UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROCA LABS, INC.,

Plaintiff,

v.

CONSUMER OPINON CORP. and OPINION CORP. d/b/a PISSEDCONSUMER.COM,

Defendants.
_____/

Case No: 8:14-cv-02096-VMC-EAJ

DEFENDANT OPINION CORP.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1.0 INTRODUCTION

Through its response to Defendant Opinion Corp.'s Motion for Summary Judgment (Doc. # 189), Plaintiff Roca Labs, Inc. ("Roca") fails completely to address (not to meet, but to even acknowledge) its burdens of proof or the factual elements of its claims, thus constituting its admission of Opinion Corp.'s entitlement to summary judgment. *See* Fed. R. Civ. P. 56(e); *see also Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981) (holding that summary judgment is required if a non-movant's response contains no "more than a repetition of his conclusional allegations"). Even worse for Roca, its opposition is (once again) based on the bad-faith argument that its meritless claim that Opinion Corp. failed to respond to Roca's untimely requests for admission. Defendants have already explained why nothing within these requests has been admitted, and that Roca knew this when filing their own motion for partial summary judgment. (*See* Doc. # 187). For this reason, this argument is not only of no substantive significance, but Roca's reliance on it – just like its charade of attending four days of depositions it knew were cancelled

in a bid to generate a basis for sanctions – is continuing proof of Roca's grave addiction to bad faith in litigation and its continued hope that this Court will not call it to task for such practice.

2.0 ARGUMENT

2.1 Opinion Corp. is Immune Under the CDA

The Communications Decency Act ("CDA"), 47 U.S.C. § 230, immunizes interactive service providers from liability for content created by third parties using the service provider's service. Roca has failed to even come forward with admissible evidence to rebut the testimony of Defendants' principals that all the consumer reviews on pissedconsumer.com and on Twitter were obviously authored by third parties.[3] To create the impression of a dispute as to an issue of material fact to allow it to survive summary judgment, Roca argues that one aspect of one step out of a seven-step process for user submissions – the counting of reviews as "complaints" – turns Opinion Corp. into a content creator. (*See* Doc. # 189 at 11.) As Roca acknowledges, however, users submitting reviews have the option to indicate that they are "pleased." (*Id.*) That a positive review may be counted as a "complaint" in another part of the website is irrelevant to the question of whether Opinion Corp. created an allegedly defamatory **review** and would, at most, lead to a claim that Roca was defamed by such miscounting alone, as opposed to by the content of the reviews – whereas it is harm arising from the latter that forms the factual basis of Roca's claims for both liability and damages. Roca also points to its allegedly undisputed facts e-h (*see id.* at 7-9), which only show post-publication annotations informing the public of this suit. Again, this has nothing to do with whether Opinion Corp. authored any underlying review.

Roca further argues, absurdly, that because the pissedconsumer.com website provides a form for users to fill out in publishing reviews, Opinion Corp. is a content provider under section 230. It relies on *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521

[3] Roca claims that Opinion Corp. has admitted to creation of the consumer reviews at issue because Opinion Corp. did not respond to Roca's untimely requests for admission. Again, because Opinion Corp. was not required to respond to these out-of-time requests, no admission can be inferred from them. (*See* Doc. # 187.)

F.3d 1157 (9th Cir. 2008) in making this argument, an extremely limited holding not even binding in this Circuit that stripped a website operator of CDA immunity because users of the defendant's website – unlike the users of pissedconsumer.com – had no choice but to render unlawful statements by using a drop down menu. *See id.* at 1166. Unlike here, each menu selection was discriminatory, giving users **no choice** but to select a discriminatory category in violation of the Fair Housing Act. *Id.* Besides being based on facts having no similarity to those here, *Roommates* also involved not the judicially disfavored tort of defamation but, to the contrary, a remedial statute meant to protect civil rights and thereby entitled to special deference. For this reason, Roca's reliance on *Roommates* does not come close to establishing the wide gap in section 230 that Roca argues for. Here, as acknowledged by Roca, positive reviews are possible – if warranted.

