UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP SELDON, **Plaintiff,** **v.** **EDWARD MAGEDSON, XCENTRIC VENTURES, LLC, and JOHN OR JANE DOE,** **Defendants.**	**Case No: 11-CV-6218**

MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(6), Defendants EDWARD MAGEDSON ("Magedson") and XCENTRIC VENTURES, LLC ("Xcentric"; collectively "Defendants) respectfully move the Court for an order dismissing this action for lack of personal jurisdiction, and dismissing the Amended Complaint for failure to state a claim upon which relief may be granted, lack of subject matter jurisdiction, and for.

Each point is discussed fully herein.

I. INTRODUCTION

Defendant previously filed a Motion to Dismiss the Complaint in this matter. In response, Plaintiff PHILIP SELDO0N ("Plaintiff" or "Mr. Seldon") filed an Amended Complaint attempting to address some of the issues raised in

the first Motion to Dismiss. The Amended Complaint, however, is still subject to dismissal.

This case involves seven separate claims. In claims one through six, Mr. Seldon seeks damages arising from a series of allegedly defamatory posts on www.RipoffReport.com, which is an Arizona-based website operated by Defendant Xcentric Ventures. The seventh cause of action is a simple breach of contract claim which generally alleges that, among other things, Defendants promised to make the allegedly defamatory posts "unsearchable", and to provide five years worth of advertising to Plaintiff and as consideration for that gesture, Defendants would receive "websites that [Plaintiff] Philip Seldon was not using." Compl. ¶ 52.

As explained herein, the Amended Complaint should be dismissed for three separate reasons. First, the Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) because Defendants are not subject to personal jurisdiction in the state of New York. Second, the claims are barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1), and even assuming all of Plaintiff's allegations are true, each of these causes of action fail to state a claim upon which relief may be granted. As such, the claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Finally, separate and apart from this issue, the seventh cause of action is barred by the statute of frauds and, assuming the first six claims for

relief are dismissed, this Court lacks subject matter jurisdiction over Plaintiff's remaining state-law breach of contract claim.

II. ARGUMENT

A. Defendants Are Not Subject To Personal Jurisdiction In New York

The Amended Complaint should also be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) because under the facts alleged in the Amended Complaint, Defendants Magedson and Xcentric are not subject to personal jurisdiction in New York. Because this is apparently a diversity jurisdiction case, the applicable test for personal jurisdiction New York state law is found in New York's long-arm statutes, CPLR §§ 301 and 302(a). *See DiStefano v. Carozzi North Am., Inc.*, 286 F.3d 81, 84 (2nd Cir. 2001); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. BP Amoco P.L.C.*, 319 F.Supp.2d 352, 357 (S.D.N.Y. 2004)). In addition, as plaintiff, Mr. Seldon has the burden of showing that personal jurisdiction is proper here. *See Penguin Group (USA), Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2nd Cir. 2010).

As the Court is aware, CPLR § 301 provides for jurisdiction over a defendant that is "engaged in such a continuous and systematic course of 'doing business' in New York as to warrant a finding of its 'presence' in the state." *Jazini v. Nissan Motor Co., Ltd*., 148 F.3d 181, 184 (2nd Cir. 1998). Here, nothing in Mr. Seldon's Amended Complaint accuses Xcentric of engaging in *any* business in New York, much less the "continuous and systematic" business required

to establish general jurisdiction under CPLR § 301, and as explained in the Declaration of Edward Magedson submitted in support of Xcentric's first Motion to Dismiss, neither Xcentric nor Mr. Magedson conduct any meaningful business in New York. As such, general jurisdiction is clearly lacking here.

The only other possible basis for personal jurisdiction is CPLR § 302 which enumerates a variety of conduct including the following acts by a defendant:

> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
>> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

N.Y. CPLR § 302(a) (McKinney 2010).

As explained in Mr. Magedson's Declaration and considering the actual allegations of Mr. Seldon's Amended Complaint, none of the subsections of CPLR § 302(a) apply here. Section 302(a)(1) does not apply because this action does not

arise out of any business transacted within the State of New York; "To establish personal jurisdiction under section 302(a)(1), two requirements must be met: (1) The defendant must have transacted business within the state; and (2) the claim asserted must arise from that business activity." *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt. LLC*, 450 F.3d 100, 103 (2nd Cir. 2006). Both of these elements are lacking here because rather than transacting any business in New York, the facts of this case show that Mr. Seldon contacted Mr. Magedson in Arizona to inquire about how he might be able to resolve the allegedly defamatory posts on the Ripoff Report website.

