

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

HOULIHAN SMITH & COMPANY, INC., <i>et al.</i>)	
)	
Plaintiffs)	
)	
v.)	Case No. 1:10-cv-2412
)	
JULIA FORTE, <i>et al.</i> ,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF FORTE DEFENDANTS’ MOTION
TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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Plaintiffs have sued the operator of an interactive message board, over comments posted by third parties that are claimed to improperly plaintiffs' reputations. Plaintiffs' ability to maintain this action depends on whether they can evade a federal law, 47 U.S.C. § 230, that makes such web hosts immune against suit as well as against liability for such content. *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 671 (7th Cir. 2008). The allegations seeking to evade Forte's immunity are both conclusory and implausible, are contradicted by documents referenced in the complaint, and are legally insufficient as a matter of law; hence defendants move to dismiss those claims. Even if plaintiffs' allegations could survive a motion to dismiss, the undisputed facts in the record show the falsity of those allegations; hence defendants seek summary judgment.

FACTS AND PROCEEDINGS TO DATE¹

This case arises from two web sites operated by Julia Forte. Forte is a North Carolina resident who, with her husband, runs the sites 800notes.com and whocallsme.com. Forte Affidavit ¶¶ 2-3. They have no employees to help operate the site. *Id.* ¶ 32. Apart from a few news articles and essays about telemarketing that have nothing to do with plaintiffs or the allegations in this case, the web sites are message boards on which the public can discuss marketing phone calls and those who make them. *Id.* ¶¶ 4-10 and attached exhibits. Forte neither authors the message board postings nor chooses the marketers about which comments are made. *Id.* ¶ 11. Rather, after a member of the public receives a marketing call, he can search the

¹The facts recited in this statement are drawn from the non-conclusory allegations of the complaint and from the affidavit of Julia Forte and its exhibits. The exhibits to the Forte affidavit are documents on which the complaint is based, and so may be considered on a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322; *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002). References to "Forte Affidavit" and "Levy Affidavit" and their exhibits are to the affidavits filed in opposition to the motion for a preliminary injunction, DN 16-2 and 16-3.

site for information about the telephone number from which the call was placed, and, if so motivated, put his own comments on the message board about that telephone number. *Id.* ¶ 10. If no comments have yet been posted about that telephone number, the viewer is given the option of posting about that number and hence creating a new message board about the number. *Id.* ¶ 14. Hundreds of thousands of different phone numbers are discussed on the two sites. *Id.* ¶ 10.

All forms for posting comments warn each poster to provide only truthful information and to avoid offensive language. *Id.* ¶¶ 12, 14, 26 and Exh. I, J. Although the sites' Terms of Service forbid knowingly false postings, they also make clear that the web host "does not monitor the content and takes no responsibility for such content," and is not "in a position to investigate, censor or otherwise ensure the accuracy of any comments, remarks or other information." *Id.* ¶ 9 and Exh. F. An additional page on the web site informs Internet users about 47 U.S.C. § 230 and explains that, because the "content on 800notes.com is authored by users of the site," the site host cannot be sued over that content. The page urges dissatisfied targets of criticism to reply to criticism by explaining their own side of the story. *Id.* Exh. H.

When a viewer posts new content to the web sites, including content about a new phone number not previously discussed there, the sites' software automatically and instantaneously places it on the message board without any human review or intervention. *Id.* ¶ 13. The sites' host looks at individual messages only when a viewer marks a message as abusive; in response, the message is either left in its entirety or removed in its entirety. Messages are not edited in any way. The most common reasons why messages are removed are that they are spam, contain advertising, or include vulgar language. *Id.* ¶ 16.

Forte's sites are supported by advertising that is placed under contracts with California and New York companies. *Id.* ¶ 18. But the sites do not sell goods or services, they have no e-

commerce functions, and advertising cannot be bought through the sites. *Id.* ¶¶ 17, 19. Forte and her LLC have no contacts with Illinois; indeed Forte has never been to Illinois. *Id.* ¶ 12.

Houlihan Smith & Co. and Houlihan Smith Advisors (together, “Houlihan”) are an investment banking operation based in Chicago. Since 2007, roughly 250 messages have been posted on pages on Forte’s sites about the telephone number 312-499-5900 by persons claiming to have received calls from Houlihan and discussing the company, generally in unflattering terms, although other posters have defended Houlihan and condemned its critics. *Id.* ¶ 20; Exhibit B to Complaint. Forte was not aware that Houlihan was being discussed on her web site, and she did not even know what Houlihan was or that it is located in Illinois, until she received a demand letter from plaintiff’s counsel on April 12, 2009. *Id.* ¶ 21. Both Houlihan Smith and its law firm, Duane Morris, have participated in the discussion about Houlihan Smith on the web sites. Forte Affidavit ¶ 20; Forte Second Affidavit ¶ 2.

The complaint alleges, mostly on information and belief, that Forte has embedded either Houlihan’s name, or content about Houlihan from the posts, in the title tags, description meta tags, or otherwise in “hidden code” on her web site. The allegations are not only false, Forte Affidavit ¶¶ 22-30, but are contradicted by documents that Houlihan itself has authenticated. Indeed, the source code for a web site is easily viewed from a web browser, and can be downloaded and printed. Houlihan itself attached such code to a **prior** lawsuit (discussed in the next paragraph), and Forte has attached such code to her affidavit as well. Forte Affidavit ¶ 23 and Exh. K. This code shows that the title and description tags on Forte’s web pages about the phone number 312-499-5900 contain that number but neither Houlihan’s name nor any content about Houlihan. *Id.* ¶¶ 22-23 and Exh. J, K.

On March 2, 2010, Houlihan filed a petition for discovery in Cook County Circuit court,

alleging that several specified posts had been posted on Forte's web sites by third parties, and asking that Forte be ordered to provide information that might lead to their identification. *Id.* Exh. K. Among the attachments to the petition was the downloaded source code from one of Forte's pages. The petition has never been served on Forte. *Id.* ¶ 33. On April 16, Houlihan filed a verified complaint in Cook County Circuit court, alleging multiple counts of defamation and interference with business caused by the allegedly defamatory statements about itself and its employees. Houlihan also characterized those criticisms as trademark misappropriation, dilution and right of publicity violations, on the theory that use of its name, and its employees' names, to identify the subjects of criticism violates its trademark and the employees' publicity rights. Finally, based on "information and belief" allegations about meta tags, title tags and other features, Complaint ¶¶ 31-38, Houlihan alleged that Forte's own content violates its trademarks. Houlihan did not show that its "information and belief" affiants — two investment bankers — had expertise to testify about how a Google search works or what meta tags do. A temporary restraining order was granted without notice. On April 19, Forte removed to this Court. DN 1.

