipt will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

This the 4th day of January, 2013.

s/ John T. Milburn Rogers
John T. Milburn Rogers

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

1. Notice of Removal, R. 1, Page ID # 1-3
2. Complaint, R. 1-1, Page ID # 4 -6
3. Motion to Dismiss, R. 7, Page ID # 39-40
4. Memo of Law, R. 8, Page ID # 41-64, 272-274
5. "2011 Dirtiest Hotels" list, R. 8-1, Page ID # 65-66
6. Response, R. 15, Page ID # 82-103
7. "2011 Dirtiest Hotels" list, R. 15-2, Page ID # 106-109
8. Motion to Amend, R. 16, Page ID # 200-201
9. Amended Complaint R. 16-1, Page ID # 202-216
10. Reply Memo, R. 19, Page ID # 221-234
11. Order, R. 25, Page ID # 266-282, 288
12. Judgment, R. 26, Page ID # 283
13. Notice of Appeal, R. 27, Page ID # 284