THE RESOLUTION EXPERTS®

In The Matter Of

Chicago Motor Car Corp., et al.	)	
	)	JAMS Reference # 1340010008
Claimant,	)	
	)	
vs.	)	
	)	Hon. Clifford L. Meacham (Ret.)
	)	
David Bates,	)	
	)	
Respondent.	)	
	)	

AWARD

Preliminary Statement

"We do not see things as they are. We see things as we are." Anais Nin

The purchase of a car, much like the purchase of a house, carries with it a component of anticipation that can cause a disproportionate reaction when things are not as they are hoped for. In addition, there are those who, once battle is joined, commit to see the fight through to an endpoint no matter the consequence. Not every battle, however, need be fought. Tilting at windmills depletes time and energy. Principles are entitled to respect and deference. Crusades grounded in pique have less resonance.

Here we have a clash of philosophies and egos. While lofty principles are invoked as the rationale for the hostilities, the tenor and tone suggest a less worthy set of motives. The facts are simple; CMC sells David Bates a car, Bates does not fully pay for it, CMC chases Bates for

payment and goes to Court to get it back, Bates learns of prior sharp business practices by the company and embarks on a crusade to alert the public about the dealership.

This dispute is between strong and stubborn personalities who have demonstrated personal animus and hostility and are entrenched in their positions. There is doubt in the mind of the Arbitrator that any result will be viewed as satisfactory. There are things that a Court (or Arbitration tribunal) can accomplish, and other things that cannot be accomplished. There are also instances in which litigation brings closure. Here, there is no middle ground, closure is not likely to be achieved, and the participants can anticipate additional conflicts in the future.

The consequence of the decision to slug it out ensures that these parties can expect an even larger investment in time, money, and aggravation in their futures. They are free to make that choice; it is not the function of an arbitration to philosophize, but to rule. In this instance the Arbitrator finds elements of both merit and questionable judgment on both sides. As was stated in closing remarks, neither party is profoundly evil or above reproach-far from it. The law will be applied to the facts as found in the Record, will be done with the recognition that few individuals or companies bat a thousand, and will anticipate that this Arbitration non result is likely to generate unintended consequences. The participants have the right to make informed decisions. Whether they do so is their choice.

Discussion

The issue is which, if any, specific YouTube videos posted by David Bates is/are appropriately ordered to be removed from Internet domains developed by Bates to expose what are alleged to be inappropriate business activities of Chicago Motor Cars, L.L.C. In addition to those domains, resultant materials were posted on other websites. There is extensive history here, but the real question is whether the First Amendment to the United States Constitution

permits Internet commentary that is inaccurate, incomplete, and, according to Plaintiffs, misleading at best and defamatory at worst. Inherent in the question is whether the postings are defamatory under any circumstances. For the reasons that follow, the Arbitrator finds insufficient legal basis to order any posting removed, and leaves the participants in the positions they occupied prior to the Arbitration.

Under both state and Federal law, a statement that is otherwise defamatory under the First Amendment is protected if the statement is an expression of the speaker's opinion. *Tunca v Painter*, 2012 IL App. (1st) 93384, 965 N.E. 2d1237 (1st Dist. 2012). To determine whether an alleged defamatory statement is an opinion protected under the First Amendment or whether it can reasonably interpreted as stating actual facts, the emphasis is on whether it contains an objectively verifiable assertion. *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755 (1st Dist. 2002), app. den. 202 Ill. 2d 662 (2002). Whether a statement is opinion or fact is a question of law in Illinois. *Moriarty v. Greene*, 315 Ill. App. 3d 225, 234 (1st Dist. 2000), app. den. 193 Ill. 2d 589 (2001).

The First Amendment prohibits defamation actions based on "loose, figurative language that no reasonable person would believe presented facts." *Imperial Apparel , Ltd. v Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381 at 397, 398 (2008). To prove defamation, a Claimant need show a Respondent made a false statement to a third party, that there was an unprivileged publication of the statement to a third party, and that the claimant was damaged. *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 323 (1st Dist 1999); *Cianci v. Pettibone Corp.* 298 Ill. App. 3d 419, 424 (1st Dist 1998). False statements do not equate with opinion.