Plaintiffs moved to extend the TRO, which Forte opposed, attaching the affidavit on which she mainly relies in support of this motion. Paul Alan Levy, Forte's counsel, also filed an affidavit authenticating documents. After receiving a reply, the Court heard argument on May 6, 2010, on plaintiffs' motion for a preliminary injunction, and denied it with an oral opinion.

ARGUMENT

I. The Court Lacks Personal Jurisdiction Over Forte.

On a motion to dismiss for lack of personal jurisdiction, the Court accepts complaint's well-pleaded allegations as true, unless contradicted by admissible averments in the defendants' affidavits (and other evidence). If the Court reaches the stage of considering the defendants'

affidavits, it should then decide if there are any genuine issues of material fact going to the issue of personal jurisdiction, and if so, the Court should hold a hearing on personal jurisdiction. *See Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782-783 (7th Cir. 2003); *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 713 (7th Cir. 2002); Although Forte has submitted an affidavit and supporting exhibits in opposition to personal jurisdiction, plaintiffs' allegations do not show the existence of personal jurisdiction under governing Seventh Circuit precedent; hence, the action should be dismissed without even considering Forte's affidavit.

Under *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), personal jurisdiction over out-of-state defendants sued for intentional torts depends on whether defendants intentionally directed tortious activity at a party in Illinois, **expressly aiming** at Illinois. *Id.* at 707-708. The application of this test is well illustrated by the facts of *Tamburo*. The authors of allegedly defamatory comments criticized Tamburo, called for a boycott of his Illinois-based business, included his Illinois address in comments, and urged readers to harass him. *Id.* at 697. Such defendants were subject to personal jurisdiction. *Id.* at 707-708. But the defendant that was accused only of facilitating the posting of the tortious comments, but did not know that Tamburo was in Illinois, was dismissed. *Id.* at 708. *Accord ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 714-715 (4th Cir. 2002) (Georgia web hosting company on whose servers another defendant violated Maryland company's copyright could not be sued in Maryland).

Here, plaintiffs must first allege, and then prove, intentional targeting of Illinois. On the record here, there is no personal jurisdiction over defendants in Illinois, for two reasons. First, the complaint's allegations do not make out a case of personal jurisdiction because plaintiffs never allege that Forte specifically aimed her site at Houlihan, knowing that it is located in Illinois. In their reply memorandum in support of the motion for a preliminary injunction,

plaintiffs laid out the paragraphs in their complaint that they believed supported jurisdiction, ¶¶ 37-39, 66-72, but although those paragraphs certainly allege that Forte aimed her web site at the world, and that Illinois is part of that world, there is no allegation that Forte focused on Illinois. Moreover, although during the hearing plaintiffs argued that Forte forms contracts with citizens of Illinois (the irrevocable license to carry postings), the complaint does not allege any causes of action based on those contracts and so they cannot form the basis for specific jurisdiction (jurisdiction arising out of contacts on which the causes of action are based). Consequently, the complaint does not allege personal jurisdiction within the requirements of *Tamburo*.

Moreover, as Forte's affidavit shows, placement of comments on her sites is effected by the web site's software without manual intervention. Forte Affidavit ¶ 13. Similarly, the addition of a given phone number to the list of those on which comments may be made is automated, taking effect when a user searches for that number and it is not already the subject of comments on the site. *Id.* ¶ 14. And even if there were the slightest grain of truth to the contention that the title or description meta tags included either Houlihan's marks or defamatory content — and the record shows that there is not — those tags are also added without manual intervention. *Id.* ¶ 22.² Thus, until she received Houlihan's demand letter, Forte was not even aware that Houlihan was discussed on her site, not to speak of being aware that Houlihan is in Illinois. *Id.* ¶ 21. But all of the allegedly tortious conduct of which Forte is accused occurred **before** that demand letter. Consequently, *Tamburo* is controlling precedent that bars personal jurisdiction here.

At the preliminary injunction hearing, it was apparent that plaintiffs intend to ask for

²The Court need not consider Forte's affidavit to establish the foregoing facts, because the complaint is based on the web sites, which the Court can examine without treating them as evidence submitted by Forte that would require consideration of whether there is a genuine issue of fact.

discovery on the issue of personal jurisdiction, arguing that it is needed to prepare for an evidentiary hearing on the issue. However, their complaint does not sufficiently allege personal jurisdiction to make consideration of Forte's affidavit necessary. Moreover, even if the complaint contained sufficient allegations, plaintiffs have not shown genuine issues about any facts material to the jurisdictional issue. For example, plaintiffs and their firm have both posted on the web sites, and have experienced the instantaneous appearance of posted matter; hence they would be able to question Forte's averments about the automated nature of postings, based on their own personal knowledge, if the averments were not true. The sites themselves show the vast quantities of numbers discussed, making it implausible that Forte could have singled out Houlihan for discussion. There is no need for discovery to address such matters.³

II. Forte Is Immune Both From Suit and From Liability for Content Posted to Her Web Site by Unknown Third Parties.

A. Section 230 Provides Forte With Immunity from Suit For The Use of the Names of "Houlihan Smith" and Its Staff Members, and for the Criticisms of Plaintiffs and Their Staff, That Others Have Placed on Her Web Sites.

The complaint repeatedly acknowledges that the derogatory messages about which plaintiffs complain were posted by the John and Jane Doe defendants. In this way, the complaint itself contains the key factual allegation that establishes Forte's immunity under 47 U.S.C. § 230. And, when the complaint itself establishes the basis for an affirmative defense, it may be asserted on a motion to dismiss under Rule 12(b)(6). *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008). Moreover, because the complaint refers to Forte's web sites, as well as to the code in

³The filing of a removal notice does not waive personal jurisdiction. *Goldey v. Morning News of New Haven*, 156 U.S. 518, 526 (1895), *Wabash Western Railway v. Brow*, 164 U.S. 271, 278-279 (1896), and *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929).

those sites, the documents attached to Forte's affidavit, attaching printed web pages and printed code from the sites, are properly considered on this motion to dismiss without converting it into a motion for summary judgment. *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002).⁴ In the alternative, the Court should grant summary judgment in Forte's favor on her section 230 defense.

