IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Dongxiao Yue, Plaintiff, v. Chun-Hui Miao; Bian-Wang.com; Doe 1, *also known as* "lawandorder," Defendants.	)	C/A No. 3:18-3467-MGL-PJG **REPORT AND RECOMMENDATION**

Plaintiff Dongxiao Yue, proceeding *pro se*, brings this diversity action raising state law claims of breach of contract, promissory estoppel, and intentional infliction of emotional distress, among others. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on Defendant Chun-Hui Miao's motion to dismiss.[1] (ECF No. 18.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Yue of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Miao's motion. (ECF No. 20.) Yue filed a response in opposition to the motion (ECF No. 34), and Miao filed a reply (ECF No. 39). Having reviewed the record presented and the applicable law, the court finds Miao's motion should be granted.

[1] Miao is also proceeding *pro se*. Miao swears that Bian-Wang.com, though listed as a defendant, is a personal website created by him and is not a distinct legal entity. (Miao Aff. ¶ 4, Mot. to Dismiss, ECF No. 18-2 at 1.) Yue does not contest Miao's affidavit. Consequently, Bian-Wang.com should be dismissed as a defendant. Also, Doe 1, who purportedly uses the username "lawandorder" on Bian-Wang.com, has not been identified by the parties or apparently been served with process. Accordingly, Doe 1 should be dismissed as a defendant pursuant to Federal Rule of Civil Procedure 4(m).

PJG

BACKGROUND

The following allegations are taken as true for purposes of resolving Miao's motion to dismiss. The plaintiff, Dongxiao Yue, is a resident of California who established a Chinese language social media website zhenzhubay.com in 2012. (Am. Compl. ¶¶ 4, 6, ECF No. 17 at 2.) In 2013, the defendant, Chun-Hui Miao, a resident of South Carolina also established a Chinese language social media website, bian-wang.com. (Id. ¶ 8, ECF No. 17 at 3.) In May 2013, Miao registered as a user on zhenzhubay.com and, through its private messaging system, secretly invited users of zhenzhubay.com to join bian-wang.com. (Id. ¶ 9.)

Around March 2014, Yue authored and published an article on zhenzhubay.com. (Id. ¶ 11, ECF No. 17 at 4.) Miao copied Yue's article and published it on bian-wang.com, generating "substantial discussion." (Id.) Thereafter, Yue registered as a user on bian-wang.com and participated in discussions on that site about the article. (Id. ¶ 12.) Sometime in 2015, Yue reported to Miao that other users made posts and comments that were insulting to Yue on bian-wang.com. (Id. ¶ 13.) Previously, Miao had published a list of "website rules" on bian-wang.com. Rule number two provided, "Blog articles shall not be censored, filtered or blocked, but any blog article that contains a Netizen's[2] user ID in its subject shall be immediately deleted once being reported (same applies to comments)." (Id. ¶ 10, ECF No. 17 at 3.) In reporting the insulting content to Miao, Yue cited rule number two. (Id. ¶ 13, ECF No. 17 at 4.) Miao deleted the offending posts and thanked Plaintiff for making the report. (Id.)

[2] A netizen is an active participant in an online community. Merriam-Webster (online edition 2019); www.merriam-webster.com/dictionary/netizen.

PJG

However, in June 2015 users again made false and defamatory statements against Yue in blog articles and comments on bian-wang.com, and Miao "actively participated in the attacks and encouraged the attacks" against Yue. (Id. ¶ 16.) The "attacks against [Yue] were prominently displayed on the front page" of bian-wang.com. (Id. ¶ 17, ECF No. 17 at 5.) Yue attempted to dissuade Miao from participating in the attacks but Miao and the other users persisted. (Id. ¶ 18.) In September 2015, Miao mocked Yue's protest of the offending content in a blog published to bian-wang.com. (Id. ¶ 20.) Miao's blog was then shared by users of bian-wang.com to other websites. (Id. ¶ 21.)

Yue warned Miao that he could be held liable for defaming Yue. (Id. ¶ 19.) But Yue told Miao that he "relinquished his right to sue Miao for his conduct prior to September 19" because Yue relied on website rule number two and sought to have the offending posts deleted. (Id. ¶ 24, ECF No. 17 at 6.) Yue emailed Miao on September 20, 2015 again asking Miao to delete defamatory content about Yue on bian-wang.com pursuant to website rule number two, and asking Miao to accept service of a California state court subpoena (related to Yue's lawsuit against users of Miao's website). (Id. ¶¶ 25-26.) Miao agreed to delete the offending content and agreed to accept service of the subpoena. (Id. ¶ 27.) On November 3, 2015, Miao posted a copy of the subpoena on bian-wang.com. (Id. ¶ 29.) Miao told Yue he did not have to respond to the subpoena because it was issued by a California court, and he was not a resident of California. (Id. ¶ 30.)