Even assuming an agreement was made during these discussions (which Mr. Magedson denies), the alleged agreement would not be sufficient to establish personal jurisdiction over Defendants in New York under CPLR § 302(a)(1). When considering this issue, Courts focus primarily on the following factors:

> (i) whether the defendant has an on-going contractual relationship with a New York corporation; (ii) whether the contract was negotiated or executed in New York and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship; (iii) what the choice-of-law clause is in any such con-tract; and (iv) whether the contract requires [the defendant] to send notices and payments into the forum state or subjects them to supervision by [a] corporation in the forum state.

Sunward Elec., Inc. v. McDonald, 362 F.3d 17, 22–23 (2nd Cir. 2004) (quoting *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2nd Cir.

1996)). Another important factor is whether the contract is to be performed in New York. *See Cooper, Robertson & Partners, L.L.P. v. Vail*, 143 F.Supp.2d 367, 371 (S.D.N.Y. 2001) (stating that "[i]n determining jurisdiction, the place of performance is more critical than the place of the execution of a contract") (emphasis added). No single factor is dispositive. Rather, a finding of personal jurisdiction must be based upon the totality of the circumstances. *See Agency Rent A* Car, 98 F.3d at 29.

Here, none of these factors weigh in favor of jurisdiction in New York. The Amended Complaint does not allege that Defendants have any ongoing contractual relationship with any New York corporation, nor does the Amended Complaint arise from any type of ongoing relationship. The Amended Complaint does not allege that Defendants went to New York to meet with Mr. Seldon, nor does it allege that the contract was executed in New York. Finally, the alleged contract did not require Defendants to supply any goods or services in New York; on the contrary, the only actions to be performed (i.e., making the allegedly defamatory postings unsearchable on Xcentric's website) would have taken place in Arizona, not New York.

Under these circumstances, personal jurisdiction cannot be based on CPLR § 302(a)(1); "[C]ourts seem generally loath to uphold jurisdiction under the 'transaction in New York' prong of CPLR 302(a)(1) if the contract at issue

was negotiated solely by mail, telephone, and fax without any New York presence by the defendant." *Worldwide Futgol Associates, Inc. v. Event Entertainment, Inc.*, 983 F.Supp. 173, 177 (E.D.N.Y. 1997); *United Computer Capital Corp. v. Secure Prods.*, L.P., 218 F.Supp.2d 273, 278 (N.D.N.Y. 2002) (finding "Where a plaintiff's cause of action is based upon a contract, negotiation of the contractual terms by phone, fax or mail with the New York party is generally insufficient to support a finding of the transaction of business in New York.") (emphasis added). This finding is further supported by the fact that Mr. Seldon initiated the contacts with Defendants; "The fact that the Plaintiff initiated the contact between the parties weighs against asserting personal jurisdiction over the Defendants." *Skrodzki v. Marcello*, ___ F.Supp.2d ___, 2011 WL 3792418, *8 (E.D.N.Y. Aug. 19, 2011) (citing *Mortgage Fund. Corp. v. Boyer Lake Pointe, LC*, 379 F.Supp.2d 282, 287 (E.D.N.Y. 2005)).

Similarly, personal jurisdiction cannot be established under either CPLR §§ 302(a)(2) or 302(a)(3) because neither of these sections apply in defamation cases. *See Gary Null & Assoc., Inc. v. Phillips*, 29 Misc.3d 245, 248, 906 N.Y.S.2d 449, 451 (N.Y.Sup. 2010) (explaining, "Defamation actions are expressly exempted from CPLR 302(a)(2) and (3), so the only provision at issue in this case is CPLR 302(a)(1), which requires defendant Phillips to transact business within the state, and the defamation claim to arise from his transaction of that business.") Finally,

personal jurisdiction cannot be based on CPLR § 302(a)(4) because Defendants do not own, use, or possess any real property in New York. *See* Magedson Dec. ¶ ¶ 10, 11.