Similarly, Roca claims Opinion Corp. is the author of certain allegedly defamatory tweets because of the coding inserting Roca's own Twitter handle and bolding a term. (*See id.* at 13-14.) But it is well-established that a service provider does not lose section 230 immunity by automatically reposting reviews as tweets. *See, Giveforward, Inc. v. Hodges*, 2015 U.S. Dist. LEXIS 102961, *30-31 (D. Md. Aug. 6, 2015). It follows that whatever incidental "programming" is necessary to convert a review to a tweet or to otherwise re-use or "repost" content is also not actionable "content," for the question is ultimately who created the content. The law is clear that Section 230 does not require a defendant to publish third party content on its own website; instead, it immunizes a "provider of an interactive computer service." 47 U.S.C. § 230(c). Per § 230(f)(2), an "interactive computer service" is any "information service . . . provider that . . . enables computer access by multiple users to a computer server . . . ." For example, just as the parties were filing Docs. # 186, 187 & 189, the U.S. District Court for the District of Maryland awarded summary judgment to an interactive computer service provider under section 230, where the plaintiff raised almost identical theories in *Giveforward, Inc. v. Hodges*, 2015 U.S. Dist.

LEXIS 102961 at *2.[4] In that case, Hodges argued that GiveForward, the defendant, lost Section 230 immunity because it "helps users create fundraising pages, offers advice on how to craft the content of those fundraising pages, suggests ways to promote the fundraiser and increase donations, and processes donations." *Id.* at *9. The court rejected this argument, even though GiveForward took a share of profits and gave helpful hints and suggestions to posters. *See*, *id.* at * 11. The court further relied on *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 252 (4th Cir. 2009), where the Fourth Circuit rejected the argument that the "structure and design" of a website made its operators a content provider, even if they encouraged complaints and categorized them. *See*, *Hodges* at *15-16. Neither did the automatic generation of a tweet give rise to liability. *See*, *id.* at *30-31. Just as Hodges failed to present evidence that GiveForward edited or added to the reviews at issue, Roca has similarly failed. Opinion Corp. is immune from suit per section 230.

2.2 Roca Has Failed to Establish a Defamation Claim Against Opinion Corp.

Much as it would like to obfuscate this fact, Roca's lawsuit is based primarily on its defamation claims. It is telling, then, that Roca's opposition is woefully deficient in attempting to show its defamation claims can survive summary judgment.

2.2.1 Roca's unsupported denial of public figure status is insufficient to overcome its burden of having to show actual malice

Roca asserts that it is not a public figure by providing the three-part test for limited public figure status laid out in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), skipping any application of this test to the facts of record, and concluding that "[t]here are no facts in the record to establish Plaintiff is a public figure under this test." (Doc. # 189 at 14.) In fact, however, the record is clear that not only is Roca at least a **limited** public figure: It is a public figure in full, which Defendants have previously established in earlier

[4] To the extent applicable, this pleading should be treated as a Notice of Supplemental Authority relative to Defendants' response to Plaintiff's motion for summary judgment, Doc. # 187.

submissions. (*See* Doc. # 57, Defendants' first Motion for Summary Judgment, at 17-18; Doc. # 148, Consumer Opinion Corp. Motion for Summary Judgment, at 9-11; Doc. # 173, Opinion Corp. Motion for Summary Judgment, at 9-10.)

To briefly recapitulate, however, Roca is a public figure, defined as one whom "[t]he public recognizes . . . and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration." *Waldbaum*, 627 F.2d at 1294. Here, Roca brags about its reputation, the scope of its operations, and its wide customer base in its own Amended Complaint (*See* Doc. # 114 at ¶¶15, 17, 23), which should resolve any question by itself. Moreover, Roca advertises its product by photographs with celebrities like Alfonso Ribeiro, and has been the subject of nearly 200 complaints filed with the Better Business Bureau and the Federal Trade Commission for their business practices. (*See* Doc. # 148-3 at 4-10; Doc. #s 131-1, 131-2; Doc. # 148-5.) At the very least there can be no question but that Roca is a limited public figure; Roca touts the special attention it garners in the weight loss community, and the company itself is central to that attention. (Compare *Waldbaum*, 627 F.2d at 1298-1299 (finding Waldbaum a limited public figure due to the innovative nature of his employer, Greenbelt)). If Roca can only make an unsupported denial of its public figure status in the face of such evidence, it truly does not have a leg to stand on, and must satisfy the exacting actual malice standard to prevail on its defamation claims, which it has utterly failed to do on summary judgment in order to maintain its claim.