Examples of statements of rhetorical hyperbole and opinion include "cheating the city" (held by the Illinois Appellate Court to not be objectively verifiable because it was not made in a specific factual context) and calling someone a "crook" (held to be a general statement "not objectively verifiable and devoid of factual content"). *Moriarty v. Greene*, supra. Generally where an alleged defamatory statement lacks a specific factual content, the statement is not objectively verifiable and is nonactionable. *Schivarelli* at 726; *Dubinsky* at 330.

Federal law is much the same, and begins with the premise that speech is a right deserving of significant protections, and censorship necessarily contemplates a heavy burden of proof. First Amendment cases hold that speech should be "uninhibited, robust, and wide open, and that it may well include vehement, unpleasant, caustic, and unpleasantly sharp attacks." This quote, from the seminal case involving speech, *New York Times Co. v. Sullivan*, 376 U.S. 254, at 274 (1964), underscores the expansiveness of permitted speech. Not all speech is protected, but speech that might be subject to censorship need overcome legal impediments.

The first argument here is whether the material is defamatory under any circumstances. If the statements are non defamatory, or truthful, the argument is over. Respondents argue both the affirmative defense of truth (with emphasis on the concept of "substantial truth") and that inasmuch as the "gist" of the published information is accurate, there can be no defamation. Accordingly, it is argued that the Constitution prohibits removal of the concededly critical comment. If, however, the statements are viewed as defamatory, the argument shifts, and the issue is whether there is "substantial truth" in the allegations.

To establish the defense of "substantial truth," a defendant (or Respondent) needs only show the publication to be true. If the "gist" or "sting" of the defamatory material is accurate, the

speech not actionable, and error in detail is permissible. *Haynes v. Alfred A. Knopf*, 8 F. 3d 1222, 1228 (7th Cir. 1993). That is this case.

There is no issue that Claimant Chicago Motor Car Corporation has engaged in false advertising. Mr. Shah has admitted as much and more, including submitting a false affidavit in litigation antecedent to this arbitration. Judgments and pleadings are public records; disseminating this information that is part of a public record is not actionable. In addition, the fact of entry of a judgment provides a colorable foundation for the opinions and conclusions published by Bates. As much as the Claimants would like to explain away these events, and as minor a part this conduct has played in comparison with the totality of business operations, the facts are what they are; once in the public domain these facts can be both circulated and commented on. In addition, insignificant errorata is not actionable in any event, and it is conceded that many postings are of this character.

This is not to say that Bates has not made errors in his postings. He has, and the limited nature of his follow up efforts in attempting to verify the truth his research is clear. To rely uncritically on internet research performed by others invites legitimate criticism. At the same time, errors in detail have been held not to constitute a deliberate or reckless untruth. *Gertz v. Welch*, 418 U.S. 323 (1974); *Bose Corp.v. Consumer Union of United States, Inc.*, 466 U.S. 485, 513 (1984), reh. den. 467 U.S. 1267 (1984).

Damages must also be proved. It is unnecessary to reach the issue of quantum of damages given both the stipulation attending this Arbitration and the conclusion reached above, but a word on the subject is appropriate. Damages must be proved as an element of the claim. No monetary damages need be proved in this arbitration, but the only proof of non monetary damages consists solely of Mr. Shah's recitation of his belief that the CMC's business has been

impacted, that there has been a diminution in the number of customers visiting the dealership as a result of the postings, and that he and others have been required to invest time fielding questions and expressions of concern over Bates' postings. As indicated, Claimants need not prove money damages per stipulation, but they are obligated to prove some form or quantum of injury to reputation. No sufficient quantification, calculation, or tangible evidence of how Claimants' reputation was impacted and over what period of time it occurred was offered. Mr. Shah opined that he was required to spend time answering inquiries regarding the dealership. Damages may not be based on speculation, hypothesis, conjecture, or whim. They need be established by a preponderance of the evidence, and must rest on an adequate foundation in Illinois (*Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, 2013 WL 1499358 (April 10, 2013). Here, that foundation is absent.

"Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007). This case is not a tie. Uninhibited, wide open, caustic, vehement, and unpleasantly sharp attacks are within the "profound commitment" favoring speech and disfavoring censorship. On this Record the Arbitrator finds Claimants have been unable to establish, consistent with the First Amendment of the Constitution of the United States, that Mr. Bates' statements are such that removal from the Internet is warranted. Accordingly, the Arbitrator declines to Order same. This should not, however, be considered an approval or an endorsement of Bates' conduct. Far from it.

ENTERED:

DATE: May 3, 2013

Clifford L. Meacham
Arbitrator

SERVICE LIST

Case Name: Chicago Motor Car Corp., et al. vs. David Bates
Reference #: 1340010008
Panelist: Meacham, Clifford L.,

Hear Type: Arbitration
Case Type: Business/Commercial

Vincent L. DiTommaso

DiTommaso Lubin PC
Vincent L. DiTommaso — Respondent
17W220 22nd St.
Suite 200
Oakbrook Terrace, IL 60181
vdt@ditommasolaw.com
Phone: 630-333-0000
Fax: 630-333-0333

Party Represented:
David Bates

Peter S. Lubin

DiTommaso Lubin PC
Peter S. Lubin — Respondent
17W220 22nd St.
Suite 200
Oakbrook Terrace, IL 60181
psl@ditommasolaw.com
Phone: 630-333-0000
Fax: 630-333-0333

Party Represented:
David Bates

Natalia Minkel-Dumet

Gonzalez Saggio & Harlan LLP
Natalia Minkel-Dumet — Claimant
111 E. Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
Natalia_Minkel@gshllp.com
Phone: 414-277-8500
Fax: 414-277-8521

Party Represented:
Chicago Motor Cars
Frank Sacco
Parin Shah

Andrew C. Murphy

DiTommaso Lubin PC
Andrew C. Murphy — Respondent
17W220 22nd St.
Suite 200
Oakbrook Terrace, IL 60181
amurphy@ditommasolaw.com
Phone: 630-333-0000
Fax: 630-333-0333

Party Represented:
David Bates

Serena E. Pollack

Gonzalez Saggio & Harlan LLP
Serena E. Pollack — Claimant
111 E. Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
Serena_Pollack@gshllp.com
Phone: 414-277-8500
Fax: 414-277-8521

Party Represented:
Chicago Motor Cars
Frank Sacco
Parin Shah

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Chicago Motor Car Corp., et al. / David Bates
Reference No. 1340010008

I, LaShawn Jones, not a party to the within action, hereby declare that on May 03, 2013 I served the attached AWARD on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Chicago, ILLINOIS, addressed as follows:

Mr. Andrew C. Murphy
Peter S. Lubin Esq.
Vincent L. DiTommaso Esq.
DiTommaso Lubin PC
17W220 22nd St.
Suite 200
Oakbrook Terrace, IL 60181
Phone: 630-333-0000
amurphy@ditommasolaw.com
psl@ditommasolaw.com
vdt@ditommasolaw.com
Parties Represented:
David Bates

Serena E. Pollack Esq.
Ms. Natalia Minkel-Dumet
Gonzalez Saggio & Harlan LLP
111 E. Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
Phone: 414-277-8500
Serena_Pollack@gshllp.com
Natalia_Minkel@gshllp.com
Parties Represented:
Chicago Motor Cars
Frank Sacco
Parin Shah

I declare under penalty of perjury the foregoing to be true and correct. Executed at Chicago, ILLINOIS on May 03, 2013.

LaShawn Jones
ljones@jamsadr.com