As the operator of web sites where third parties may post comments about companies that place marketing telephone calls, Forte is completely immune from liability for the content that third parties place on her web site. This immunity is provided by the Telecommunications Act of 1996, 47 U.S.C. § 230(c)(1): “[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.” Section 230(e)(3) further provides, “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” Every court to consider this issue, including Illinois and the Seventh Circuit, *Chicago Lawyers’ Committee For Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 671-672 (7th Cir. 2008), *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1191-1196; 799 N.E.2d 916, 922-927 (5th Dist. 2003), has ruled that § 230 prohibits any law, federal or state, from imposing liability on an internet provider for content supplied to a web site by a different person. Section 230

bars ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone, or alter content.’ *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997); *see also, e.g., Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 986 (10th Cir. 2000) (“Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”)

⁴ The pages and code can also be viewed online, thus confirming Forte's affidavit.

Green v. America Online, 318 F.3d 465, 471 (3rd Cir. 2003).⁵

Moreover, Section 230(e)(3) provides not just an immunity from liability but immunity from suit: “No **cause of action may be brought** and no liability may be imposed.” (emphasis added). *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980, 983 (10th Cir. 2000). Statutory language that bars bringing an action is commonly held to create an immunity from suit and not just protection against liability. *E.g.*, *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169, 183-184 (2d Cir. 2008); *Manion v. Evans*, 986 F.2d 1036, 1040-1041 (1993); *Decker v. IHC Hospitals*, 982 F.2d 433, 436-437 (10th Cir. 1992). That implication is particularly strong in this case because the section also confers protection against imposition of liability. If “no cause of action shall be brought” were not an immunity from suit, that language would be mere surplusage, and well-accepted rules of statutory construction require an avoidance of interpretations that render words of the statute irrelevant. *United States v. Wheeler*, 540 F.3d 683, 690 (7th Cir. 2008); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 575 (7th Cir. 2001).⁶

Plaintiffs acknowledged this immunity in their TRO memorandum but sought to evade the immunity on grounds that are inapplicable. First, they argued that section 230 immunity

⁵See also *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008); *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018, 1026 *et seq.* (9th Cir. 2003); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006); *Donato v. Moldow*, 865 A.2d 711(N.J. Super. 2005); *Austin v. CrystalTech Web Hosting*, 211 Ariz. 569, 569 (Ariz. 2003); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001); *Doe v. AOL*, 783 So. 2d 1010, 1013-1017 (Fla. 2001).

⁶In two separate opinions, Judge Easterbrook takes issue with the use of the term “immunity” that every other circuit and state appellate court has used to characterize the protection that section 230 provides. *Craigslis*, 519 F.3d at 670; *Doe v. GTE Corp.*, 347 F.3d 655, 659-660 (7th Cir. 2003). However, these opinion passages are dictum — in both cases, the interactive service provider was held not to be liable, and in neither case did the outcome turn on whether the protection was deemed to be an “immunity.”

applies only to content provided by others but not to content provided by the web host. Second, they argue that, because they are putting forward “intellectual property claims,” their complaint is saved from section 230 immunity by 47 U.S.C. § 230(e)(3).

B. The Allegations That Forte Is an “Information Content Provider” Do Not Save the Complaint from Dismissal or Summary Judgment Under Section 230.

Throughout the complaint, as in their March 2 pre-litigation petition, plaintiffs acknowledged that the disparaging postings of which they complain were posted by third-party, anonymous posters whom they seek to identify. Only after they decided to sue Forte personally did they change their tune, making vague references to content allegedly provided by Forte. But even in that regard, their papers never identify any **specific** content provided by Forte, not to speak of providing admissible evidence showing that specific comments were authored by Forte. They also apparently argue that, to the extent that their claims rest on “intellectual property” theories, those claims at least are outside the scope of section 230 immunity. Neither evasion defeats this motion to dismiss and/or for summary judgment.

Consistent with section 230’s purpose, the definition of interactive computer service is construed broadly, while the definition of information content provider is construed narrowly. *Carafano*, 339 F.3d at 1123; *Stayart v. Yahoo!, Inc.*, 651 F. Supp.2d 873, 884 (E.D. Wis. 2009); *Atlantic Recording Corp. v. Project Playlist*, 603 F. Supp.2d 690, 699-700, 701 (S.D.N.Y. 2009). In suggesting that Forte is an information content provider, plaintiffs never specify content that Forte allegedly provided (other than hidden code, an issue addressed below).

In the remainder of this section of the brief, we address plaintiffs’ “information content provider” evasion in three parts. First, we address the only specific allegations in the complaint, about Forte’s alleged insertion of names and derogatory words into her hidden tags, and show

that those allegations are contradicted by documents that the Court can consider on a motion to dismiss and hence without addressing the summary judgment aspect of this motion; we also show that, if the Court addresses those issues on summary judgment, Forte is entitled to judgment as a matter of law because there are no genuine issues of fact. Second, we argue that even if the allegations about the tags were true, they would not be a basis for judgment against Forte because they would only show that Forte was truthfully characterizing the contents of the web pages. Third, we address the “information content provider” allegations that have been put forward in plaintiffs’ briefs and oral argument, but not specifically alleged in the complaint, and argue that those allegations are too conclusory and implausible to pass scrutiny under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007).

1. The Contentions That Forte Is Responsible for Content That She Placed in Hidden Code, and That She Otherwise Schemed to Have Her Web Pages Rank Higher on Google or Yahoo!, Do Not Save the Complaint from Either Dismissal or Summary Judgment Both Because They Are Contradicted by Documents on Which the Complaint Relies, and Because the Undisputed Facts in the Record Show That the Allegations Are False.

Plaintiffs’ main basis for charging Forte with trademark and right of publicity violations is that she allegedly placed either the names of Houlihan and its staff, or derogatory characterizations of Houlihan and its staff, in title tags, description meta tags, and other hidden code on her web pages, and that she made unspecified agreements with Google and Yahoo! to have her web pages about Houlihan appear at the top of searches for the company using its name. Although these claims are factually specific, they do not save the complaint from dismissal because they are flatly contradicted by documents referenced in the complaint—that is, the web pages themselves and their source code, which can be found by inspecting the pages themselves. In addition, Forte has attached the source code to her affidavits in support of this motion, and the

authenticity of these documents is uncontested (indeed, plaintiffs themselves have attached such documents to their own papers). They can, therefore, be considered on this motion to dismiss.