2.2.2 Roca has not even alleged actual malice

It is unfortunate for Roca that its attorneys apparently still have no understanding of what actual malice is, even after a year of litigation and having the concept explained to them in three motions for summary judgment. Roca's actual malice argument is that Opinion Corp. made statements in order to harm Roca and that it operates pissedconsumer.com so as to attract

negative statements directed to different businesses. (Doc. # 189 at 14-15.) Perhaps Roca meant to connect "anger" with malice, but as a legal matter, Roca fails to articulate how any of the above meets its burden of showing, by **clear and convincing evidence**, that Opinion Corp. made the statements at issue with **knowledge** of their falsity or **reckless disregard** for their truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280-82 (1964). This is in addition to Roca having absolutely no factual basis whatsoever for its assertions. Roca simply jettisons its burden of proof, ignoring the exacting constitutional standard and offering a sophomore's concept of what "malice" might "actually" mean.

Roca also makes the mistaken argument that it has alleged defamation *per se*[5] "and thus malice is presumed by making the statements." (Doc. # 189 at 17.) Again, even if this were true, it is irrelevant to the question of actual malice; "express" or "common law" malice simply means ill will on the part of the speaker and a tendency for the statements at issue to harm the defendant. *See Lawnwood Med. Ctr. Inc. v. Sadow*, 43 So. 3d 710, 727 (Fla. 4th DCA). This has nothing to do with a public figure plaintiff's "actual malice" burden of proof, as the common law tradition of implied malice does not trump *Sullivan* and its progeny. *See Klayman v. City Pages*, 2015 U.S. Dist. LEXIS 49134, *42 (M.D. Fla. Apr. 3, 2015) (citing *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 363 n.7 (11th Cir. 1987) ("common law malice" malice and "actual malice" are distinct, and *under Sullivan* "actual malice may not be presumed"). Just as Opinion Corp. predicted in the instant Motion for Summary Judgment, Roca cannot establish actual malice. It has not even attempted to, and such an utterly deficient response to a fatal flaw in its defamation claims cannot allow Roca to survive summary judgment.

[5] In addition to Roca mistakenly believing that a defamation *per se* claim excuses it from proving actual malice, it also asserts that damages are presumed. However, the caselaw cited by Roca, *Richard v. Gray*, 62 So.2d 597, 598 (Fla. 1953), the cases it cites, and their progeny, all involve damage to a human person. Roca is a corporate entity incapable of suffering the presumed general damages in a *per se* defamation claim. Moreover, the statements do not actually rise to defamation *per se*. Compare *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. 376, 379-80, 522 N.E.2d 959 (1988) (characterizing plaintiffs as "insurance crooks," who engaged in "insurance fraud" constitutes a statement of **opinion** and not fact); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1203, 1984 U.S. Dist. LEXIS 18771, *22-23, 10 Media L. Rep. 1608 (N.D. Ill. 1984) (statement made that practices of a nutritionist were "consumer fraud," was a statement of opinion).

2.2.3 Roca has made no argument as to why any statement at issue is capable of a defamatory meaning

Neither does Roca meaningfully respond to the damning argument that none of the allegedly defamatory statements at issue are capable of defamatory meaning.[6] Instead of responding to Defendants' detailed analysis by attempting to articulate how even a **single** statement at issue is a factual assertion, Roca instead attacks the reliability of Defendants' expert witness, Edwin Nagelhout. This is a puzzling tactic, given that Dr. Nagelhout is mentioned nowhere in the instant Motion for Summary Judgment.[7] Roca does not discuss its basis for asserting that any statement at issue is a factual assertion, with or without expert testimony. Roca addresses none of Opinion Corp.'s arguments, thus failing completely to meet its burden of coming forward with evidence or argument to support a necessary element of its defamation claims. On this basis alone the Court should grant summary judgment in Opinion Corp.'s favor.

