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Steinmetz v Energy Automation Sys., Inc.
2014 NY Slip Op 50566(U)
Decided on April 7, 2014
Supreme Court, Kings County
Schmidt, J.
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Decided on April 7, 2014

Supreme Court, Kings County

<p>Michael Steinmetz, , Plaintiff,</p> <p>against</p> <p>Energy Automation Systems, Inc. AND BETTER BUSINESS BUREAU OF NASHVILLE, TENNESSEE, INC., DOING BUSINESS AS THE BETTER BUSINESS BUREAU, AND COUNCIL OF BETTER BUSINESS BUREAUS, INC., ALSO DOING BUSINESS AS THE BETTER BUSINESS BUREAU, Defendants.</p>
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500554/13

David I. Schmidt, J.

*The following papers numbered 1 to 9 read herein:**Papers Numbered*

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed 1-2

Opposing Affidavits (Affirmations) 3

Reply Affidavits (Affirmations)

Affidavit (Affirmation) [*2]

Other Papers *Memoranda of Law + Affidavits* 4, 5, 6-9

Upon the foregoing papers, defendants Council of Better Business Bureaus, Inc. (the CBBB), and the Better Business Bureau of Middle Tennessee, Inc., erroneously sued here as the "Better Business Bureau of Nashville, Tennessee, Inc." (the Nashville BBB or NBBB) move, pursuant to CPLR 3211 (a) (1) and (7), and alternatively, pursuant to CPLR 3212, to dismiss the complaint of plaintiff Michael Steinmetz (plaintiff).

Overview

In this action alleging common-law fraud and violations of General Business Law §§ 349 and 350, plaintiff alleges that he was defrauded by defendant Energy Automation Systems, Inc. (EASI) when he entered into an agreement to serve as a distributor of EASI's energy conservation products and services. With respect to defendants CBBB and the Nashville BBB (the BBB defendants), plaintiff alleges that after he complained in October 2012 to the Nashville BBB about a history of complaints against EASI, the Nashville BBB, which had awarded EASI an "A+" rating, neither withdrew the accreditation nor lowered the rating, making both BBB defendants equally liable with EASI for plaintiff's monetary loss and punitive damages.

Facts

EASI is a corporation based in Hendersonville, Tennessee, which for approximately 35 years has marketed energy conservation systems intended to reduce electrical energy consumption in large industrial and commercial facilities. [\[FN1\]](#) The complaint alleges that

EASI directly markets its products and services to New York residents through "business opportunity/franchise expos, websites, and other methods designed to solicit business from New York" (Complaint, p. 1-2 [¶3]). Based upon complaints filed with various state regulators about certain of EASI's business practices in the early 2000's, EASI entered into a series of consent orders with state regulators during the period of 2007-2010, wherein EASI acknowledged the regulators' allegations and consented to the entry of sanctions against it. Sanctions included paying restitution (refunds) to affected purchasers/investors of EASI's products, providing audited financial statements to the regulators, and ceasing to sell its products in violation of certain state registration laws. The complaint alleges that the deceptive practices in which EASI engaged "continue to this day" and [that] the [EASI] [w]ebsite and its materials contain prohibited statements," despite the consent orders (*id.* at p. 1-2 [¶3]).

The complaint further alleges that the CBBB "creates or helps create standards, practices, and procedures including those dealing with Better Business Bureau accreditation, rating, and advertising practices" (*id.* at p. 2 [¶4A]). According to Beverly Baskin, Senior Vice President of the CBBB, "the CBBB is the national association of local Better Business Bureaus" and is a "non-profit corporation organized under the laws of the state of Delaware with its principal place of business in Arlington, Virginia." It "owns trademarks licensed to local BBBs, coordinates the setting of policy by and among the local BBBs, and represents the BBBs collectively in national endeavors." However, Ms. Baskin states that "the CBBB does not participate in the day-to-day activities of the local BBBs," and "plays no role in the actual rating or accreditation of specific companies within a particular BBB's service area." In addition, according to Ms. Baskin, prior to being served with the [*3] complaint in this action, the CBBB "had no knowledge whatsoever of the events transpiring between the Nashville BBB and either EASI or [plaintiff]."

Like its national counterpart, the local Nashville BBB "creates or implements standards, practices, and procedures involving the accreditation [and] rating[] of various companies including co-defendant [EASI]" (Complaint, p. 2 [¶4B]). Similar to other local Bureaus, the Nashville BBB uses a "letter grade, or alpha,' rating system" to grade companies in its service area" (*id.* at p. 7 [¶26], quoting Letter, State of Conn. Atty. Gen.) According to the affidavit of Brandi Morgan, Director of Operations of the Nashville BBB, the Nashville BBB is a Tennessee non-profit corporation based in Nashville whose service area is limited to 45 counties in central Tennessee and southern Kentucky. Ms. Morgan states that based upon its

own application of its own published standards, the Nashville BBB currently has accredited EASI and assigned EASI an "A+" rating, which are both published on the Nashville BBB website.

According to the complaint, "[c]onsumers rely upon BBB approval as an indicator that a company complies with BBB standards and therefore provides truthful or accurate statements about its business and products and will provide[] refunds where needed" (*id.* at p. 2 [¶5]). "Despite the history of complaints, enforcement actions and acknowledged violations through consent orders, the BBB gives [EASI] an A+ [rating] and calls it an approved business [and] . . . [EASI] touts that fact on its website without disclosing prior violations[,] which have helped enable it to deceive customers and will continue to deceive consumers including those in New York State" (*id.* at p. 2 [¶5]). In this regard, the complaint alleges that due to "the cost and time" involved to commence legal actions, "many consumers will not receive damages or restitution and that [EASI] will continue to prosper" (*id.* at p. 2 [¶6]).

The complaint sets forth four consent orders which "recite that EASI failed to disclose a prior bankruptcy, [that] lawsuits [were] filed by disgruntled consumers [against EASI] . . . , [that EASI] failed to comply with registration requirements, [and] violated [state] [c]onsumer protection laws," and alleges that "[n]otwithstanding the consent orders specifically identifying the necessity of disclosure of the prior bankruptcy, [EASI] still touts its supposed 30 year record of continued growth and success . . ." (*id.* at p. 3 [¶9]). Further, the complaint alleges that when "fraud and illegal acts are detected in one state and a consent order entered, [EASI] does not hesitate to engage in the same conduct in other states" (*id.*). In particular, the complaint alleges that EASI has "misstate[d] a record of growth," [and] "conceal[ed] a bankruptcy" (*id.* at p. 3-4 [¶9]); that EASI "has boasted of a comprehensive referral network in various states facilitating large profits and easy sales, but purchasers have found the opposite," and that "[EASI's] current website still does not comply with the consent orders it signed" (*id.* at p. 4 [¶9]).