Under each of these factors, it is apparent that personal jurisdiction in New York would be improper. As such, because Mr. Seldon cannot satisfy the threshold showing necessary to establish jurisdiction, it is not necessary for the Court to consider whether due process would be offended here. *See Mortgage Fund. Corp.*, 379 F.Supp.2d at 288 (concluding, "Because personal jurisdiction pursuant to the long-arm statute is not present, the Court need not assess whether a jurisdictional finding in this matter would satisfy due process.")

B. Claims 1–6 Are Barred By 47 U.S.C. § 230(c)(1).

Assuming that the Court reaches the merits of this dispute, Mr. Seldon's claims should be dismissed because even assuming the allegations in the Amended Complaint are true, each of these claims are completely barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1). According to paragraph 8 of Mr. Seldon's Amended Complaint, several derogatory postings were created and submitted to the Ripoff Report website by third parties. Mr. Seldon alleges that these posts contain a variety of false and defamatory statements which give rise to his claims against Defendants Xcentric and Magedson.

Nowhere in his Amended Complaint does Mr. Seldon allege that any of

the defamatory posts were authored or written by Mr. Magedson or Xcentric. Instead, it appears that Mr. Seldon seeks to impute liability to Mr. Magedson and Xcentric for "publishing" these posts either "with knowledge that the defamatory material about Philip Seldon on ripoffreport.com was false," Compl. ¶ 8, or because "defendants [Xcentric and Magedson] failed to take proper steps to ascertain their accuracy." Compl. ¶ 12. Even if true, these allegations are insufficient to state a claim upon which relief may be granted because as the providers and operators of the Ripoff Report website, Defendants Xcentric and Magedson are immune from liability based on the "publication" of material posted on the site by a third party:

> Whether Defendants are shielded from liability by the CDA is at the heart of this case. The Court notes that this very issue has been litigated by several district courts to date, where nearly identical allegations against Xcentric (and Magedson where applicable) based on Ripoff Report postings have been barred under the CDA. The Court also finds that the CDA applies to Defendants here.

Asia Economic Institute, LLC v. Xcentric Ventures, LLC, 2011 WL 2469822, *5 (C.D.Cal. 2011) (emphasis added) (citing *GW Equity, LLC v. Xcentric Ventures, LLC*, 2009 WL 62173 (N.D.Tex. 2009) (finding Xcentric and Magedson entitled to immunity under the CDA); *Intellect Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273 (N.Y.Sup. 2009) (same); *Whitney Info. Network Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095 (M.D.Fla. 2008) (same); *Global Royalties, Ltd. v. Xcentric Ventures*, LLC, 544 F.Supp.2d 929 (D.Ariz. 2008) (same); *see also Herman*

v. Xcentric Ventures, LLC, Case No. 1:10-cv-00398 (N.D.Ga. Feb. 12, 2011) (recognizing, "Since the CDA was enacted in 1996, every state and federal court that has considered the merits of a claim against the Ripoff Report has, without exception, agreed that Xcentric and Magedson are entitled to immunity under the CDA for statements posted by third-party users.")

Although numerous courts, including at least one New York court, *see Intellect Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273 (N.Y.Sup. 2009), have previously found Xcentric and Magedson are entitled to CDA immunity as long as the allegedly defamatory material was posted by a third party (as alleged here), it is worth nothing that the New York Court of Appeals recently addressed and reaffirmed the broad scope of the CDA in *Shiamili v. The Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 2011 WL 2313818 (N.Y. June 14, 2011) (explaining, "A defendant is therefore immune from state law liability if (1) it is a 'provider or user of an interactive computer service'; (2) the Amended Complaint seeks to hold the defendant liable as a 'publisher or speaker'; and (3) the action is based on 'information provided by another information content provider.'")

