



Agreement and O'Rourke, therefore, is liable for the failure. In a lawsuit brought in California state court in 2007 (the "California litigation"), Plaintiff asserted a substantially similar claim against O'Rourke. Under the Settlement Agreement, Kessman agreed to dismiss all claims in the California litigation with prejudice. Further, the Settlement Agreement releases O'Rourke from any liability "arising out of or related in any way to the . . . Asset Purchase Agreement."

Plaintiff's claim against O'Rourke, therefore, shall be dismissed.

Next, the Third Party Complaint purports to state a defamation claim against Defendant Yates based upon Yates' verification of the Complaint that commenced the proceedings in this action. Yates's verification, however, is entitled to absolute immunity. "[O]therwise defamatory statements made by judges, parties, witnesses and attorneys, during the course of judicial proceedings, are absolutely privileged." *Hoover v. Van Stone*, 540 F.Supp. 1118, 1121 (D. Del., 1982).

Last, Defendants argue that the defamation claim against Defendant McNally should be dismissed because Plaintiff does not identify the third parties to whom McNally allegedly published the defamatory statements. The Third Party Complaint alleges that on November 18, 2008, McNally uttered the alleged defamatory statements to a casino employee on the gaming floor at the Wynn Las Vegas casino and to a casino employee on the gaming floor at the Venetian casino. Because Plaintiff does not identify each casino employee by name, Defendants argue the claim must be dismissed. The Court disagrees.

"A claim of defamation requires the following elements to be established: 1) a false and defamatory communication concerning the plaintiff, 2) publication of the communication to third parties, 3) understanding of the defamatory nature of the communication by the third party, 4)

fault on the part of the publisher, and 5) injury to the plaintiff.” *Smiley v. Daimler Chrysler*, 538 F. Supp. 2d 711, 715 -716 (D. Del. 2008) (internal quotations omitted). Unlike in the cases relied upon by Defendants, the Third Party Complaint identifies with some degree of specificity the third parties to whom the alleged defamatory statements were published. Defendants have pointed the Court to no case that would require a Plaintiff, in order to survive a motion to dismiss, to plead the “publication to a third party” element of a defamation claim with more detail.

Consequently, the claims in the Third Party Complaint against Defendants O’Rourke and Yates are dismissed with prejudice, and the claims against Defendant McNally are dismissed without prejudice. An appropriate Order accompanies this Opinion.

/s/ JOEL A. PISANO  
United States District Judge

Dated: September 28, 2009

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

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AMERANTH, INC.,	:	
	:	
Plaintiff,	:	Civil Action No. 08-851 (JAP)
	:	
v.	:	<b>ORDER</b>
	:	
MARC D. KESSMAN, et al.	:	
	:	
Defendants.	:	

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Presently before the Court is a motion by Third Party Defendants (referred to herein as “Defendants”) Keith McNally, Kevin O’Rourke, and Vern Yakes to dismiss Defendant/Third Party Plaintiff Marc Kessman’s (referred to herein as “Plaintiff”) Third Party Complaint. The motion has not been opposed. The Court decides the matter without oral argument pursuant to Rule 78. For the reasons in the accompanying Opinion,

IT IS on this 28<sup>th</sup> day of September 2008,

ORDERED that Defendants motion to dismiss the Third Party Complaint is GRANTED;  
and it is further

ORDERED that the claims in the Third Party Complaint against Defendants O’Rourke and Yates are dismissed with prejudice, and the claims against Defendant McNally are dismissed without prejudice.

/s/ JOEL A. PISANO  
United States District Judge