The complaint further alleges that "[a]n important part of [EASI]'s solicitation of sales and ability to deceive is its statement of Better Business approval [which] [l]eads purchasers to believe the company adheres to the standards of honesty, integrity, and responsiveness to consumer complaints that are stated to be part of the Better Business Bureau creed" (*id.* at p. 4 [¶14]).

Plaintiff resides in Brooklyn, New York. At some unidentified point in time, plaintiff paid EASI a \$40,000 fee for the right to distribute EASI's energy conservation products and services. According to the complaint, "while undergoing training, plaintiff realized [EASI's deceptive practices] and asked for his money back but the defendant smirked and refused" (*id.* at p. 4 [¶12]). Thereafter, in October, 2012, plaintiff forwarded a complaint to the Nashville BBB, which "included [*4] copies of prior enforcement actions and consent orders" which meant that "the BBB knew of the history of deception, prior state enforcement actions, and consent orders" (*id.* at p. 5 [¶17]). Despite the foregoing, "the BBB continued to allow, permit, [and] countenance, [EASI] stating its approved rating with the BBB," and that "[p]rospective investors would have no reason to know of the pattern of deception set forth in the complaint by way of the BBB approval and . . . [would] believe the opposite [as] [] [t]hese matters are not accurately disclosed on [EASI's] website and other materials" (*id.* at 5 [¶19]).

The complaint further alleges that EASI does not comply with the standards set forth by the BBB (*id.* at 5 [¶20]). In this regard, the complaint alleges that according to BBB Accreditation Standard A-2, "an accredited business or organization agrees to: Follow federal, state/provincial and local advertising laws," but that [EASI] "has violated laws and regulations and [has] acknowledged these violations through its consent orders, but continued these deceptive practices in violation of BBB rules" (*id.* at p. 6 [¶21]). Specifically, the complaint alleges that consumers relied upon the accreditation of EASI by the BBB to their detriment, and that the BBB knew that EASI did not comply with BBB standards. In this regard, the complaint alleges that:

"The accreditation of [EASI] would lead consumers to believe that they should trust the statements of a BBB approved vender, rather than do the necessary investigation which would reveal the pattern of deception and facts and findings set forth in the state consent orders. BBB provides a website designed to protect consumers and inform them of deceptions and scams . . . Consumers will assume the BBB does not endorse or permit deception, and that approved companies are not engaged in it."

BBB knew or had reason to know of [EASI's] non-compliance with its standards but has continued its accreditation to the date of this complaint. [EASI] provided that accreditation and it[s] A + rating on its home page to secure additional franchisees and customers" (*id.* at p. 6 [¶22-24]).

The complaint concludes that "[t]he BBB should not provide [an] A+ rating to companies such as [EASI] which have multiple complaints and administrative violations;" that "consumers will mistakenly believe that such companies have few if any complaints and adequately address concerns of dissatisfied consumers" when such has not been the case [with EASI]; that New York State has a substantial state interest in deterring continued deception and protecting potential future victims;" that "prior state actions have failed to stop [EASI] or induce it to alter its practices;" and that "[t]he combination of BBB's creed and statements and [EASI's] deception have the capacity to mislead consumers and violate the New York Deceptive Practices Act" (*id.* at p. 7-8 [¶26-29]).

The complaint seeks compensatory, consequential, punitive and other incidental damages against all defendants, as well as a preliminary and permanent injunction against defendants "to protect prospective purchasers." It alleges two causes of action, one for common-law fraud and the other for violations of General Business Law §§ 349 and 350. Finally, the complaint notes that plaintiff had previously filed a pro se complaint and "may seek to join this claim with its prior one." [*5]

After plaintiff commenced this action, the BBB defendants moved to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), and for summary judgment, in the alternative. Plaintiff opposed the motion, which is presently before the court for disposition.

Arguments/Discussion

The BBB defendants first argue that the court lacks personal jurisdiction over the Nashville BBB. In this regard, they contend that the Nashville BBB did not do business in New York to support the exercise of jurisdiction pursuant to CPLR 301 and that plaintiff, in any event, does not allege any basis for the court to assert jurisdiction over the Nashville BBB in his complaint. Defendants also assert that the conduct of the Nashville BBB was insufficient to confer personal jurisdiction over it in New York pursuant to CPLR 302, New York state's long arm statute.

In his opposition to this branch of defendants' motion, plaintiff first notes that the court has personal jurisdiction over *co-defendant EASI*. With respect to the Nashville BBB, plaintiff asserts that "[d]efendants have and will continue to target New York residents for their deceptive sales scheme," and that "[t]he BBB endorsement is and will be a centerpiece in inducing credulous consumers to purchase from [EASI] and suffer substantial losses." Plaintiff further argues that the Nashville BBB "does not deny" that it "conducts business

throughout the country," and that "[t]he BBB endorsement of . . . [EASI] is a central part of the [EASI] scheme, and is being used to deceive consumers."

In reply, defendants assert that the Nashville BBB does in fact, deny both that it conducts business throughout the country and that its rating of EASI deceives consumers. Specifically, defendants contend that plaintiff has not offered any evidence that the Nashville BBB conducts business throughout the country, and that plaintiff's assertion with respect to EASI's rating is legally irrelevant to the issue of personal jurisdiction. Defendants also assert that to the extent plaintiff is suggesting that the court may exercise jurisdiction over the Nashville BBB pursuant to CPLR 302 (a) (1) - namely where the defendant "transacts any business within the state or contracts anywhere to supply goods or services in the state" - it should be rejected.

"[W]here a motion is made to dismiss a complaint for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proof to prove a basis for such jurisdiction" ([Paterno v Laser Spine Inst.](#), 112 AD3d 34, 39 [2013] [internal citations and quotation marks omitted]). "That burden, however, does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiffs need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant" ([Brinkmann v Adrian Carriers, Inc.](#), 29 AD3d 615, 616 [2006] [internal citations and quotation marks omitted]).

"In order to be subject to personal jurisdiction under CPLR 301, a foreign corporation must be found to be engaged in a continuous and systematic course of doing business such that the aggregate of the corporation's activities are not occasional or casual but have a fair measure of permanence and continuity sufficient to make it reasonable according to traditional notions of fair play and substantial justice that the litigant be required to defend the action in the forum" ([Jurlique, Inc. v Austral Biolab Pty.](#), 187 AD2d 637, 639-640 [1992], citing [Laufer v Ostrow](#), 55 NY2d 305 [1982]; [see also Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC](#), 90 AD3d 977, 979 [2011]). "Whether a corporation itself may be deemed to be present in the State with permanence and continuity is evaluated using a number of factors . . . including conducting business affairs in New York, and/or maintaining an office, bank accounts, property or employees in the state" ([Kahn \[*6\] v Leo Schachter Diamonds, LLC](#), 2013 NY Slip Op 32280 [U], *9 [Sup Ct, NY County 2013], citing [Landoil Resources Corp. v Alexander & Alexander Servs., Inc.](#), 77 NY2d 28, 33 [1990]; [Frummer v Hilton Hotels International, Inc.](#), 19 NY2d 533, 537 [1967]).