The first six claims in Mr. Seldon's Amended Complaint each attempt to impose liability on Mr. Magedson and Xcentric for "publishing" material which was created by a third party. Thus, the CDA's immunity plainly renders those

claims subject to dismissal under Rule 12(b)(6). *See Global Royalties*, 544 F.Supp.2d at 933 (granting 12(b)(6) dismissal of claims against Magedson and Xcentric where the material at issue was posted on the Ripoff Report website by a third party, because: "Through the CDA, 'Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.'") (quoting *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1122–23 (9th Cir. 2003); *see also Coppage v. U-Haul Inter., Inc.*, 2011 WL 519227 (S.D.N.Y. 2011) (granting 12(b)(6) dismissal of claims based on CDA immunity); *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, (S.D.N.Y. 2009) (granting 12(b)(6) dismissal of claims based on CDA immunity).

The Seventh cause of action, though based in contract, requests damages for Defendants failure to *remove* the allegedly defamatory posts. Such a claim is also barred by the CDA. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (holding negligent undertaking claim arising from alleged promise to remove post was barred by the CDA because: "the duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because such conduct is publishing conduct that we have insisted that section 230 protects from liability 'any activity that can be boiled down to deciding whether to exclude

material that third parties seek to post online.'") (quoting *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157 (9th Cir. 2008)).

In other words, it is obvious that Mr. Seldon's seventh cause of action is based in large part on the violation of an alleged promise to make the derogatory postings "unsearchable" (which essentially identical to the allegation in *Barnes v. Yahoo!*). Even assuming this allegation is true, the only *damages* Mr. Seldon claims to have suffered would necessarily arise from the derogatory third party comments themselves, not from the loss of money paid by Mr. Seldon to Defendants (indeed, Mr. Seldon does not allege making any payment to Defendants in consideration for their alleged agreement). This claim then, also seeks to treat Defendants as a publisher and is barred by the CDA.

Following the filing of Defendants' Motion to Dismiss the original Complaint, Mr. Seldon attempted to plead around the CDA by claiming, for the first time, that Defendants created the "title tag" of the postings at issue. In addition to being false and a violation of Rule 11, this allegation does not save Mr. Seldon from the CDA. The New York Court of Appeals recently determined that such allegations will not save a Plaintiff from dismissal under the CDA. *Shiamili v. The Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 2011 WL 2313818 (N.Y. June 14, 2011). In *Shiamili,* the Court of Appeals considered whether a plaintiff's claim against a website operator arising out of allegedly defamatory

comments posted to the website was barred by the CDA. The Court of Appeals affirmed the dismissal of the Complaint despite allegations that the Defendant had moved the comment to a stand-alone post, prefacing it with the statement that, "the following story came to us as a . comment, and we promoted it to a post," and despite the allegation that the Defendant gave the post the heading, "Ardor Realty and Those People," and the sub-heading, "and now it's time for your weekly dose of hate, brought to you unedited, once again, by 'Ardor Realty Sucks,' and for the record, we are so. not. afraid." Moreover, the Defendant in the *Shiamili* case added a photograph that could be considered further commentary on the third-party posting. The Court of Appeals determined that "Defendants' added headings and illustration do not materially contribute to the defamatory nature of the third-party statements."

In the case at bar, as in *Shiamili,* the titles that were alleged to be added by Defendants did not materially contribute to the defamatory nature of the third-party statements. One of the postings which Mr. Seldon alleges was posted by a third-party, specifically accuses him of being a sexual pervert. Even if Defendants added a title of "sexual pervert," which it did not, it did not materially contribute to the defamatory nature of the third-party statements, which explained in detail why Mr. Seldon is a sexual pervert. (Amended Complaint, Paragraph 18). Similarly, the headline "Tax Free Money Income," which was alleged to be created

by Defendants, makes no defamatory statement at all. (Amended Complaint, Paragraph 32). Another posting which Mr. Seldon alleges was posted by a third-party, specifically accuses Mr. Seldon of harassing someone in retaliation. Even if Defendants added a title of "Philip Seldon Vindictive Harassment," which it did not, it did not materially contribute to the defamatory nature of the third-party statements, which explained in detail why Mr. Seldon was engaging in vindictive harassment. (Amended Complaint, Paragraph 39). The final headline that Defendants are accused of creating was simply, "Philip Seldon," a title which is clearly not defamatory.

Thus, Mr. Seldon's amendment to his original Complaint does not cure the defect found in the original Complaint. The claims are barred by the CDA.