First, paragraphs 32-35 of the complaint allege that Forte added their names and defamatory words to the title tags and description meta tags of pages about Houlihan Smith. However, these tags can be found at the beginning of the source code of any web page, after the HTML code “<title>” and “<meta name=‘description’ content=’””, respectively. Forte Affidavit ¶ 22. Forte has attached such source code to her own affidavit, Exhibits K, L, and plaintiffs attached such source code to the pre-discovery lawsuit that they filed against Forte on March 2, Levy Affidavit, Exhibit R. The source code of each of the pages on 800Notes.com and whocallsme.com can be viewed on those pages as they appear on the Internet. In every one of those documents, the source code reveals that **none** of the title tags or description meta tags contain Houlihan’s name, the name of any staff member, or any of the derogatory content posted by the users of Forte’s web site. *Id.* ¶¶ 22-23 and Exh. K, L; Levy Affidavit Exh. Q. Only the telephone number 312-499-5900 appears in the title tags or description meta tags.⁷

Second, plaintiffs sought to bolster their intellectual property claims by citing Google

⁷Showing desperation to argue that hidden code on Forte’s sites included its name and derogatory terms, plaintiffs tried to stave off a ruling at the preliminary injunction hearing by presenting the Court with new printed pages of code. DN 22, Levy Second Affidavit, Exhibit T. After securing a delay to confer with their expert, plaintiffs admitted that the expert was unable to “confirm” that the code showed that Forte had placed these terms in the code of her web site. In fact, as Forte’s second affidavit shows, it would have been plaintiffs’ own agents — whoever it was who printed out the code that was presented to the Court — that placed the terms in the code, by the simple trick of conducting a Google search, thereby placing the phrase “Houlihan Smith scam” in the search box on Forte’s web page, and then viewing and printing the code of the page that was thereby created. By a similar technique it is possible to place the phrase “800 Notes scam” in a search box on Houlihan Smith’s own home page, and then print out code showing the phrase in the code. Stiles Affidavit and Exhibits Z and AA. Houlihan Smith’s counsel refused to identify the person who created the code that was presented to the Court at the preliminary injunction hearing, but described the creation of and reliance on the code as an “honest mistake.” Levy Third Affidavit, Exhibit Y.

search results and reasoning backwards that, because Houlihan's name and some of the derogatory terms appeared in the search results, it must have been Forte's hidden code that put them there. Complaint ¶¶ 32, 35. But such "reasoning" does plaintiffs no good in avoiding dismissal because, in fact, the code itself can be considered on Forte's 12(b)(6) dismissal motion, and the code itself does not contain any of the names or any of the derogatory words—it just contains the telephone number 312-488-5900. Even if there were such hidden code, the complaint never makes the causal connection between such code and the results—it never alleges any basis for believing that Google always uses hidden code for the text shown in its search results. To the contrary, as Forte's affidavit shows, ¶ 24, Google itself says only that it "sometimes" uses the contents of a description meta tag as the text in search results.

Moreover, a review of search related documents provided by plaintiffs themselves shows that the same page shows up with **different** contents in the search result, depending on what search strings were used. Forte Affidavit ¶¶ 25-27 and Exh. L; *see also* Levy Affidavit ¶ 6 and Exh. S (Google search strings for different search terms show same pages with different snippets excerpted). These documents show that Google search results include **text** from the underlying pages that is relevant to the search terms, not the title tags or description meta tags. *Id.*

Third, plaintiffs allege in ¶ 36 (on information and belief) that Forte enters into "agreements with engines (such as Google)" to ensure high search placement for the pages containing the critical statements when Internet users perform searches using the Houlihan Smith name, or the name of Houlihan's "principals, employees agents or representatives" in the search string. However, these allegations are flatly contradicted by the Google search results that plaintiffs attached to their papers, as well as any other search results that may be performed. (For example, Forte has supplied search results using the names of both of plaintiffs' executives who

verified the complaint). Although Google and Yahoo! do allow bidding on search terms to ensure that certain search results appear in the “sponsored links” and “sponsored results” sections of their search results, the search results show that there are **no** such search results when Houlihan’s name is used as a search term, and certainly no search results from Forte’s web sites. The “organic” portions of Google and Yahoo! search results are, by definition, solely based on Google’s search ranking algorithm, unaffected by any sponsorship or advertising agreements.

In sum, all of the allegations about Forte’s supposed use of secret code or agreements to affect the search engine treatment of the pages about telephone calls from Houlihan Smith’s phone numbers are squarely contradicted by the actual documents that the complaint references, or on which it is based, and hence this aspect of the complaint cannot support Houlihan’s claims.

Finally, even if this aspect of plaintiffs’ complaint withstands a Rule 12(b)(6) motion to dismiss, it falls on summary judgment because there is no genuine issue of material fact about the absence of such material from the source code. Undisputed Facts, ¶¶ 41 to 44. Forte has sworn that neither Houlihan’s name, nor the names of any of its staff, nor any of the derogatory words, are present in any of the source code of her web site, and she has placed the source code itself in the record to demonstrate the truth of these averments. Plaintiffs produced **no** evidence to the contrary. Although the complaint is verified, the most significant parts of paragraphs 32, 34 and 36 are alleged on information and belief — not enough to block summary judgment, because Rule 56(e) affidavits must be made on personal knowledge. *Williams v. Seniff*, 342 F.3d 774, 789 (7th Cir. 2003). Nor have plaintiffs provided any reason to believe that the two officials who verified the complaint — both of them investment bankers — have any expertise to testify about HTML code and what affects Google search results. Thus, none of the “evidence” in paragraphs 31 to 38 of the complaint is admissible.

Moreover, although plaintiffs retained an expert witness on computer issues, that expert witness has in no way contradicted Forte's averments about the "code" on her web site and its impact on search ranking and search results. He states only that he would need to see all of the code associated with Forte's web pages before he could assess the "computer-related statements" in her affidavit. After the preliminary injunction hearing, Forte offered to provide any portion of her HTML code that plaintiffs' expert witness needed to see to verify the statements in her affidavit about the code, Levy Second Affidavit ¶ 2 and Exh. X. ; plaintiffs have not specified what the expert needs to see. *Id.* ¶¶ 3-4 and Exhibit Y.⁸

2. The Contention That Forte Placed Houlihan's Name (or the Names of Some of Its Staff) in Hidden Code on Her Web Site, or Otherwise Sought to Elevate Her Site in Search Results, for Those Names, Would Fail as a Matter of Law Even if the Allegations Were Not Contradicted by Documents on Which the Complaint Rests and by the Undisputed Facts.