As an initial matter, the complaint fails to allege that Nashville BBB is subject to jurisdiction pursuant to CPLR 301, which was plaintiff's burden (*Teplin v Manafort*, 81 AD2d 531, 531 [1981] ["a plaintiff who seeks to invoke in personam jurisdiction of this court with respect to a nonresident defendant must expressly allege in the complaint facts bringing the nonresident within CPLR 301 and 302."]). In any event, defendants have established that Nashville BBB is not subject to personal jurisdiction in New York under CPLR 301. First, defendants point to the affidavit of Ms. Morgan, Director of Operations of Nashville BBB. Ms. Morgan avers that the Nashville BBB is a non-profit organization incorporated under the laws of Tennessee with its principal place of business in Nashville, Tennessee, and its service is limited to 45 counties in central Tennessee and southern Kentucky. Moreover, Ms. Morgan states that: "[a]lthough the Nashville BBB is a member of CBBB - the national umbrella organization for the North American system of Better Business Bureaus - each regional Better Business Bureau is autonomous and independently managed by its own CEO with oversight by its own local Board of Directors."

Defendants also rely upon the affidavit of Ms. Baskin, Senior Vice President of the Nashville BBB, who similarly avers in her affidavit that: "[t]he Nashville BBB is a separately incorporated and independently financed non-profit organization that is a member of the CBBB and is granted the right to use the marks of the CBBB." Moreover, Ms. Morgan states that the Nashville BBB is not authorized to do business in the state of New York; does not own any bank accounts, real property, or other assets in the state of New York; does not maintain any offices or employees in the state of New York; does not pay taxes to the state of New York; and that none of its corporate officers reside in New York. Further, defendants correctly assert that while the Nashville BBB publishes a website that is accessible to persons in New York (and around the world), this sort of incidental contact is not sufficient to establish general jurisdiction under CPLR 301 ([*see Parsons v Kal Kan Food, Inc.*, 68 AD3d 1501](#), 1502 [2009] [New Jersey corporation engaged in warehousing and distribution services, which was not registered to do business in New York, did not own or lease any real or personal property in New York, paid no New York State taxes, and where none of its corporate officers resided in New York, stored products in its warehouse which were transported to or from New York, mailed brochures to customers in New York and had a Web site which was accessible worldwide, was not subject to personal jurisdiction under CPLR 301 because it only engaged in mere solicitation of business in New York, which was insufficient to constitute "doing business" under CPLR 301]; *Blue Fountain Media, Inc. v*

Metasense, Inc., 2013 NY Slip Op 31405 [U], *8-9 [Sup Ct, NY County 2013] ["(Defendant's) interactive website, permitting New York customers to obtain information, communicate with (defendant), and edit and approve their documents, is insufficient to establish jurisdiction under CPLR 301, in the absence of evidence that the website allowed customers to purchase goods and services or other evidence of its systematic course of business in New York"]; *Haber v Studium, Inc.*, 22 Misc 3d 1129 [A], 2009 NY Slip Op 50368 [U], *7 [Sup Ct, NY County 2009] [internal citations and quotation marks omitted] ["It has been repeatedly held that the fact that a foreign corporation has a website accessible to New York is insufficient to confer jurisdiction under CPLR § 301."]; *Bossey v Camelback Ski Corp.*, 21 Misc 3d 1116 [A], 2008 NY Slip Op 52080 [U], *6 [Sup Ct, Suffolk County 2008] ["That a foreign corporation has an interactive [*7] website accessible to New Yorkers is alone insufficient to confer jurisdiction under CPLR 301."].

Plaintiff has failed to raise any arguments rebutting defendants' showing. In this regard, plaintiff has not offered any evidence that the Nashville BBB conducts business throughout the country. In addition, plaintiff's contention with respect to EASI's rating has no bearing on the issue of personal jurisdiction.

Defendants have also established that there is no jurisdiction over the Nashville BBB under CPLR 302 (a) (1). In this regard, "[u]nder New York's long-arm statute, a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state or contracts anywhere to supply goods or services in the state (CPLR 302[a]), regardless of whether that non-domiciliary has actually entered New York State" ([MPG Assoc., Inc. v Roeske](#), 112 AD3d 590, 591 [2013 [internal citations and quotation marks omitted]]). Specifically, "[w]hether a defendant has transacted business within New York is determined under the totality of the circumstances, and rests on whether the defendant, by some act or acts, has purposefully avail[ed] itself of the privilege of conducting activities within [New York]" (*id.*, quoting [Ehrenfeld v Bin Mahfouz](#), 9 NY3d 501, 508 [2007]). "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege[s] of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal citations and quotation marks omitted]). "CPLR 302 (a) is a single act statute [and] proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Daniel B. Katz & Assoc. Corp.*, 90 AD3d at 979 [internal citations

and quotation marks omitted]).

"In analyzing personal jurisdiction in the internet context, many New York courts have adopted the sliding scale of interactivity, formulated in *Zippo Manuf. Co. v Zippo Dot Com, Inc.* (952 F Supp 1119, 1125-26 [WD Pa 1997]), according to which websites are classified as (1) interactive [a defendant provides goods and services over the internet or knowingly and repeatedly transmits computer files to customers in other states]; (2) middle ground [permits the exchange of information between users in another state and the defendant], and (3) passive [makes information available to users]" ([Deer Consumer Prods., Inc. v Little, 35 Misc 3d 374](#), 385 [2012], citing *Royalty Network Inc. v Dishant.com, LLC*, 638 F Supp 2d 410 [SD NY 2009]). In this regard, "it has been held that exercising personal jurisdiction over the owner of an internet website accessible in New York, required that the site be highly interactive' and more than mere presence on the internet" (*id.*, citing *Citigroup Inc. v City Holding Co.*, 97 F Supp 2d 549, 565 [SD NY 2000]). Stated otherwise, "personal jurisdiction cannot be based upon [a] website" where it is "informational only and, thus, passive' in nature" (*Paterno*, 112 AD3d at 40, citing *Zippo Mfg. Co.*, 952 F Supp 1119 [WD Pa] [no personal jurisdiction under CPLR 302 (a) (1) where there was no indication that the website owned by defendant permitted a user thereof to purchase any goods or services from defendant, that it contained any online form application process, or that it allowed any interaction through the site]). "When a website is passive . . . plaintiffs may have to prove something more to justify the exercise of personal jurisdiction—that is, plaintiffs must show that defendant purposefully (albeit electronically) directed his activity in a[] substantial way to the forum state" (*id.* at 40-41 [internal citations and quotation marks omitted]). Accordingly, "such a passive website, without more, cannot be used as the basis for the assertion of long-arm personal jurisdiction" (*id.* at 41, citing [\[*8\]Grimaldi v Guinn, 72 AD3d 37](#), 48 [2010]). In fact, as the *Paterno* court pointed out, *Grimaldi* held that "[i]f the foreign corporation maintains an informational Web site accessible to the general public but which cannot be used for purchasing services or goods, then most courts would find it unreasonable to assert personal jurisdiction over that company" (*Grimaldi*, 72 AD3d at 48 [internal citations omitted]; [see also Benefits By Design Corp. v Contractor Mgt. Servs., LLC, 75 AD3d 826](#), 930 [2010] [defendant did not transact business in New York by maintaining a Web site that offered information about its products and services and which offered opportunities for customer feedback to New York users along with others, and plaintiffs' descriptions of the Web site indicated that the site was informative in nature and did not

