

EXHIBIT 1

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Briefs and Other Related Documents

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United States District Court, W.D. Wisconsin.

ASSOCIATED BANK-CORP., Plaintiff,

v.

EARTHLINK, INC., Defendant.

No. 05-C-0233-S.

Sept. 13, 2005.

Lynn M. Stathas, for Plaintiff.

Kim Grimmer, Solheim, Billing & Grimmer, S.C.,
Madison, WI, C. Celeste Creswell, Joseph W.
Ozmer, II, Wargo & French, LLP, Atlanta, GA, for
Defendant.

MEMORANDUM AND ORDER

SHABAZ, J.

*1 Plaintiff Associated Bank-Corp. commenced this action against Defendant EarthLink, Inc. seeking monetary and injunctive relief. Plaintiff seeks damages pursuant to three theories of liability: Tortious Interference with Business Relations, Negligence and Fraudulent Representations in violation of Wis. Stat. § 100.18(1). Plaintiff also seeks injunctive relief alleging a violation of 15 U.S.C. § 1125(a), Injury to Business Reputation. Jurisdiction is based on 28 U.S.C. § 1331 and diversity of citizenship, 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on Defendant's motion for summary judgment. Also before the Court is Plaintiff's Rule 56(e) motion. The following facts are those most favorable to Plaintiff.

BACKGROUND

Plaintiff Associated Bank-Corp. is a diversified multibank holding company headquartered in Green Bay Wisconsin. Associated Bank is the company's largest member bank with over 300 locations in

Wisconsin, Illinois and Minnesota. Defendant EarthLink, Inc. is an internet service provider with its principal place of business in Atlanta Georgia. However, Defendant has over five million subscribers throughout the United States including customers in Wisconsin, Illinois and Minnesota.

Defendant provides its customers with access to the internet. It also provides additional software and services designed to block spam electronic mail, alert customers of fraudulent websites and block pop-up windows. One of the services Defendant provides to its customers and other users of the internet is the use of its ScamBlocker0 tool. ScamBlocker0 is a free service that in part protects users from phisher scams.

Generally, a phisher site is a fraudulent web site that mimics the site of a legitimate business. The phisher site attempts to have internet users click on the link provided in the phisher's email. If the user clicks on the link he or she is taken to the phisher site. The phisher site then directs the user to enter personal or financial information. This information is then used for criminal purposes.

ScamBlocker0 works by redirecting users to a Scam Alert page. The page states the following pertinent information:

POTENTIALLY FRAUDULENT WEB SITE
ALERT generated by ScamBlocker from EarthLink
You have been redirected to this page by
ScamBlocker from EarthLink.

The Web address you requested is on our list of potentially Dangerous and Fraudulent Web Sites. Those who visit the site may be at high risk for identity theft or other financial losses.

Please do not continue to this potentially risky site. Simply click your browser's back button.

Internet Scams and ScamBlocker There has been a recent increase in Internet scams that use fraudulent emails. These emails often include links to fake Web sites, which look like real sites but are set up [to] steal personal information.

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With ScamBlocker, any time you attempt to visit one of these addresses on the growing list of potentially fraudulent Web sites gathered by EarthLink and our partners, your browser will automatically redirect to a Scam Alert page (like this one). It's that simple!

*2 Users can continue to the site they requested by disabling the ScamBlocker0 tool and clicking on a button labeled "[c]ontinue to this potentially dangerous or fraudulent site."

Plaintiff owns and operates an online banking web site located at *www.associatedbank.com*. Plaintiff's customers can use the web site to access checking and savings accounts, apply for personal and business loans, access retirement and investment accounts and transact other bank related business. Plaintiff's web site has been the target of phishing attacks.

On approximately April 12, 2005 ScamBlocker0 identified Plaintiff's web site as a potentially dangerous and fraudulent web site. However, this was an error because Plaintiff's web site was (and is) a legitimate web site. On April 13, 2005 Plaintiff contacted Defendant to report the error and at 11:49 p.m. that same day a customer (and employee) of Plaintiff reported he was able to visit the web site again without being redirected by ScamBlocker0. However, while Plaintiff's site was on the list of potentially fraudulent websites any internet user that had installed ScamBlocker0 would have been redirected to the Scam Alert page when he or she tried to visit the site.

Plaintiff commenced this action on April 15, 2005 and Defendant filed its answer on May 16, 2005. Defendant's motion for summary judgment and Plaintiff's Rule 56(e) motion are presently before the court.