Yue indicates that defamatory blog postings against him continued on bian-wang.com in 2016. (Id. ¶ 31.) Yue obtained a subpoena from a South Carolina state court in a separate lawsuit in October 2016 seeking information regarding several users of bian-wang.com, but Miao ignored the subpoena. (Id. ¶¶ 33-34.) In December 2016, Yue posted on bian-wang.com a request to Miao

PJG

to delete all posts on the website that mention Plaintiff pursuant to website rule number two, but Miao refused and "launched a round of verbal insults on Plaintiff." (Id. ¶¶ 35-36, ECF No. 17 at 8.) Yue told Miao that the website's rules are a contract between them and insisted that Miao perform under the contract. (Id. ¶ 36.) Miao responded that if Yue believed that he breached a contract, Yue could close his account on the website. (Id. ¶ 37.) Miao then updated the website rules to include a clause in rule number two titled "Statute of Limitations" and stated that "one must report a request for deletion under Rule No. 2 within a year." (Id. ¶ 38.)

In July 2018, Yue filed suit against the named defendants in California state court but the matter was ultimately dismissed for lack of personal jurisdiction. (Id. ¶¶ 40-41.) Yue filed this action on December 17, 2018. Yue claims that at the time he filed the original amended complaint, bian-wang.com continued to have posts that attacked Yue, many still prominently displayed on the website's front page. (Id. ¶ 42, ECF No. 17 at 9.)

Yue expressly raises causes of action for breach of contract, "tortious breach of implied covenant of good faith and fair dealing," promissory estoppel, intentional infliction of emotional distress, and "statutory unfair competition" pursuant to California Business and Professional Code § 17200, et seq. ("Unfair Competition Law"). As to the breach of contract and breach of implied covenant claims,[3] Yue claims the website rule number two constituted a contract, and Miao's refusal to delete offending posts about Yue constituted a breach of that contract. (ECF No. 17 at 9-12.) As to the promissory estoppel claim, Yue claims that he detrimentally relied on the promises made by

[3] The court's analysis of Yue's claim for breach of the implied covenant of good faith and fair dealing is subsumed in the analysis of the breach of contract claim because the covenant is merely a clause that is presumed to be in every contract under South Carolina law. See generally Adams v. G.J. Creel & Sons, Inc., 465 S.E.2d 84, 85 (S.C. 1995).

PJG

Miao in the website rules because he relinquished his right to sue Miao, assuming the offending posts would be removed by Miao. (Id. at 12-13.) As to Yue's claim of intentional infliction of emotional distress, Yue alleges Miao's failure to remove the offending posts caused him severe emotional distress. (Id. at 13-14.) Finally, as to Yue's claim for unfair competition, Yue alleges Miao's "attacks" diminished the reputation and credibility of Yue and zhenzhubay.com. (Am Compl. ¶ 79, ECF No. 17 at 14.) Yue claims he has been injured by the continued presence of the offending posts. (Id. ¶¶ 52, 62, ECF No. 17 at 10-11.) Yue also claims that Miao's failure to remove the posts has caused Yue to have to expend resources in lawsuits against the users who made the posts. (Id. ¶¶ 53, 62, 68-69, ECF No. 17 at 10-13.) Yue seeks damages, restitution, specific performance, and an injunction that bars the defendants from engaging in unfair competition and publishing defamatory statements about him. (Id., ECF No. 17 at 15-16.)

DISCUSSION

A. Rule 12(b)(6) Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the complaint. Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. Id. When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the

PJG

complaint. Erickson v. Pardus, 551 U.S. 89, 94 (2007). The court "may also consider documents attached to the complaint, see Fed. R. Civ. P. 10(c), as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (citing Blankenship v. Manchin, 471 F.3d 523, 526 n.1 (4th Cir. 2006)).

Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson, 551 U.S. 89, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Miao's Motion to Dismiss

1. Immunity Under the Communications Decency Act

Miao argues that all of Yue's claims are barred by the Communications Decency Act of 1996, 47 U.S.C. § 230. The court concludes that the Communications Decency Act bars only Yue's claim of intentional infliction of emotional distress and part of Yue's claim under California's Unfair Competition Law.