permit purchases, orders, or other direct business transactions by which defendant could be found to have projected itself into New York for business purposes]; *Citigroup Inc.*, 97 F Supp 2d at 565 ["At one end (of the spectrum of cases involving a defendant's use of the internet) are cases where the defendant makes information available on what is essentially a passive' web site. This use of the internet has been analogized to an advertisement in a nationally-available magazine or newspaper, and does not without more justify the exercise of jurisdiction over the defendant."]; *Weiss v Barc, Inc.*, 2013 WL 2344409, at *4 [SD NY, May 29, 2013, No. 12-CV-7571 (TPG)] ["Passive websites are ones that are limited to making information available to users, and without more specific contact with New York there is no jurisdiction over the non-domiciliary defendant"]; *see also Deer Consumer Prods., Inc.*, 35 Misc 3d at 385; *Royalty Network, Inc.*, 638 F Supp 2d at 418).

The *Paterno* court also noted that while *Grimaldi* concluded that " passive Web sites, when combined with other business activity, may provide a reasonable basis for the assertion of personal jurisdiction'. . . the other business activity' must be . . . substantial and . . . connected to the claim asserted . . ." (*Paterno*, 112 AD3d at 41, quoting *Grimaldi*, 72 AD3d at 48). Thus, the rulings of *Paterno* and *Grimaldi* recognize websites which are classified as either "interactive" or "middle ground." As alluded to above, when websites are interactive, they "knowingly transmit goods or services to users and if made available to New York residents, the activities can be sufficient for obtaining personal jurisdiction over a defendant" (*Weiss*, 2013 WL 2344409, at *4; *Royalty Network, Inc.*, 638 F Supp 2d at 418-419 ["Where an interactive' website is not only available but also purposefully directs activity into a forum state—for example, by making sales of goods or services to New York residents—those activities can be sufficient to trigger jurisdiction under section 302 (a) (1)"]; *Citigroup Inc.*, 97 F Supp 2d at 565 ["At the other end of the spectrum are cases in which the defendant clearly does business over the internet, such as where it knowingly and repeatedly transmits computer files to customers in other states."]). "Middle ground" websites, as noted above, exist "where a user can exchange information with the host computer, [and where] the exercise of jurisdiction in these cases is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site" (*Deer Consumer Prods., Inc.*, 35 Misc 3d at 385, citing *Citigroup Inc.*, 97 F Supp 2d at 565, *Best Van Lines, Inc. v Walker*, 490 F3d 239, 251 [2007]). In this regard, "[w]here [a] website falls somewhere in the middle ground,' the jurisdictional inquiry requires closer evaluation of its contact with New York residents" (*id.*, citing *Royalty Network Inc*, 638 F Supp 2d at 419; *see*

also Paterno, 112 AD3d at 40-41; *Grimaldi*, 72 AD3d at 48).

Here, defendants have established that the Nashville BBB operates a "passive website." In this regard, Ms. Morgan avers in her affidavit that the website "is limited to providing information [*9] about businesses located in the counties it serves reaching out to the Nashville BBB by visiting its Website." She also asserts that "the Nashville BBB does not knowingly transmit goods or services to users, or charge membership or other fees to users of its Website, nor does the Nashville BBB Website permit purchases, orders, or other direct business transactions between the Nashville BBB and consumers in New York or elsewhere."

Even assuming that the website were classified as either "middle ground" or "interactive," defendants have also demonstrated that the Nashville BBB would still not be subject to jurisdiction because the Nashville BBB has not "purposefully (albeit electronically) directed [its] activity in a[] substantial way to the forum state" (*Paterno*, 112 AD3d at 40-41 [internal citations and quotation marks omitted]). As indicated, the Nashville BBB website contains information about businesses "located in the counties its serves to consumers reaching out to the Nashville BBB by visiting its Website" (Morgan, Aff., ¶ 8). Therefore, it does not rate businesses based in New York. Accordingly, it cannot be said that its postings on the website "which are merely accessible to anyone - in New York and in the entire world - were expressly targeted to *anyone in New York*" (*Deer Consumer Prods., Inc.*, 35 Misc 3d at 386).

Defendants have also shown that plaintiff is unable to establish personal jurisdiction over the Nashville BBB pursuant to CPLR 302 (a) (3). This subsection confers personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state" where the non-domiciliary "(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" (emphasis added). As indicated above, the complaint fails to allege *any* basis to assert jurisdiction over the Nashville BBB. As such, it does not allege that the Nashville BBB "regularly does or solicits business" or "derives substantial revenue from goods used or consumed or services rendered" in New York, or "(ii) should reasonably expect the act to have consequences" in New York "and derives substantial revenue from interstate or international commerce." In any event, operating a website

accessible to people in New York cannot, without more, establish that the Nashville BBB regularly does or solicits business or engages in any business in New York under subsection (i) (*Weiss*, 2013 WL 2355509, at *5)] [no jurisdiction under CPLR 302 (a) (3) (i) where plaintiff failed to satisfy its burden of alleging that defendant "regularly does or solicits business, or engages in any business in New York"]. Further, defendants have demonstrated, via the affidavit of Ms. Morgan, that jurisdiction also fails under both subsections ([i] and [ii]) because the Nashville BBB "does not knowingly transmit goods or services to users, or charge membership or other fees to users of its Website, nor does the Nashville BBB Website permit purchases, orders, or other direct business transactions between the Nashville BBB and consumers in New York or elsewhere," and thus does not derive any revenue from goods used or consumed or services rendered in New York or elsewhere.