MEMORANDUM

Defendant argues it is entitled to summary judgment because it is immune from liability pursuant to 47 U.S.C. § 230(c)(1) which provides immunity for interactive computer services that publish

information received from third party information content providers. Plaintiff argues summary judgment is not appropriate because Defendant acted as an information content provider when it created and developed the substance of the erroneous warning about Plaintiff's website. Accordingly, Plaintiff argues Defendant's conduct is not protected by the immunity granted in 47 U.S.C. § 230.

As a preliminary matter the Court has before it Plaintiff's motion to strike paragraphs 12, 14, 20, 21 and 24 of Scott Mecredy's declaration. Having reviewed the challenged portions the Court finds no merit in Plaintiff's motion. The Court considers these paragraphs in so far as they are made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the declarant is competent to testify to the matters stated therein. Fed.R.Civ.P. 56(e).

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 55(c).

A fact is material only if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. *Id.* Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

*3 To determine whether there is a genuine issue of material fact courts construe all facts in the light most favorable to the non-moving party. *Heft v. Moore*, 351 F.3d 278, 282 (7th Cir.2003) (citations omitted). Additionally, a court draws all reasonable inferences in favor of that party. *Id.* However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." *Id.* at 283 (citations omitted).

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Section 230(c) of the Communications Decency Act of 1996 provides in relevant part: “[n]o provider ... 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).

Section 230(f)(2) defines the term “Interactive computer service” as “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). Accordingly, § 230 creates immunity for any cause of action that would make Interactive computer services liable for information originating from a third-party. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997).

The statute goes on to define the term “Information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). The actions of Information content providers are not immune from liability under § 230. *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F.Supp.2d 1037, 1045 (N.D.Cal.2004) (citations omitted).

Courts have treated § 230 immunity as “quite robust, adopting a relatively expansive definition of “interactive computer service” and a relatively restrictive definition of “information content provider.” *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir.2003).

Accordingly, Section 230 effectively immunizes providers of interactive computer services from “civil liability in tort with respect to material disseminated by them but created by others.” *Blumenthal v. Drudge*, 992 F.Supp. 44, 49 (D.D.C.1998).

The Court concludes that a reasonable trier of fact could not infer that Defendant acted as an information content provider. In support of its

motion for summary judgment Defendant submitted the declaration of Scott Mecredy. Mr. Mecredy is the Project Manager for the ScamBlocker0 tool and accordingly knows how the tool operates. He indicated one of Defendant's third-party vendors identified Plaintiff's web site as a potentially fraudulent site. He also indicated this list of phisher sites was directly input into Defendant's database without any alteration of content on Defendant's part. Further, Exhibit 1 to the Mecredy declaration demonstrates the information was imported from another party. Because the evidence indicates the information came from another provider Defendant cannot be held liable for the republication of the statements under § 230. *Optinrealbig.com*, at 1044.

*4 Plaintiff argues because Defendant did not disclose the identity of the third-party provider (the name was redacted on Exhibit 1 to the Mecredy declaration) Defendant itself authored the erroneous warning or in the alternative controls the entity. However, there is no evidence supporting that assertion in the record. Further, had Defendant edited the list of phisher sites it received from the third-party vendor Congress enacted § 230 “to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions. *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir.2000) (citations omitted).

Imposing liability on Defendant for the inaccurate information provided by a third-party content provider would treat Defendant as the publisher, a result § 230 specifically proscribes. Accordingly, Defendant is immune from suit pursuant to § 230.

Defendant asserts it is entitled to attorneys' fees because Plaintiff did not have standing to bring an action under the Lanham Act, 15 U.S.C. § 1125. Under the Lanham Act a court may award reasonable attorney's fees to the prevailing party in exceptional cases. 15 U.S.C. § 1117(a). The party needs to prove an exceptional case exists by clear and convincing evidence. *Finance Inv. Co. (Bermuda) Ltd. v. Geberit*, 165 F.3d 526, 533 (7th Cir.1998) (citations omitted). Further, when a defendant is the prevailing party in an action the standard is not whether plaintiff filed the action in

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good faith but rather whether the action was oppressive. *S Industries, Inc. v. Centra 2000, Inc.*, 249 F.3d 625, 627 (7th Cir.2001) citing (*Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 126 F.3d 1028, 1031 (7th Cir.1997)). An action is oppressive if it lacked merit, had elements of an abuse of process claim and plaintiff's conduct unreasonably increased the cost of defending against the suit. *Id.*

Defendant cannot meet its burden of proving Plaintiff's action was oppressive. The Court has not reached the merits of Plaintiff's Lanham Act claim. Accordingly, Defendant did not have to defend against the merits of that action and it cannot prove that the Lanham Act claim unreasonably increased the cost of defending against the suit as a whole.