As the Court noted in its oral opinion denying the motion for a preliminary injunction, it is black-letter trademark law that the use of a trademark is not forbidden when it is used "to tell the truth." *Prestonettes v. Coty*, 264 U.S. 359 (1924). In *Prestonettes*, the issue was whether a reseller of Coty-brand perfume, who repackaged the brand-named product and sold it in smaller containers, could be forbidden from telling customers that the containers had "Coty" toilet

⁸ There is an air of unreality to trademark arguments about the results of searches for the string "Houlihan Smith scam" or "Houlihan Smith fraud." There is no evidence that anybody in the real world, other than lawyers trying to construct hypotheticals to use in a brief, has conducted Internet searches using these strings, If there were, who would they be? Presumably, Internet users who are worried about possible scams or frauds, or who are doing "due diligence" to find out whether there are complaints about Houlihan that should worry them. Such users ought to be able to find web pages like the Forte's pages about 312-499-5900, where complaints about Houlihan have accumulated. And if they do find those pages, it is not because of confusion about source, or because of any lessening of the power of Houlihan's mark. Trademark law is not designed to suppress dissent, but to protect consumers against source confusion.

powders and perfumes. Justice Holmes said that the use of the name was not forbidden — “When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.” *Id.* at 368. By analogy, even if there were any truth to the contention that Forte were placing the Houlihan name, or the names of its staff, in the title tags or description meta tags for pages on which that company or those staff members were discussed, or if she were scheming in various ways to have her web pages appear prominently when members of the public used search engines to find pages about Houtlihan or about its named staff members, that would not violate any of the plaintiffs’ rights, because she would just be using the names to “tell the truth” about the contents of the pages.

Courts across the country have dealt with a highly analogous issue, in considering trademark claims based on the use of a trademark in domain names for gripe sites (or even fan sites). Such courts consistently hold that web site operators may use the trademark in the domain name for web sites about the trademark holder, at least so long as it is clear from the web site itself that it is not sponsored by the trademark holder. *Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research*, 527 F.3d 1045 (10th Cir. 2008); *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003).

Similarly, several district courts have held that the hosts of “gripe sites” may place a trademark in the meta tags as a way of announcing to search engines and their users, “Here is a web site that has something to say about the trademark holder.” *Gregerson v. Vilana Financial*, 2006 WL 3227762 (D. Minn., Nov. 7, 2006); *J.K. Harris & Company v. Kassel*, 253 F. Supp. 2d 1120 (N.D. Cal. 2003); *Bihari v. Gross*, 119 F. Supp.2d 309 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998). Indeed, several courts of appeals have indicated in highly analogous cases that the use of a trademark in the meta

tags or “path” of a web page that describes the relationship between the web page operator and the trademark holder does not violate the trademark laws. *North Am. Med. Corp. v. Aciom Worldwide*, 522 F.3d 1211, 1224 n.10 (11th Cir. 2008) (case cited by plaintiffs to support meta tag claim distinguishes use of trademark in tags for site that explicitly discusses trademark holder) *Interactive Products Corp. v. a2z Mobile Office Solutions*, 326 F.3d 687, 698 (6th Cir. 2003) (reseller of plaintiff’s product could use the trademarked name of that product in the post-domain path for pages on the reseller’s web site where the product was offered for sale); *Playboy Enterprises v. Welles*, 279 F.3d 796, 803-804 (9th Cir. 2002) (former “playmate of the year” could use the trademarked abbreviation “PMOY” in the meta tags for the web site where she sells her services, and sells access to photographs of herself); *see also Trans Union v. Credit Research*, 142 F. Supp.2d 1029, 1039-1040 (N.D. Ill. 2001) (defendants could use plaintiff’s mark in meta tags for site on which defendants sold products derived from plaintiff).

Consequently, even if plaintiffs’ allegations about the use of the mark in the tags or other code were not contradicted by documents on which the Court can rely, either on the motion to dismiss or on the motion for summary judgment, those claims would fail as a matter of law.

3. Plaintiffs’ Vague and Conclusory Allegations About Forte’s Status as an Information Content Provider, Through Possible Conduct Other Than Use of Hidden Code, Do Not Withstand Dismissal Under *Iqbal* and *Twombly* and Should, in Any Event, Be Dismissed on Summary Judgment.

The complaint contains specific allegations about Forte’s supposed inclusion of content about Houlihan Smith in the hidden code, and about other scheming to elevate web pages about Houlihan Smith in search results on Google or Yahoo!; those allegations are discussed above. Paragraph 31 alleges that Forte “combine[s her] own original content with each posting,” and then gives the supposed incorporation of content into hidden code as “examples” in paragraphs

32-38 and 52; it is not clear whether plaintiffs intend to argue that paragraph 31 describes any conduct beyond that which is alleged in paragraphs 32-38 and 52. The complaint also recites that Forte has “included [her] own original content to [sic] the Websites,” ¶¶ 48, 59, and that Forte “ha[s] and continue[s] to make, publish and disseminate . . . postings regarding Houlihan . . .” ¶¶ 100, 103, 113. It is unclear whether plaintiffs intend to argue that these broad allegations are intended to assert that Forte does something — other than including content in the hidden code — to add her own “original content” about Houlihan Smith.

However, even if plaintiffs’ invoke paragraphs 31 and similar paragraphs as setting for charges of adding content other than in the hidden code, those allegations do not survive Forte’s motion to dismiss, because they are only conclusory assertions of an exception to Forte’s immunity from suit. In considering the complaint’s allegations, the Court should ignore merely conclusory allegations that recite a possible basis for ignoring statutory immunity without providing specific facts which, if true, would make defendant liable. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-555 (2007). These requirements are needed to avoid the “in terrorem” effect of allowing a plaintiff with a “largely groundless claim” to force defendants into costly discovery or to increase a claim’s settlement value. *Id.* at 557-558. “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.’ A claim has facial plausibility 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.

Since *Twombly* and *Iqbal* were decided, courts have extended the prohibition against conclusory allegations and the requirement that the plaintiff plead a “plausible” case to include complaints that seek to circumvent § 230 immunity. *Nemet Chevrolet v. ConsumerAffairs.Com*, 591 F.3d 250, 255-260 (4th Cir. 2009); *Cornelius v. DeLuca*, 2009 WL 2568044, at *3 (E.D. Mo. Aug. 18, 2009); *Stayart v. Yahoo!*, 651 F. Supp.2d 873, 880-881 (E.D. Wis. 2009); *Goddard v. Google*, 640 F. Supp.2d 1193, 1196 (N.D. Cal. 2009) (allegations that Google “not only encourages illegal conduct, [but] collaborates in the development of the illegal content and, effectively, requires its advertiser customers to engage in it,’ unsupported by other specific allegations of fact, are mere ‘labels and conclusions’ amounting to a ‘formulaic recitation of the elements’ of CDA developer liability, and as such, they ‘will not do’”); *Alvi Armani Medical v. Hennessey*, 629 F.Supp.2d 1302, 1307 (S.D. Fla. 2008) (allegations sufficiently concrete to withstand dismissal under § 230).⁹ The courts also require more detailed pleading when, as in this case, the lawsuit imposes a burden on free speech rights. *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982).