Finally, the remaining grounds for jurisdiction under CPLR 302 are inapplicable where, as here, the complaint fails to allege that defendant "commits a tortious act within the state" or "owns, uses, or possesses any real property situated" in New York (CPLR 302 [a] [2], [a] [4]).

Plaintiff has failed to rebut defendants' arguments regarding the lack of personal jurisdiction over the Nashville BBB. To the extent that plaintiff argues that the court has jurisdiction over the [*10]Nashville BBB under CPLR 302 (a) (1) - because Nashville BBB's endorsement of EASI will induce consumers "to purchase from [EASI] and suffer substantial losses" - this claim lacks merit. In this regard, defendants correctly argue that the only transaction to which plaintiff points, either in his complaint or in his opposition, is the transaction in which he engaged *with EASI*, which he accuses of having made misrepresentations. However, even assuming that EASI may have directed consumers in New York to information about its products and services that included the Nashville's BBB rating, this is simply not comparable to a circumstance in which the Nashville BBB engaged in a transaction in New York by making statements to consumers here (*see e.g. Deer Consumer Prods., Inc.*, 35 Misc 3d at 386 [no jurisdiction under CPLR 302 (a) (1) where there was "no indication that (defendant's) internet postings on [its] websites, which [were] merely accessible to anyone - in New York and in the entire world - were expressly targeted at *anyone in New York*"]). To the extent that plaintiff argues that the Nashville BBB's operation of its own website is sufficient to support the exercise of personal jurisdiction, defendants reiterate, correctly, that the operation of an informational website does not serve to confer personal jurisdiction pursuant to CPLR 302 (a) (1) (*Benefits By Design Corp.*, 75

AD3d at 830; *Weiss*, 2013 WL 2355509, at *4). Accordingly, the complaint is dismissed as against the Nashville BBB for lack of personal jurisdiction.

On the merits, the complaint must be dismissed against both the Nashville BBB and the CBBB. In this regard, defendants have demonstrated that plaintiff has failed to properly plead his causes of action under General Business Law §§ 349 and 350 and common-law fraud. With respect plaintiff's General Business Law claims, "[s]ection 349 (a) prohibits [d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state' whereas section 350 proscribes [f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state'"(*New York Public Interest Research Group, Inc. v Insurance Information Inst.*, 161 AD2d 204, 204 [1990], quoting General Business Law §§ 349, 350). "While purely commercial speech, although entitled to certain constitutional safeguards, can be subject to scrutiny under false advertising and deceptive practices statutes . . . the critical factor in determining if particular speech may be regulated or barred by government is whether it proposes a commercial transaction" (*id.* at 205-206). In this regard, "[a]s consumer protection laws, sections 349 and 350 prohibit, and have only been applied to, frauds or other deceptive practices arising out of commercial transactions . . . and not to general expressions of opinion about public matters" (*id.* at 205; *see also Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002] ["The origin of any advertising or promotional conduct is irrelevant if the deception itself—that is, the advertisement or promotional package—did not result in a transaction in which the consumer was harmed."]; [Haire v Bonelli](#), 57 AD3d 1354, 1359 [2008] ["The claims based upon consumer protection statutes, General Business Law §§ 349 and 350, were properly dismissed because defendants were not involved in any consumer transactions with plaintiff or the general public."]). "The elements of a cause of action under these statutes are that: (1) the challenged transaction was consumer-oriented'; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct" ([Denenberg v Rosen](#), 71 AD3d 187, 194 [2010]).

Here, plaintiff does not allege in the complaint that defendants were involved in any consumer transactions with him or the general public. In this regard, the CBBB is not alleged to have disseminated any communications. Notably, Ms. Baskin, the CBBB's Senior Vice President, [*11]states in her affidavit that "the CBBB plays no role in the actual rating or accreditation of specific companies within a particular BBB's service area," and that it "did not compile, determine or communicate the rating or accreditation of EASI." In contrast, the

Nashville BBB issued its own opinions about EASI and other companies based on its own standards. Specifically, Ms. Morgan, Director of Operations of the Nashville BBB, avers that the Nashville BBB provides "accreditation and letter grades for businesses located in the area it serves, based on accreditation standards and grading elements published on the Nashville BBB Website," and that "[b]ased on its application of those published standards, [it] accredited . . . [EASI] and assigned to EASI an A+' rating." Thus, neither of the BBB defendants may be deemed a seller of consumer goods or services (*see Genesco Entertainment, Div. of Lymutt Industries, Inc. v Koch*, 593 F Supp 743, 751 [SD NY 1984] ["The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising."]; [Solomon v Bell Atl. Corp.](#), 9 AD3d 49, 52 [2004] ["Claims under General Business Law §§ 349 and 350 are available to an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising."]; *Marcus v Jewish Nat'l Fund, Inc.*, 158 AD2d 101, 105 [1990] [fund-raising activities of defendant nonprofit organization subject to same prohibitions against committing dishonest or fraudulent acts that are applicable to groups and individuals engaged in commerce]).

In any event, courts have held that ratings systems do not propose any offer of sale or other commercial transaction to consumers (*see e.g. Univision Communications, Inc. v Nielsen Media Research, Inc.*, 2004 WL 3050799, at *3 [Cal. Super. Ct. July 7, 2004, No. BC316833] ["Though advertising sellers and buyers rely on the ratings system, the ratings system itself does not propose a commercial transaction . . . Therefore, the speech can be afforded first amendment protection."]). Finally, defendants note that the complaint references fees paid by accredited businesses in connection with their accreditations. However, Ms. Morgan confirms that this fact is disclosed on the Nashville BBB website, and avers that these fees "fund the Nashville BBB's nonprofit mission of promoting trust for the entire local market, allowing the Nashville BBB to report on and grade both accredited and non-accredited businesses." In any event, defendants point out that "economic motivation" is "insufficient to turn material into commercial speech" (*New York v American School Publications, Inc.*, 119 AD2d 13, 18 [1986], *affd* 69 NY2d 576 [1987] ["The United States Supreme Court . . . has held that the mere fact that something is an advertisement does not render it commercial speech, and economic motivation is also insufficient to turn material into commercial speech."]).

In his opposition, plaintiff fails to rebut defendants' arguments. In this regard, relying upon *Better Business Bureau, Inc. v Medical Directors, Inc.* (681 F2d 397 [5th Cir 1982]), plaintiff asserts that the Nashville BBB "itself has recognized that the government has a legitimate interest in deterring false and deceptive conduct and [that] this does not offend constitutional limits." However, to the extent that plaintiff is suggesting that an endorsement by the BBB may constitute commercial speech subject to regulation, plaintiff's reliance upon *Better Business Bureau* (681 F2d 397) is misplaced. Specifically, *Better Business Bureau* involves a defendant business which falsely advertised that BBB representatives had personally endorsed its products and services (a weight-loss program). The court held that defendant's advertisements constituted commercial speech, and that the BBB was entitled to an injunction against that defendant's continued false representation in their [*12] advertisements. Here, in contrast, plaintiff does not allege that the BBB defendants disseminated any advertisements proposing commercial transactions, only that defendant EASI has done so. As such, plaintiff's argument must be rejected. Based upon the foregoing, this cause of action must be dismissed.