"Recognizing that the Internet provided a valuable and increasingly utilized source of information for citizens, Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services to preserve the 'vibrant and competitive free market' of ideas on the Internet." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009) (quoting 47 U.S.C. § 230(b)(2)); see also Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir.

PJG

1997) ("Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."). The Communications Decency Act provides, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Important here, it also provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[4]

As the United States Court of Appeals for the Fourth Circuit has explained:

> Taken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties. Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them. State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online.

Nemet Chevrolet, 591 F.3d at 254-55 (internal citations omitted). "To further the policies underlying the CDA, courts have generally accorded § 230 immunity a broad scope." Id. at 254 (citing Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007)).[5]

---

[4] "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). The parties here do not dispute that bian-wang.com is an interactive computer service.

[5] The Fourth Circuit describes the bar to liability under the Communications Decency Act as an "immunity," whereas some courts find the Act only precludes liability by "definitional clause." Compare Nemet Chevrolet, 591 F.3d at 254 n.4 (suggesting the distinction may not have a practical effect) with Doe v. GTE, 347 F.3d 655, 660 (7th Cir. 2003).

PJG

Here, Miao argues that all of Yue's claims seek to hold Miao liable for content created by third parties—that is, the offensive posts by users of bian-wang.com. Consequently, Miao argues, he is immune from suit under the Communications Decency Act. (Mem. Supp. Mot. to Dismiss, ECF No. 18-1 at 7-8.) The court observes that while most of Yue's claims allege injury from the offensive posts of other users on bian-wang.com, Yue's Unfair Competition Law claim also alleges injury caused by Miao's own "vicious and immoral attacks" against Yue. (Am. Compl. ¶¶ 79-80, ECF No. 17 at 14.) Thus, to the extent Yue seeks to hold Miao liable for content Miao created himself, the Communications Decency Act provides no immunity against Yue's Unfair Competition Law claim. See Zeran, 129 F.3d at 330 (providing that § 230 does not provide immunity for "the original culpable party who posts defamatory messages" even if they qualify as an "interactive computer service" under the statute).

Otherwise, Miao is correct that Yue seeks redress only for injuries caused by other users of bian-wang.com. (See generally Am. Compl. ¶¶ 52, 62, ECF No. 17 at 10-11.) However, Yue argues that his claims for breach of contract and promissory estoppel are not barred by the Communications Decency Act because Yue does not seek to hold Miao liable as a publisher of third-party content; rather, Yue seeks to hold Miao liable as the counter-party to a contract. (Resp. in Opp'n, ECF No. 34 at 11-12.) The court agrees.

The Fourth Circuit has not addressed whether claims for breach of contract or promissory estoppel are barred by the Communications Decency Act, even where the ultimately injury is based on content created by third parties and published on the defendant's website. However, the United States Court of Appeals for the Ninth Circuit addressed this very issue in Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009). Barnes sued Yahoo!, Inc. ("Yahoo") after her former boyfriend posted

PJG

confidential and sexually explicit material about Barnes on a website run by Yahoo. Id. at 1098. Pursuant to Yahoo's policies, Barnes made several requests to have the material removed from Yahoo's website to no avail, even though Yahoo told Barnes the material would be removed. Id. at 1098-99. The material was removed after Barnes filed suit against Yahoo for negligent undertaking and promissory estoppel. Id. Yahoo moved to dismiss Barnes's claims pursuant to the Communications Decency Act, arguing that it was generally immune because Barnes sought to hold Yahoo liable for third-party content. Id.

The Ninth Circuit rejected Yahoo's claim of "general immunity," and instead found that the Act bars only claims for which the plaintiff's theory of liability treats the defendant as a "publisher or speaker of third-party content." Id. at 1101. The court stated:

> Thus, what matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230(c)(1) precludes liability.

Id. at 1101-02.

Thus, the court found Barnes's claim of negligent undertaking was barred by the Communications Decency Act because the undertaking that Yahoo was purportedly negligent in performing was the removal of the indecent material from its website. Id. at 1102-03 ("[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove. . . . 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

PJG

post online.' ") (quoting Fair Hous. Council of San Fernando Valley v. Roomates.Com, LLC, 521 F.3d 1157, 1170-71 (9th Cir. 2008)).

However, the court found that Barnes's promissory estoppel claim was not barred by the Communications Decency Act because claims predicated on a defendant's breach of a promise do not seek to hold the defendant liable for the defendant's actions as a publisher or speaker. Id. at 1106. The court stated:

> In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract—an enforceable promise—not from any non-contractual conduct or capacity of the defendant. Barnes does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached.
> . . .
> Promising is different because it is not synonymous with the performance of the action promised. That is, whereas one cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it at the same time. Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event.