C. The Seventh Claim is Barred by The Statute of Frauds and If The First Six Claims Are Dismissed, The Amended Complaint Should Be Dismissed For Lack of Subject Matter Jurisdiction

In Mr. Seldon's original Complaint, he alleged there was an agreement between Defendants and himself that required Defendants "to provide five years worth of advertising for various companies with which Philip Seldon was affiliated."

Defendant's Motion to Dismiss the original Complaint properly pointed out that the alleged contract is barred by the Statute of Frauds.

Every agreement, promise or undertaking is void, unless it

> or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;

N.Y. Gen. Oblig. Law § 5-701 (McKinney)

"Clearly, termination of an agreement as a result of its breach is not performance thereof within the meaning of the Statute of Frauds, and an oral agreement which by its own terms must continue for more than a year unless terminated by its breach is void." *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 457, 472 N.E.2d 992, 995 (1984)

Following his receipt of the Motion to Dismiss, Mr. Seldon filed the Amended Complaint. Attempting to cure his Statute of Frauds problem, Mr. Seldon modified the Complaint to allege that Defendants agreed "to provide advertising for various companies with which Philip Seldon was affiliated…" (Amended Complaint, Paragraph 53). In other words, he simply removed the part of the allegation that identified the length of time that the advertising would be for. Here again, Mr. Seldon's attempt to plead around the law in complete disregard of the truth of the allegation fails. By not pleading a length of time that the advertising would be for, the claim is essentially that the advertising would be perpetual. It seems to have no end according to the allegation. The claim is still

barred by the statute of frauds. Clearly, the Amended Complaint does not allege that the performance could be completed within a year.

In addition, if the Court dismisses the first six claims in Mr. Seldon's Amended Complaint under the CDA, the sole remaining cause of action—breach of contract—should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because the Amended Complaint fails to establish the Court's subject matter jurisdiction over that claim. Although Mr. Seldon's *pro se* Amended Complaint does not allege the specific statutory basis upon which federal subject matter jurisdiction is founded, because this case involves no claim arising under federal law or otherwise presenting a federal question, the only possible basis for jurisdiction would be diversity pursuant to 28 U.S.C. § 1332(a) which, of course, would require both diversity of citizenship (which is present) and a plausible claim supporting a controversy in excess of $75,000 (which is not present).

In this context, "A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount." *Tongkook Am., Inc. v. Shipton Sportswear Co.,* 14 F.3d 781, 784 (2nd Cir. 1994) (quoting *Moore v. Betit*, 511 F.2d 1004, 1006 (2nd Cir. 1975)). Even if this showing is made, it can be rebutted by establishing that "to a legal certainty", the amount recoverable does not meet the jurisdictional threshold. *Wolde–Meskel v. Vocational Instruction Project Cmty.*

Servs., Inc., 166 F.3d 59, 63 (2nd Cir. 1999).

Here, Mr. Seldon demands $150,000 in damages for the Seventh cause of action. However, he has failed to plead any causal relationship between his demanded damages and the purported breach. He has pled no facts which would lead to a reasonable probability that the claim is for more than $75,000. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (stating that Rule 8 requires more than "the-defendant-unlawfully-harmed-me accusation[s]" and "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do"). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqba*l, 129 S.Ct. at 1949. Rather, "[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." *Id*.

Because Mr. Seldon cannot, under the CDA, impose liability on Defendants Magedson and Xcentric for *failing to remove* third party generated material, *a fortiori*, he has pled no other harm that could possibly justify a damage award in excess of the mandatory $75,000 threshold necessary to support diversity jurisdiction under 28 U.S.C. § 1332(a). For these reasons, his seventh cause of action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

I. CONCLUSION

For the reasons above, Defendants Xcentric and Magedson respectfully move the Court for an order dismissing this action for lack of personal jurisdiction, for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction.

Dated this 28th day of Nov. 2011.

/s/ Maria Crimi Speth
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2011 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and on November 29, 2011 mailed the attached document to the following:

Philip Seldon
500 E 77th Street
New York, NY 10162
Plaintiff Pro Se

And a courtesy copy of the foregoing delivered to:

HONORABLE MICHAEL H. DOLINGER
United States Magistrate Judge
United States District Court
500 Pearl St.
New York, NY 10007-1312

/s/ Debra Gower