Defendants have also established that plaintiff has failed to plead any of the elements of his common-law fraud cause of action with the requisite particularity required by CPLR 3016. "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; [see also *Salazar v Sacco & Fillas, LLP*, 114 AD3d 745 \[2014\]](#)). "Pursuant to CPLR 3016 (b), a cause of action alleging fraud must be pleaded with particularity so as to inform the defendant of the alleged wrongful conduct and give notice of the allegations the plaintiff intends to prove" ([McDonnell v Bradley](#), 109 AD3d 592, 593 [2013]).

Here, the main (and fatal) defect of the complaint is that it alleges that all of the allegedly fraudulent statements or omissions of fact upon which plaintiff relied in entering into his transaction with EASI *were made by EASI*, and not by either of the BBB defendants. [FN2] Moreover, as defendants also point out, and as the record reveals, plaintiff alleges that he only informed the Nashville BBB about the consumer complaints against EASI *after* his transaction with EASI, whereupon the Nashville BBB continued to allow EASI to advertise its BBB approval on its website, to the purported detriment of other potential EASI

consumers. Due to the foregoing sequence of events, plaintiff is simply unable to plead most of the elements of his fraud claim and fails, in any event, to state a cause of action.

Addressing the fraud elements in seriatim, as to the first element, namely, whether defendant made a representation or a material omission of fact which was false and which the defendant knew to be false, rankings and ratings of business, such as the accreditation and letter rating made by the Nashville BBB, are not statements of "fact" (*see e.g. Tsereteli v Residential Asset Securitization Trust 2006-A8*, 692 F Supp 2d 387, 394 [SD NY] [whether a particular factor "was properly considered or adequate to support a particular rating was not a matter of objective fact . . . [it] was instead a statement of opinion by each agency that it believed, based on the models it used and the factors it considered, that [this factor] . . . was sufficient to support the . . . rating"]; *Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust et al. v J.P. Morgan Acceptance Corp. I. et al.*, 2012 WL 601448, at *15 [ED NY Feb. 23, 2012, No. 08-CV-1713(ERK)(WDW)] [internal citations and quotation marks omitted] ["While the ratings assigned to the Certificates may have poorly predicted their original value, a credit rating is not an objective fact, but rather a statement of opinion by each agency that it believed, based on the models it used and the factors it considered, that the credit quality of the mortgage pool underlying each Certificate was sufficient to support the assigned rating."]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [2000] ["The purported [*13]misrepresentations relied upon by plaintiffs may not form the basis of a claim for fraudulent and/or negligent misrepresentation since they are conclusory and/or constitute mere puffery, opinions of value or future expectations."]). In any event, plaintiff does not allege that the accreditation and the letter grade assigned to EASI by the Nashville BBB "were known by the defendants to be false at the time they were made" (*Cora v Spanish Naturopath Soc'y*, 168 AD2d 535 [1990], *appeal dismissed, appeal denied* 78 NY2d 940 [1991]; *see also Ronan v Northrup*, 245 AD2d 1119, 1120 [1997]). Instead, as noted above, plaintiff alleges that he advised the Nashville BBB of the complaints against EASI *after* he had purchased a distributorship from EASI.

Defendants have also established that the complaint fails to allege any facts to indicate that the Nashville BBB's representations about EASI, namely the accreditation and the letter grade, were made with the intent to deceive for the purpose of inducing plaintiff to rely on them (*NY Med. College v Histogenetics, Inc.*, 6 AD3d 410, 411 [2004]). Likewise, defendants have shown that the complaint does not allege facts that plaintiff relied on Nashville BBB's accreditation and letter grading for EASI. Rather, the complaint only alleges generalized

claims, namely that: "[c]onsumers rely upon BBB approval as an indicator that a company complies with BBB standards" and that EASI's "statement of Better Business Bureau approval . . . leads *purchasers* to believe the company adheres to the [BBB] standards" (Complaint, p. 2 [¶5], p. 4 [¶14]).

Lastly, defendants have established that the complaint fails to allege facts demonstrating that the loss of plaintiff's \$40,000 resulted from his reasonable reliance on the Nashville BBB's accreditation and letter grading for EASI. In this regard, the complaint alleges that plaintiff sustained monetary loss because he relied on EASI's purportedly false and misleading statements (*id.* at p. 4 [¶10] ["As a result of [EASI'S] fraud and deceptions, plaintiff lost \$40,000 . . . "]).

In opposition to this branch of defendants' motion, plaintiff has failed to rebut defendants' arguments. Accordingly, this cause of action must be dismissed as well.

Finally, defendants argue that even were the court to find that the complaint is sufficiently pleaded, the causes of action fail as a matter of law because statements of opinion, such as the ratings provided by the Nashville BBB, constitute non-actionable expression under the Federal Constitution and Constitution of the State of New York (*Steinhilber v Alphonse*, 68 NY2d 283, 286 [1986] [Federal Constitution]; *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 255-256 [1991] [New York State Constitution]; *see also*

Immuno A.G. v Moor-Jankowski, 74 NY2d 548, 555 ["it is settled that pure opinion — however misguided or vituperative — is entitled to the absolute protection of the State and Federal constitutional free speech guarantees."]; [Mann v Abel](#), 10 NY3d 271, 276 [2008] ["Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation."])

The court agrees. In *Steinhilber*, the Court of Appeals held that "a pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based . . . An opinion not accompanied by such a factual recitation may, nevertheless, be pure opinion' if it does not imply that it is based upon undisclosed facts" (*Steinhilber*, 68 NY2d at 289)). Determining whether a given statement expresses fact or a nonactionable expression of opinion is a question of law for the court (*id.* at 290). The factors to be considered are: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2)

whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which [*14]the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Brian v Richardson*, 87 NY2d 46, 51 [1995] [internal citations and quotation marks omitted]).

"[C]ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose and in particular should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff" (*Mann v Abel*, 10 NY3d at 276 [internal citations and quotation marks omitted]).