Even if the allegations that Forte adds her own content to posts about Houlihan were not too conclusory to survive Forte’s motion to dismiss, they would fail the *Iqbal* and *Twombly* test of plausibility. Inspection of Forte’s web sites — which the Court can do because they are alleged in the complaint — reveal that they feature comments about hundreds of thousands of different telephone numbers, and that when new messages are posted, they appear

⁹Where, as here, the complaint and the documents on which it is based establish that Forte is an interactive computer service provider, immunity can be asserted even though it is an affirmative defense. *Buckley v. Fitzsimmons*, 20 F.3d 789, 793 (7th Cir. 1994); *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993).

instantaneously, and hence could not be subject to human intervention. Without any more specific allegations about what content Forte included, and how she could have selected Houlihan's telephone numbers from among the hundreds of thousands on the site as a focus for her attention, the general allegations about adding content should not be a basis for denying the motion to dismiss.

In support of its motion for a preliminary injunction, Houlihan relied on two anonymous Internet postings to an Internet message board called Xcomplaints.com, accusing Forte of asking for money to take down posted criticisms. Although the Illinois state court allowed Houlihan's complaint to be amended to add these two postings as exhibits, the complaint itself does not allege that Forte adds content to individual postings, or that she solicits contact from companies that are criticized on her web sites so that she can demand money for removing criticisms. Moreover, nothing in these postings allege that Forte has added content about Houlihan Smith, and the plaintiffs in this case would lack standing to complain about the addition of content about other companies or about efforts to extort other companies. The record reveals that Houlihan Smith personnel have been aware of the pages about their companies since 2008 (having participated in the discussion), and that Houlihan's counsel have contacted Forte directly about the sites; yet they did not experience any demand for funds. To the contrary, Forte flatly told them she was unwilling to engage with their concerns, and urged them either to post responses or sue the critics. The Court should not accept the submission of these exhibits as tantamount to allegations of Forte's conduct vis-a-vis the plaintiffs.¹⁰

¹⁰Should plaintiffs seek leave to amend their complaint to include such allegations, we will serve a Rule 11 motion on that point and, when the case is over, ask the Court to consider whether reliance on anonymous Internet postings that conveniently appeared in April 2010 made it "likely" that plaintiffs would be able to obtain "evidentiary support after further investigation and discovery."

Even if plaintiffs' allegations are accepted, Forte's motion for summary judgment should be granted on such claims. Forte's affidavit squarely and directly negates any contention that she has ever added any content about Houlihan Smith to the comment pages of her web sites.¹¹ This evidence is undisputed.

III. Plaintiffs' "Intellectual Property" Claims Should Be Dismissed Under Rule 12(b)(6), Because the User Comments Neither Dilute Nor "Misappropriate" Plaintiffs' Marks, Nor Violate the Right of Publicity Claims of Any of Plaintiffs' Staff.

Plaintiffs contend that the user comments themselves dilute plaintiffs' marks or violated its staff's right of publicity, and therefore that section 230 does not immunize Forte from liability for allowing those comments to remain on her web site. This argument is fallacious.

There are two forms of dilution. The first is "blurring," which means that the use of the mark hurts the "distinctiveness" of the mark as referring only to one source. *Illinois High School Ass'n v. GTE Vantage*, 99 F.3d 244, 247 (7th Cir. 1996). For example, nobody is likely to be confused about whether Google is the maker of a heavy truck called the "Google truck," but allowing a truck manufacturer to use that brand name could lessen the uniqueness of the "Google" name that associates only the (ever-expanding) product-line offered by the company

Rule 11(b)(3). The postings, dated April 4 and 13, 2009, are false. Forte Affidavit ¶ 38. For example, the posting most heavily quoted by Houlihan was from someone who claimed to be a former employee of 800Notes.com, even though Forte and her husband have no employees. *Id.* Moreover, given the hundreds of thousands of different telephone numbers discussed on Forte's sites, *id.* ¶ 10, the scenarios described by the two anonymous posts would be impossible for a two-person operation like Forte's. In a lawsuit complaining that Houlihan was falsely maligned by anonymous criticisms on the Internet, it is highly ironic that Houlihan sought a prior restraint of speech based on anonymous postings that criticize its adversary. We trust that, having received Forte's response to these emails, plaintiffs will not attempt to use them any further or to add allegations to the complaint based upon them.

¹¹Forte wrote about this litigation after the Court denied plaintiffs' motion for a preliminary injunction. Houlihan Smith Sues 800notes for Criticism and Loses, <http://800notes.com/news/houlihan-smith-sues-800notes-for-criticism-and-looses>.

from Mountain View California with that company. However, using a company's trademark to identify it as a subject of criticism, does not "blur" the mark; if anything it reinforces the association between the trademark and its owner. *Wham-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp.2d 1254, 1262 (N.D. Cal. 2003); 6 McCarthy on Trademarks and Unfair Competition § 31:155 (4th ed. 2010). The complaint charged Forte with "dilut[ing] **and** tarnish[ing] the Houlihan mark, and with harming the "distinctive quality" of the mark, ¶¶ 70, 71, and although Houlihan's motion for a temporary restraining order rested on alleged "lessening of the capacity of the famous mark to identify and distinguish goods and services," Mem. at 16, 17, plainly a blurring claim. However, at the preliminary injunction hearing plaintiffs abandoned any claim for blurring.

Therefore, if there is any trademark claim to be advanced here, it must be a claim for the other form of dilution, "tarnishment." But applying tarnishment theory here fails for several reasons. First, tarnishment consists of displaying the mark in unsavory circumstances (such as using it on a pornographic movie or poster), or using it as a mark to identify shoddy goods. The use of a mark "to criticize or to ridicule plaintiff's product or its image is not actionable under an antidilution statute, either state or federal." 4 McCarthy on Trademarks and Unfair Competition § 24:90 (4th ed. 2010) "If the antidilution statute were construed as permitting a trademark owner to enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct." *Id.*, quoting *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987).