Even if Roca had properly argued that a single statement at issue was meant as an assertion of fact, Opinion Corp. has submitted an abundance of admissible evidence – none of which is directly rebutted or even addressed by Roca – to verify these statements as true or substantially true. Roca merely claims that Opinion Corp.'s expected witnesses lack personal knowledge as to the truth of the statements.[8] This, again, is nonsensical. One does not need to be the author of a statement to be capable of determining whether it is true or substantially true, making the statements of Roca's customers relevant and admissible. Their experiences with Roca's product and customer service corroborate the allegations in the allegedly defamatory

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[6] Roca argues that Opinion Corp. "makes the simultaneous, yet diametrically opposed, assertions" that some statements are both protected statements of opinion and true statements of fact. (Doc. # 189 at n.3.) Roca has once again failed to grasp the concept of alternative arguments. Opinion Corp.'s position is that all these statements are statements of opinion, and to the extent that any contain factual assertions, such assertions are true. Defendants enunciated this position at least as early as their first Motion for Summary Judgment (*See* Doc. # 57 at 21-24).

[7] Roca has otherwise challenged Dr. Nagelhout in its Motion *in Limine*, Doc. # 191. Opinion Corp. respectfully addresses the admissibility and reliability of his testimony in a separate opposition to be filed.

[8] Incredibly, Roca complains that Opinion Corp. has not identified any of the individuals who authored the allegedly defamatory reviews. (*See* Doc. # 189 at 16.) **Neither has Roca**. As more thoroughly explained in Defendants' opposition to Roca's partial motion for summary judgment (Doc. # 187), if Roca does not know the identities of the consumers writing about their personal, subjective experiences with Roca and its products, there is simply no way that it can prove (or even assert in good faith) that any factual content within the statements is false.

statements at issue. And beyond this, there is evidence outside the declarations Defendants have provided establishing the truth of the allegedly defamatory statements. These are all matters of record. (*See* Doc. # 148, *passim*, and evidence cited therein and Doc. # 173, *passim*, and evidence cited therein, incorporated herein by reference.) The only evidence of record to support the assertion that the statements at issue are false is a self-serving and largely fact-free declaration from Don Juravin, who does not explain why or how any particular statement at issue is false. Roca counters volumes of documentary evidence with the legal equivalent of covering its ears and shouting to itself. Its non-responsive opposition should not permit its case to go to trial.[9]

2.3 Roca Has Still Failed to Make Out Even a Facial FDUTPA Claim

Fla. Stat. § 501.201 et seq. (2014) requires that there be a **consumer relationship** between the parties, engaged in a business transaction, for a plaintiff to have standing to bring a claim under FDUTPA. *See Dobbins v. Scriptfleet, Inc.*, 2012 U.S. Dist. LEXIS 23131 (M.D. Fla. Feb. 23, 2012) (citing *Kertesz v. Net Transactions, Ltd.* 635 F. Supp. 2d 1339, 1349 (S.D. Fla. 2009). The legislative history is clear. *See Kertesz*. Contrary to Roca's assertion, *Beacon Prop. Mgmt. v. PNR, Inc.* 890 So. 2d 274 (Fla. 4th DCA 2004) suggests, in dicta, that under some circumstances a consumer relationship might not be required; it did not rule on the issue, as it found there was a consumer relationship. *See id.* at 278. In the subsequent eleven years no federal court has taken up the invitation to adopt such a holding. Thus, while Roca "does not allege a consumer relationship between Plaintiff and Defendants, or even an employment, business, or competitor relationship" (Doc. # 43, Magistrate's Report and Recommendations, at 9), its FDUTPA claim must fail for lack of standing.

[9] Roca additionally asserts that "Defendant does not address Plaintiff's allegation that it was defamed by the false statistics and other content that Defendant creates and publishes." (Doc. # 189 at 17.) Roca was apparently sloppy in copying and pasting its opposition to co-Defendant Consumer Opinion Corp.'s motion for summary judgment, as the instant motion explains how Roca's defamation claims based on statements actually authored by Opinion Corp. are sanctionably weak. (*See* Doc. # 173 at 18-20.)