Also relevant here is that statements constituting opinion or puffery are protected against both statutory trade practices and false advertising claims (*see Koagel v Ryan Homes, Inc.*, 167 AD2d 822, 823 [1990] ["the estimate of taxes (which was an expression of opinion), cannot serve as the basis for claims of deliberate, negligent or unintentional misrepresentation . . . or of a deceptive business practice in violation of General Business Law § 349."]; *American Food & Vending Corp. v IBM*, 245 AD2d 1089, 1090 [1997], *appeal dismissed without opinion* 91 NY2d 956 [1998], *appeal denied* 93 NY2d 807 [1999] ["the alleged fraudulent representation by IBM's representative relied upon [by plaintiff, namely that a national vending contract (with plaintiff's competitor) was most unlikely' and there was nothing to worry about', was not a statement of fact, but an expression of opinion, which will not support an action for fraud."]; *Zanani v Savad*, 217 AD2d 696, 697 [1995] ["In general, a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud."]; [Mandarin Trading Ltd. v Wildenstein](#), [16 NY3d 173](#), 179 [2011] [letter regarding value of painting "constituted nonactionable opinion that provided no basis for a fraud claim."]).

Here, "considering the content and context of the [statements on the Nashville BBB website] as a whole, as well as their tone and apparent purpose" (*Bonanni v Hearst Communications, Inc.*, 58 AD3d 1091, 1093 [2009]), a reasonable reader would conclude that the accreditation and rating by grade (A+) were conveying BBB's opinion of EASI, rather than facts about the company (*id.*). As defendants point out, and the record reveals, the Nashville BBB website states, in part, that:

"BBB letter grades represent the BBB's opinion of the business. The BBB grade is based on BBB file information about the business. In some cases, a business' grade may be lowered if the BBB does not have sufficient information about the business despite BBB requests for that information from that business.

BBB assigns letter grades from A+ (highest) to F (lowest). In some cases, BBB will not grade the business (indicated by an NR, or No Rating') for reasons that include insufficient information about a business or ongoing review/update of a business' file.

* * *

*BBB grades are not a guarantee of a business' reliability or performance, and BBB recommends that consumers consider a business' grade in addition to all other available information about [*15]the business" (emphasis added) (Morgan Aff., Ex. B)*

In addition, the page of the website which accredits EASI advises that: "BBB accreditation does not mean that the business' products or services have been evaluated or endorsed by BBB, or that BBB has made a determination as to the business' product quality or competency in performing services" (*id.* Ex. A).

Moreover, the Nashville BBB website lists the "elements" upon which it bases its grades. Specifically, the website states that "BBB grades are based on information in BBB files with respect to the following factors" of which seven are listed, most containing several subsections. The grade, therefore, constitutes "pure opinion" in that it is "a statement of opinion which is accompanied by a recitation of the facts upon which it is based" (*Steinhilber*, 68 NY2d at 289). Even were it argued that the accreditation and grade are not accompanied by a factual recitation - since the website lists only factors, as opposed to an actual factual recitation - an "opinion not accompanied by such a factual recitation may, nevertheless, be pure opinion' if it does not imply that it is based upon undisclosed facts" (*id.*). Here, the website not only implies but states that it is based on certain factors. Stated otherwise, it discloses the factors upon which the grade is based. [\[FN3\]](#) Finally, the accreditations and letter grade, by their very nature, do not have a precise meaning, and are not capable of being verified as being true or false (*see Castle Rock Remodeling, LLC v Better Bus. Bureau of Greater St. Louis, Inc.* (354 SW3d 234, 242-243 [Mo. Ct. App. 2011])). Accordingly, a reasonable reader would not believe that an accreditation and letter grade of a company were conveying facts about that company.

As noted above, courts in other jurisdictions have held that ratings of businesses published by local Better Business Bureaus are non-actionable opinion. For example, in *Castle Rock Remodeling, LLC* (354 SW3d at 242-243), the plaintiff, a business engaged in retail sales and installation of windows and doors, filed a petition against defendant Better Business Bureau of Greater St. Louis, Inc. for money damages alleging libel/slander and tortious interference with business expectancy based on, among other things, the BBB's reliability report on the plaintiff business, giving the plaintiff a "C" rating, and concerns over plaintiff's advertising. As an initial matter, the court held that the factual statements in the BBB report were either capable of non-defamatory meaning or were true and therefore not actionable as a matter of law (*id.* at 240). With respect to the BBB's "C" rating of the plaintiff, the court found that courts in other jurisdictions have held that "a rating or a grade cannot be objectively verified as true or false and thus, are opinion accorded absolute privilege," and therefore ruled that the rating was "protected as opinion under the First Amendment" (*id.* at 241, 243). Specifically, the court held that:

"[a]s in *Browne [v AVVO, Inc., 525 F Supp 2d 1249 (WD Wa 2007)] and Aviation Charter, Inc. [v Aviation Research Group, 416 F3d 865 (8th Cir 2005)]*, BBB's rating system relies on objective and subjective components, and BBB's weighting of the objective data. As in *Browne*, BBB's report is clear that the impression of the rating is opinion and that BBB's rating of a business reflects the BBB's opinion about the business' and BBB's judgment. Like the [*16] defendant's rating in *Browne*, it is clear that the BBB rating is based on an evaluating process' and subjective opinion.' See *Browne*, 525 F Supp [2d] at 1252. Thus, neither the nature of the information provided nor the language used on BBB's website would lead a reasonable person to believe that the rating is a statement of actual fact.

Moreover, like the ratings in *Browne and Aviation Charter, Inc.*, BBB's C' rating of Castle Rock is not sufficiently factual to be susceptible of being proved true or false. Although one may disagree with BBB's evaluation of the underlying objective facts, the rating itself cannot be proved true or false. Therefore, the rating is protected as opinion under the First Amendment" (*id.* at 242-243., quoting *Browne*, 525 F Supp 2d at 1252).

See also Auto Repair Grp. LLC v Better Business Bureau Inc., Case No. CV-09-702830, *2 [Cuyahoga County, Ohio Ct. Comn. Pl Feb. 1, 2011] ["Plaintiff's claim for defamation must fail as a matter of law . . . Defendant's actions, publishing a rating of D-', are the Defendant's opinion, protected by the Ohio Constitution."]; *Caribbean Cruise Line, Inc. v Better Business Bureau of Palm Beach County, Inc. d/b/a Better Business Bureau of Southeast Florida and the Caribbean, et al.*, Case No. 50-2012-CA010670 XXXX MB, at *2 [Cir Ct, Fifteenth