Id. at 1107 (internal citations omitted).

The court finds the reasoning of Barnes applies here. If, as Yue alleges, Miao had a contractual obligation to Yue to remove offensive content from bian-wang.com, or if Miao made a legally enforceable promise to Yue to remove the content, Miao cannot now use the Communications Decency Act to avoid an otherwise lawful obligation. As the Ninth Circuit explained in Barnes:

> [O]nce a court concludes a promise is legally enforceable according to contract law, it has implicitly concluded that the promisor has manifestly intended that the court enforce his promise. By so intending, he has agreed to depart from the baseline rules (usually derived from tort or statute) that govern the mine-run of relationships

PJG

> between strangers. Subsection 230(c)(1) creates a baseline rule: no liability for publishing or speaking the content of other information service providers. Insofar as Yahoo made a promise with the constructive intent that it be enforceable, it has implicitly agreed to an alteration in such baseline.

Id. at 1108-09.

The court finds the distinction drawn in Barnes comports with the Fourth Circuit's understanding of the Communications Decency Act's purpose—that the statute is meant to protect computer service providers *in their role as publishers*. See Zeran, 129 F.3d at 331 ("Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."); Nemet Chevrolet, 591 F.3d at 254 ("Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them."). Here, as to Yue's contract-based claims, the behavior Yue most directly seeks to hold Miao accountable for is Miao's purported failure to adhere to his obligations as a party to a contract, not for Miao's failure to act as a responsible publisher of third-party content. The Fourth Circuit has also given weight to another stated purpose of the Act, "to encourage service providers to self-regulate the dissemination of offensive material over their services." Zeran, 129 F.3d at 331. Here, if Miao obligated himself under contract law principles to remove offensive content, to provide him blanket immunity from his own promises would frustrate the purposes of the Act. Cf. Barnes, 570 F.3d at 1096 ("Thus a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for

PJG

contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.").

Moreover, other federal courts have implied that claims of breach of contract or promissory estoppel are not barred by the Act, though they have not directly addressed the issue. See Obado v. Magedson, 612 F. App'x 90, 94 (3d Cir. 2015) (affirming the district court's dismissal of the plaintiff's promissory estoppel claim on the merits after finding other claims were barred by the Communications Decency Act); Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 595 n.13 (S.D.N.Y. 2018) (addressing the merits of the plaintiff's promissory estoppel claim because the plaintiff sought to hold the defendant liable for the defendant's own content, and the duty purportedly violated was the duty to speak candidly to the defendant's customers, not to edit and remove content; but acknowledging that the statements at issue described the defendant's conduct and policies as a publisher, and the plaintiff's ultimate injury was associated with user-generated content); Klayman v. Zuckerberg, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (finding the Act barred the plaintiff's claim in part because the court refused to transform the plaintiff's tort claim into a contract claim). Accordingly, the court finds that the Act does not bar Yue's claims for breach of contract and promissory estoppel.

As to Yue's tort claim for intentional infliction of emotional distress, the court finds the claim is barred by the Act. Yue's premise for Miao's liability as to this claim is that Miao intentionally injured Plaintiff by refusing to delete the offending posts by third parties. (Am. Compl. ¶¶ 73-74, 77, ECF No. 17 at 13-14). Thus, Yue seeks to hold Miao liable for actions that are "traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." Zeran, 129 F.3d at 330. Accordingly, Yue's claim for intentional infliction of emotional

PJG

distress is barred by the Act. Similarly, to the extent Yue's Unfair Competition Law claim is premised on Yue's failure, in the role of publisher, to delete offending posts by third parties, the Communications Decency Act bars the claim.[6]

2. Failure to State a Claim

Miao alternatively argues that if Yue's claims are not barred by the Communications Decency Act, they should be dismissed for failure to state a claim upon which relief can be granted. As to Yue's claims for breach of contract and promissory estoppel based on website rule number two, Miao argues that Yue fails to plausibly allege facts showing that the website rules constituted a contract, or that the rules amounted to a binding promise. Also, Miao argues that Yue fails to plead facts suggesting a violation of California's Unfair Competition Law. The court agrees.

The elements of a breach of contract cause of action in South Carolina are the existence of a contract, its breach, and damages caused by the breach. Allegro, Inc. v. Scully, 791 S.E.2d 140, 145 (S.C. 2016); Fuller v. E. Fire & Cas. Ins. Co., 124 S.E.2d 602, 610 (S.C. 1962). On the other hand, promissory estoppel is a quasi-contractual remedy that applies only when necessary to prevent fraud or injustice. The elements of promissory estoppel are (1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was

[6] As explained previously, to the extent Yue's Unfair Competition Law claim is premised on Miao's own purported offensive content, the claim would *not* be barred.