Even if Roca did have standing to bring its FDUTPA claim, it still has not provided any competent evidence of damages suffered due to any unfair or deceptive business practice of Opinion Corp. Roca also does not identify in its opposition how any of Opinion Corp.'s business practices violate FDUTPA. The only evidence that Roca offers to support its contention of damages is a paragraph from the declaration of Don Juravin, a known perjurer,[11] which states that "Roca has been greatly damaged because of the defamatory postings and Tweets. Roca's brand has been eroded, sales have been hurt and customers have refused to buy the product." (Doc. # 172-5 at ¶18.) Roca provides no documents to indicate the extent of their loss of sales, the identities of any such customers, or any causal nexus. Not a single supporting fact is submitted to support or meaningfully quantify these damages. But "a claim for damages under FDUTPA requires proof of actual damages." *Pegasus Imaging Corp. v. Northrop Grumman Corp.*, 2010 U.S. Dist. LEXIS 118586, *15 (M.D. Fla. Nov. 4, 2010). Opinion Corp. is not aware of the claimed $40m in damages; it is only aware that Roca has alleged such losses.

Even if Roca had provided such evidence, it asserts a claim for lost profits, i.e., consequential damages, which are not recoverable under FDUTPA. *See Eclipse Med. v. Am. Hydro-Surgical Instruments*, 262 F. Supp. 2d 1334, 1357 (S.D. Fla. 1999) ("'actual damages' under FDUTPA is a term of art, defined by Florida courts as 'the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered . . .'") (citations omitted). Nor can Roca recover under FDUTPA for "stigma or diminution in value type damages." *Orkin Exterminating Co. v. Delguidice*, 790 So. 2d 1158, 1162 (Fla. 5th DCA 2001). Roca has thus failed to even claim "actual damages" under the statute, and thus has still yet to assert a valid FDUTPA claim. Thus, Roca's FDUTPA claim fails.

[11] There is no question that Don Juravin committed perjury when he submitted a sworn affidavit to the Court that a "review" of Roca's product from celebrity Alfonso Ribeiro on pissedconsumer.com was genuine. (*See* Doc. # 20; Doc. # 26.)

2.4 Roca Has Failed to Provide Any Evidence to Support its Tortious Interference Claims

Despite ample opportunity to produce evidence of causation as to its alleged damages, Roca has never done so, citing only to ¶263 of its Amended Complaint as "evidence" of individuals with whom Roca has a prospective economic relationship. Roca otherwise literally admits that "[n]ot one such opportunity has been documented, or even identified, in discovery." (*See*, Doc. # 189 at 19.) This Court needs no citation to precedent for the proposition that allegations in a pleading do not create a genuine dispute as to an issue of material fact sufficient to withstand summary judgment. Just as the Court found over nine months ago, "Plaintiff has failed to satisfy its burden of proof on the issue of causation and is not likely to succeed on the merits of its claim for tortious interference." (Doc. # 43 at 12.) Nothing has changed since then.

Roca also makes the argument that Opinion Corp. cannot challenge the validity of Roca's gag clause because it is not a party to this contract. But while a party may not sue to **enforce** a contract unless it is a party or an intended beneficiary, (*see* Doc. # 189 at 20), Opinion Corp. is not attempting to enforce anything. It is asserting a defense, valid in response to a **tortious interference with contractual relationships** claim, that the contract that it is accused of interfering with is not legal. Roca's contractual interference claim cannot, as a legal matter, be better than the contract it claims was breached itself.

3.0 CONCLUSION

Roca's response to Opinion Corp.'s motion for summary judgment relies on requests for admission that are not admitted; a vague, self-serving declaration from a perjurer; and its own Amended Complaint, none of which create any genuine dispute as to any issue of material fact. Roca has completely neglected to respond to entire swaths of the instant motion at all, entitling Opinion Corp. to summary judgment.

Dated: August 20, 2015

Respectfully Submitted,

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CASE NO.: 8:14-cv-02096-VMC-EAJ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 20, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served upon counsel for Plaintiff, via transmission of Notices of Electronic Filing generated by CM/ECF.

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