Moreover, as amended in 1998, the language of the Illinois anti-dilution statute does not extend to tarnishment claims. Before 1998, the statute allowed relief "if there exists a likelihood

of injury to business reputation or of dilution of the distinctive quality of the mark.” 765 ILCS 1035/15, quoted in *Planet Hollywood (Region IV) v. Hollywood Casino Corp.*, 80 F. Supp.2d 815, 902 (N.D. Ill. 1999). But the new version of the statute, 765 ILCS 1036/65, eliminated the phrase “injury to business reputation,” and now allows relief only if the defendant “causes dilution of the distinctive quality of the mark.” The significance of this change is shown by Justice Stevens’ opinion for the Court in *Moseley v. V Secret Catalogue*, 537 U.S. 418, 432-433 (2003), which questioned whether the federal antidilution statute applied to tarnishment because that statute, unlike many state statutes, included no reference to “business reputation.” Congress promptly responded by amending the federal anti-dilution statute to include “blurring by tarnishment,” 15 U.S.C. § 1125(c). Illinois’ amendment, by contrast, moved the **state** statute in precisely the opposite direction, eliminating the reference to business reputation. Moreover, we not found a single Illinois state-court case since 1998 applying the state dilution statute to support a claim of tarnishment. Consequently, because plaintiffs asserted that they are relying only on **state** trademark law, DN 12, 4 n.1, they cannot make any dilution claim here.

Nor do plaintiffs have any viable right of publicity claims. The right of publicity is a right to decide “whether and how to use an individual’s identity for commercial purposes,” 765 ILCS 1075/10 — that is, for the purpose of selling goods and services. None of the statements on the web site use Smith’s name to promote the sale of goods or services; they use his name to say why the speakers disapprove of him. To justify their TRO, plaintiffs argued that Forte’s commercial use is shown by the fact that the site carries advertising. TRO Mem. 19. But if this were so, the Chicago Tribune would be guilty of “commercial exploitation” of Rod Blagojevich’s right of publicity every time it ran a letter to the editor savaging him for corruption, because the Tribune carries advertising and sells copies. Just as “noncommercial use” may be found in a

dilution case where the underlying speech is non-commercial, even though the speech is contained in something that is sold, *Mattel v. MCA Records*, 296 F.3d 894, 905-907 (9th Cir. 2005), so the criticisms that Forte's users have articulated are not "commercial" just because they appear on a web site that carries advertising. Moreover, the right of publicity may not be used to suppress criticism, *Hoffman v. Capital Cities/ABC*, 255 F.3d 1180 (9th Cir. 2001), *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), for the same reason that trademark dilution law cannot be used to make criticism actionable, as discussed above.

Plaintiffs also have no claim for common law misappropriation of trademark.¹² Under Illinois law, "misappropriation of trademark" must meet the same test as a statutory claim of trademark infringement, including a showing that "the infringer's use of a similar mark creates a 'likelihood of confusion' on the part of the consuming public." *Tarin v. Pellonari*, 253 Ill.App.3d 542, 551, 625 N.E.2d 739, 746 (1 Dist. 1993). Here, plaintiffs make no allegation of likelihood of confusion and no showing of likelihood of confusion, and there is no possibility of such a showing. No consumer visiting Forte's web pages about calls from 312-499-5900 would imagine that the pages are sponsored by plaintiffs; nor would anybody looking at the Google search results attached to plaintiffs' papers think that clicking on those links would take them to

¹²In their papers in support of a TRO or preliminary injunction, plaintiffs invoked *Board of Trade v. Dow Jones & Co.*, 108 Ill. App. 3d 681, 439 N.E.2d 526 (1st Dist. 1982), *aff'd*, 98 Ill. 2d 109, 456 N.E.2d 84 (1983). That case is inapposite, because plaintiff's claim there was a "not ness" type claim, based on the misappropriation of information. Such claims are now largely preempted by copyright law, subject to the very narrow exception recognized in *NBA v Motorola*, 105 F.3d 841, 852 (2d Cir. 1997). For example, the plaintiff and defendant must be direct competitors, which surely is not true here. Moreover, to the extent that plaintiffs rely on common law misappropriation as a basis for evading section 230, on the theory that it is an intellectual property claim, both the Illinois Court of Appeals, 108 Ill. App. at 689, and Supreme Court, 98 Ill.2d at 117, 118, consistently characterized misappropriation as a tort.

Houlihan's own web pages.¹³

Finally, even if state trademark or right of publicity law applied to the facts and claims for injury to reputation on which plaintiffs' TRO turns, the use of the Houlihan name, and of the names of its staff members, is nominative fair use — the use of the names to identify the owners of those names as the subject under discussion. *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005); *Ty, Inc. v. Publications Int'l*, 2005 WL 464688 (N.D. Ill. Feb. 25, 2005); *World Impressions v. McDonald's Corp.*, 235 F.Supp.2d 831, 842-843 (N.D. Ill. 2002). Consequently, none of plaintiffs' "intellectual property" claims can survive dismissal.

IV. Plaintiffs' Other State-Law Claims Should Also Be Dismissed.

Even if section 230 did not immunize Forte from suit and from liability on plaintiffs' other state law claims, plaintiffs' remaining state-law claims should nevertheless be dismissed in whole or in part.

Plaintiffs allege a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, ("ICFA") which allows one who is injured by fraudulent conduct or deceptive advertising "in the conduct of any trade or commerce" to sue for damages and injunctive relief. Several elements of the ICFA cause of action are absent here. First, Forte's web site does not advertise her goods or services; it is a message board that allows members of the public to discuss telephone callers. Although the sites carry advertisements, the presence of such advertisements do not make the site commercial for the purposes of the ICFA,

¹³Because infringement claims under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), are sometimes described as "common law trademark" claims, and because the complaint does not limit the source of the common law being invoked to Illinois law, Forte removed in part based on federal question jurisdiction. "Likelihood of confusion" is a necessary element of a section 43(a) claim. Because plaintiffs disclaimed any reliance on federal law following removal, DN 12 at 4 n.1, we do not discuss federal law any further in this memorandum.

any more than a newspaper's advertisements makes it engaged in trade or commerce under the ICFA. On Houlihan's theory, any business that was unhappy about its portrayal in a newspaper article would have a cause of action against the newspaper under the ICFA, which is surely not what the legislature intended. Perhaps a newspaper could be sued under the ICFA if it attracted advertising by misstating its circulation figures; but figures in the news cannot sue a newspaper under the ICFA simply because the newspaper carries ads. Put another way, although defendants' web site has advertising, it is not the **advertising** that is alleged to violate the ICFA, and the Act applies only to the advertising.