PJG

expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance. N. Am. Rescue Prods., Inc. v. Richardson, 769 S.E.2d 237, 241 (S.C. 2015).[7]

Here, Yue contends website rule number two constituted a binding browsewrap agreement.[8] (Resp. in Opp'n to Mot. to Dismiss, ECF No. 34 at 14-16.) Yue also contends the website rule constituted a unilateral contract. See generally Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 165-66 (S.C. 2003) ("A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance."). However, Yue fails to plead facts that plausibly show website rule number two could constitute a contract or a legally enforceable promise. The website rule at issue allegedly stated, "Blog articles shall not be censored, filtered or blocked, but any blog article that contains a Netizen's user ID in its subject shall be immediately deleted once being reported (same applies to comments)." On its face, this rule appears merely to be a statement of Miao's intent on how he would moderate users' behavior on the website. The rule creates no obligation on the part of Miao or the users, nor does it manifest any promise that is actionable in the event of a breach. See generally 17 C.J.S. Contracts § 1 (providing "the mere

[7] The parties do not address choice of law. This court must follow the choice of law rules applicable in South Carolina. See Witt v. Am. Trucking Ass'n, Inc., 860 F. Supp. 295, 300 (D.S.C. 1994). Where the formation of a contract is at issue, as here, South Carolina courts apply the substantive law of the place where the contract at issue was formed. See id. at 300 (citing O'Briant v. Daniel Constr. Co., 305 S.E.2d 241, 243 (S.C. 1983)).

[8] See Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009) ("On the internet, the primary means of forming a contract are the so-called 'clickwrap' (or 'click-through') agreements, in which website users typically click an 'I agree' box after being presented with a list of terms and conditions of use, and the 'browsewrap' agreements, where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly[,] a party instead gives his assent simply by using the website.") (internal citation and quotation marks omitted). South Carolina courts have not spoken on the issue of browsewrap agreements.

PJG

expression of an intention or desire" is not a legally enforceable promise that forms the basis of a contract). Thus, based on the allegations in the Amended Complaint, the rule has none of the hallmarks or elements of a contract or promise. Yue fails to plead facts that would plausibly show the existence of a contract or an unambiguous promise by Miao.

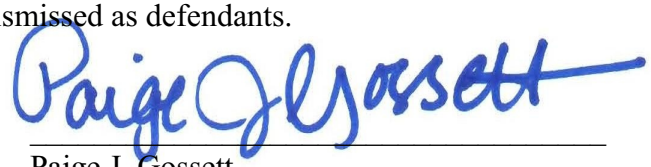
As to Yue's claim for unfair competition pursuant to California Business and Professional Code § 17200, et seq.,[9] Yue fails to plausibly allege that he has standing to bring such a claim. "[T]o establish standing under the UCL a plaintiff must (1) establish a loss or deprivation of money sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that the economic injury was the result of, i.e., caused by, the unfair business practice that is the gravamen of the claim." Perez v. Wells Fargo Bank, N.A., 929 F. Supp. 2d 988, 1003 (N.D. Cal. 2013) (internal quotation marks and alterations omitted). Here, Yue makes no allegation of any economic loss as a result of Miao's conduct. Accordingly, to the extent a claim under the California Unfair Competition Law is available to Yue, he fails to state a claim upon which relief can be granted.

[9] It is not clear that this California statute can apply to Miao's online conduct in South Carolina. See Allergan, Inc. v. Athena Cosmetics, Inc., 738 F.3d 1350, 1359 (Fed. Cir. 2013) (stating California's Unfair Competition Law does not apply to conduct outside its borders); Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) (asserting a strong presumption against extra-territorial application of the unfair competition law). Nor is it clear that the statute applies to non-commercial activities. See generally That v. Alders Maint. Ass'n, 206 Cal. App. 4th 1419 (Cal. Ct. App. 2012). Yue argues that Miao's conduct was directed to Yue and his website in California. Yue fails to cite to any case that would indicate such conduct is covered by the California statute, and the court is aware of none. Moreover, it is not clear from the pleadings that Yue's website is a commercial enterprise.

PJG

RECOMMENDATION

Based on the foregoing, the court recommends Miao's motion to dismiss be granted (ECF No. 18), and that Bian-Wang.com and Doe 1 be dismissed as defendants.



June 27, 2019
Columbia, South Carolina

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.' " Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).