Judicial District, Palm Beach County, Fla. June 14, 2013] ["As a matter of law, the consumer rating which forms the basis for all claims in Plaintiff's Amended Complaint constitutes a statement of pure opinion which is absolutely protected under Florida law and the First Amendment to the United States Constitution."]; *Dipiero v Better Business Bureau of West Mich., Inc.*, Case No. 13-00827-CZ, at *3 [Kent County, Mich Cir Ct May 6, 2013], *3 ["the rating is not a representation of *fact* or a statement of *fact* . . . It is a letter grade based on a private rating system and it is unclear exactly how each rating is calculated . . . It is essentially defendant's *opinion* based on whatever standards it sets and however it decides to interpret them."]; *Joel R. Fink d/b/a/ Joel Fink Law Firm v Better Business Bureau of Minn., Inc. et al.*, No. 62-CV-09-9533, at *14-15 [Ramsey County, Minn. Oct. 4, 2010] [BBB rating of "B-" and BBB's statement that "(t)his rating represents BBB's degree of confidence [that] the business is operating in a trustworthy manner and will make a good faith effort to resolve any customer concerns" - given the statement's position within (the) overall context of the Reliability Report, its tenor, setting, format and purpose; the statement's lack of figurative or hyperbolic language; the reasonable expectations of the audience for such reports; and the lack of susceptibility to being proved true or false, the statement at issue is opinion."]. Based upon the foregoing, defendants have demonstrated that the statements on the Nashville BBB website, viewing the content of the website as a whole, are expressions of protected opinion.

In opposition to this branch of defendants' motion, plaintiff suggests that the rating and accreditation of EASI do not constitute opinion because they are based on "a set of objective, verifiable criteria to evaluate companies," which could not be satisfied in light of the consent orders entered against EASI. However, as noted above, the factors upon which the BBB bases its ratings and accreditations are "objective and subjective components, and BBB's weighting of the objective [*17]data" and "on an evaluating process and subjective opinion" (*Browne*, 525 F Supp 2d at 1252 [internal citations and quotation marks omitted]). As such, the rating "is not sufficiently factual to be susceptible of being proved true or false" (*id.* at 1252-1253) and is therefore protected under the First Amendment.

Plaintiff also attempts to distinguish the BBB defendants' grading and accreditation of EASI from "neutral forums" such as "Yelp!" or "TripAdvisor" "which [according to plaintiff] display varying opinions about a company or product" but which do not provide an endorsement, as does the BBB. Again, the accreditations and grading provided by the BBB constitute non-actionable opinion, protected by the First Amendment. In any event, as defendants correctly reply, even assuming websites such as Yelp! and TripAdvisor do not provide endorsements, the Nashville BBB states on its website that its accreditations and grading are not intended as endorsements of EASI's products and services (*see Morgan Aff., Ex. A* ["BBB accreditation does not mean that the business' products or services have been evaluated or endorsed by BBB, or that BBB has made a determination as to the business'

product quality or competency in performing services."]).

Finally, the BBB defendants have established their alternative demand for relief, namely that defendant CBBB is entitled to summary judgment dismissing the complaint insofar as asserted against it. In this regard, "[i]n the absence of a clear indication of dominion and control, parent [and] subsidiary . . . are treated separately and independently for purposes of assigning legal responsibility" (*Meshel v Resorts Int'l of New York, Inc.*, 160 AD2d 211, 213 [1990]; see also *Goessel v Club Med Sales*, 209 AD2d 356, 356 [1994]; *Shefulsky v Sony Corp. of Am.*, 232 AD2d 397, 397 [1996]).

Here, Ms. Morgan and Ms. Baskin both aver in their affidavits that defendant CBBB is a separate entity from the Nashville BBB. In particular, Ms. Morgan states that "[a]lthough Nashville BBB is a member of CBBB - the national umbrella organization for the North American system of Better Business Bureaus - each regional Better Business Bureau is autonomous and independently managed by its own CEO with oversight by its own local Board of Directors;" that "[t]he CBBB is not the parent company of the Nashville BBB;" and that "the CBBB is a separate entity from the Nashville BBB, and has no control or authority over the Nashville BBB with regard to the reporting of ratings or accreditation of specific businesses by the Nashville BBB."

Further, Ms. Morgan states (and Ms. Baskin reiterates) that "[t]he CBBB does not determine the ratings the Nashville BBB assigns to specific businesses, and does not participate in accreditation of specific businesses by the Nashville BBB," and that "[t]he CBBB does not control the Nashville BBB Website, where the Nashville BBB posts the ratings and accreditation of businesses and its members." In addition, Ms. Morgan avers that the Nashville BBB "is a non-profit organization organized under the laws of the state of Tennessee with its principal place of business in Nashville, Tennessee," and that "its service area is limited to 45 counties in central Tennessee and Southern Kentucky."

Moreover, Ms. Baskin avers that "the Nashville BBB is a separately incorporated and independently financed non-profit organization that is a member of the CBBB and is granted the right to use the marks of the CBBB." Ms. Baskin also states that "[t]he CBBB is the national association of local Better Business Bureaus," and that it is a "non-profit corporation organized under the laws of the state of Delaware with its principal place of business in Arlington, Virginia." Further, Ms. Baskin states that while "[t]he CBBB owns trademarks

licenses to local BBBs, [*18]coordinates the setting of policy by and among the local BBBs, and represents the BBBs collectively in national endeavors," it "does not participate in the day-to-day activities of the local BBBs" and "plays no role in the actual rating or accreditation of specific companies within a particular BBB's service area." Finally, Ms. Baskin avers that "[t]he CBBB does not own or otherwise hold any controlling interest in the [Nashville BBB]." Based upon the foregoing, defendants have made a prima facie showing entitling defendant BBB to summary judgment.

Plaintiff has failed to oppose this branch of defendants' motion for alternative relief. In this regard, plaintiff has failed to submit any counter-statement of material facts that he contends are genuinely in dispute, and thus all of defendant CBBB's proffered material facts are deemed admitted by him (22 NYCRR § 202.70[g], Rule 19-a[b] & [c])([*Ocelot Capital Mgt., LLC v Hershkovitz*, 90 AD3d 464](#), 465 [2011]). Further, since he has failed to refute defendants' arguments, they are deemed admitted (*see Town of Angelica v Smith*, 89 AD3d 1547, 1550 [2011]).

In light of the foregoing, the motion of defendants to dismiss the complaint pursuant CPLR 3211 (a)(7) is granted. This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: The facts are taken from the complaint and documents annexed thereto, plaintiff's opposition, and affidavits annexed to defendants' motion.

Footnote 2: See, e.g. Complaint at p. 1-2 [¶3]: "the Energy Automation Website and its materials contain prohibited statements; "Energy Automation touts that fact [the A+ rating and accreditation] on its website without disclosing prior violations . . ." (*id.* at p. 2 [¶5]; "As a result of Energy Automation' [sic] fraud and deceptions, plaintiff lost \$40,000" (*id.* at p. 4 [¶11]).

Footnote 3: The Nashville BBB website similarly sets forth the criteria required to be an accredited business.