Another requirement for an ICFA claim is that, under several decisions of the Illinois Supreme Court, to properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under that Act, a plaintiff must allege that he was, in some manner, deceived. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 153-154, 776 N.E.2d 151, 162-163 (2002), citing *Zekman v. Direct American Marketers*, 286 Ill. App. 3d 462, 675 N.E.2d 994 (1 Dist. 1997), *rev'd on other grounds*, 695 N.E.2d 853, 860-861, 182 Ill.2d 359 (1998). Indeed, plaintiffs must allege and prove "the defendant's **intent** that the plaintiff rely on the deception." The complaint does not allege, and plaintiffs certainly do not prove, that Houlihan was deceived by statements about it on Forte's web site.

Yet another requirement for an ICFA claim is that the plaintiff must show how the allegedly deceptive activity implicates consumer protection concerns. As the Seventh Circuit stated in *Speakers of Sport v. ProServ*, 178 F.3d 862, 864 (7th Cir. 1999),

while a competitor is permitted to bring suit under the Act as a representative of the consumer interest (an example would be a case in which a multitude of consumers had been deceived by a competitor and their individual losses were too small to warrant the costs of suit), he must "prove, by clear and convincing evidence, how the complained-of conduct implicates consumer protection

concerns.” [citations omitted] No effort at proving this was made here. The only consumer in the picture is Rodriguez, and the allegation that he was injured is made by Speakers rather than by him.

178 F.3d at 868.

The verified complaint does not come close to alleging any harm to consumers. Indeed, Houlihan is worried about the impact on its own reputation, not deception of consumers.

Finally, Houlihan claims that Forte has violated the Uniform Deceptive Trade Practices Act (“DTPA”), 815 ILCS § 510/1 *et seq.* To the extent that this statute is invoked as another label for Houlihan’s trademark claims, it fails for the same reasons that those claims fail. To the extent that Houlihan invokes the DTPA as a false advertising claim, the DTPA does not apply for reasons similar to the flaws in the ICFA claim: Even if there is advertising on the site, it is not the advertising that is alleged to be deceptive; and the DTPA applies only to complaints that are based on “**consumer** confusion or deception,” *Menasha Corp. v. News America Marketing*, 238 F. Supp.2d 1024, 1035 (N.D. Ill. 2003) (emphasis added), which is not proved here.

There is an additional flaw in the DTPA claim — the courts distinguish between product disparagement, which is barred by the DTPA, and disparagement of the producer, which is governed by defamation law. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983); *Allcare, Inc. v. Bork*, 176 Ill.App.3d 993, 531 N.E.2d 1033, 1037-1038 (1988). The Illinois courts have consistently resisted efforts to “blur the distinction between defamation and commercial disparagement” by characterizing the criticism of a company as product disparagement under the DTPA. *Allcare, supra*, 531 N.E.2d at 1038, and cases cited there. In sum, there is no claim here under the DTPA.

Even the defamation claims would be largely subject to dismissal under Rule 12(b)(6), even absent section 230. First, statements are not defamatory if they are rhetorical hyperbole or

employed only in a loose, figurative sense. *Madison v. Frazier*, 539 F.3d 646, 654 (7th Cir. 2008). Some of the derogatory statements on which plaintiffs are suing are factual in nature, such as the statement that an unidentified ex-employee of plaintiffs “was an ex-con who ran a commodity pool scam . . . and spent 51 months in a federal ‘condo.’” Complaint ¶ 26, third bullet point on page 7. But the use of the word “scam” is not necessarily actionable – it depends on the context of the rest of the statement. *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996); *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987). Some of the statements identified in the complaint use the word “scam” more vaguely, as rhetorical hyperbole that is not actionable. *See also Lauderback v. ABC*, 741 F.2d 193, 197 (8th Cir. 1984) (“broad brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion”).

Second, some of the statements cited in the complaint seem to be taken out of context, and in context, they appear to be statements of opinion based on disclosed facts, which are not defamatory unless the underlying facts are false and defamatory. *Stevens v. Tillman*, 855 F.2d 394, 400 (7th Cir. 1988). For example, the complaint cites a statement from “Caitlin,” quoting the words, “they were not in the business of doing anything other than ripping us off.” Complaint ¶ 16 (second bullet point from bottom of page 7). But viewing the entire comment from which these words were excerpted (which are quoted in the footnote below), this commenter was reporting on what happened in a meeting between some of plaintiffs’ representatives and Caitlin’s company.¹⁴ Plaintiffs affiants nowhere dispute the concrete facts on

¹⁴“I found their demeanor strange from the beginning. I understand the need to mask their intentions from ‘gossipy’ administrative assistants, but the questions they asked and their tone, as well as their unwillingness to review our due diligence materials prior to their coming here and meeting our team face to face, indicated to me that they were not in the business of doing anything

which Caitlin's opinion was based; nor could they have personal knowledge of those facts unless they were in the meeting.

Third, several of the statements cited in the complaint were placed on Forte's web site more than one year or even more than two years before the complaint was filed on April 16, 2010, but the statute of limitations for defamation in Illinois is one year, 735 ILCS 5/13-201. Illinois has adopted the single publication rule, *Hukic v. Aurora Loan Services*, 588 F.3d 420, 436 (7th Cir. 2009), and courts generally agree that the single publication rule applies to Internet web sites. *Oja v. Army Corps of Engineers*, 440 F.3d 1122 (9th Cir. 2006); *Van Buskirk v. New York Times Co.*, 325 F.3d 87, 89 (2d Cir.2003). No action for defamation may be brought over these claims.

CONCLUSION

The motion to dismiss the complaint, or in the alternative to grant summary judgment on the issue of section 230 immunity, should be granted.

Respectfully submitted,

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other than ripping us off. We have been in discussions with several other investment banking groups, none of whom charge upfront fees and all of whom agreed to [a] review of due diligence prior to a meeting." DN 6-1, at 8-9. Similarly, the statement by "Not quite right" is taken out of context: only the words "Houlihan clearly is a scam" are quoted in the complaint (bullet point above matter quoted from Caitlin), but in context this Doe was just replying to previous commenters, one of whom complained about government subsidies that keep investment banking companies in business. Doe then added her own observations that showed she was just expressing her opinion: "but you can't put them in the same class as Goldman or JP Morgan. Not all investment banks are run like angry telemarketing offices." DN 6, at 58.

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June 4, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2010, I am electronically filing the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document will thereby be served on counsel for plaintiffs. I further certify that on this date a copy of this filing is being emailed to pro se defendant Jamon Silva, and that a copy will be mailed to him by first class mail, postage prepaid, to the following addresses:

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/s/ Paul Alan Levy