ORDER

IT IS ORDERED that Defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Rule 56(e) motion is DENIED.

IT IS FURTHER ORDERED that Defendant's motion for attorneys' fees under the Lanham Act is DENIED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant against plaintiff dismissing the action and all claims contained therein with prejudice and costs.

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END OF DOCUMENT

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C

Court of Appeals of Arizona,
Division 1, Department C.
Mark Andrew AUSTIN, Plaintiff-Appellant,
v.
CRYSTALTECH WEB HOSTING, an Arizona
corporation; John M. Daniels aka Jack
Daniels, d/b/a, PT Bali Discovery Tours,
Defendants-Appellees.
No. 1 CA-CV 04-0823.

Dec. 22, 2005.

Background: Owner of Bali travel business brought action against Internet website hosting company and competitor, after company refused to remove allegedly defamatory statements that competitor made on his website. The Superior Court in Maricopa County, No. CV2004-000253, Cathy M. Holt, J., granted website hosting company summary judgment and dismissed claim against competitor for lack of personal jurisdiction. Owner of travel business appealed.

Holdings: The Court of Appeals, Maurice Portley, J., held that:

(1) internet website hosting company was immune, under the Communications Decency Act of 1996 (CDA), from defamation claim brought by travel business owner, and

(2) exercise of personal jurisdiction over business owner's competitor would not be reasonable.

Affirmed.

West Headnotes

[1] Libel and Slander ⇨28

237k28 Most Cited Cases

At common law, when applying a standard of responsibility, those who publicize another's libel may be treated: (1) as primary publishers, such as book or newspaper publishers; (2) as conduits, such as a telephone company; or (3) as distributors, such

as a book store, library, or news dealer. Restatement (Second) of Torts § 581(1).

[2] Libel and Slander ⇨28

237k28 Most Cited Cases

Primary publishers in a libel action are generally held to a standard of liability comparable to that of authors because they actively cooperate in publication. Restatement (Second) of Torts § 581(1).

[3] Libel and Slander ⇨28

237k28 Most Cited Cases

Conduits who publicize another's libel lack the ability to screen and control the information being communicated and are therefore ordinarily immune from liability. Restatement (Second) of Torts § 581(1).

[4] Libel and Slander ⇨28

237k28 Most Cited Cases

Distributors who publicize another's libel are subject to an intermediate standard of responsibility, and may be held liable as publishers if they know

or have reason to know of the defamatory nature of the matter they disseminate. Restatement (Second) of Torts § 581(1).

[5] Telecommunications ⇨1344

372k1344 Most Cited Cases

Although the primary goal of the Communications Decency Act of 1996 (CDA) is to control the exposure of minors to indecent material, the Act also attempts to remove disincentives for the development and utilization of blocking and filtering technologies and to encourage the development of technologies that allow users to control the information they receive. Communications Decency Act of 1996, § 509, 47 U.S.C.A. § 230.

[6] States ⇨18.81

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360k18.81 Most Cited Cases

[6] Telecommunications ↻1317

372k1317 Most Cited Cases

To effectuate its goals of encouraging the development of technologies that allow users to control information they receive, the Communications Decency Act of 1996 (CDA) overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. Communications Decency Act of 1996, § 509, 47 U.S.C.A. § 230.

[7] Telecommunications ↻1344

372k1344 Most Cited Cases

In the Communications Decency Act of 1996 (CDA), Congress seeks to remove disincentives to self-regulation and encourage service providers to self-regulate the dissemination of offensive material over their services without fear they would incur liability as a result of their trouble. Communications Decency Act of 1996, § 509, 47 U.S.C.A. § 230.

[8] Telecommunications ↻1344

372k1344 Most Cited Cases

Interactive computer service company was immune, under the Communications Decency Act of 1996 (CDA), from defamation claim brought by owner of travel business after company refused to remove allegedly defamatory statements that competitor made on website hosted by the company; Act eliminated publisher as well as distributor liability for defamatory statements. Communications Decency Act of 1996, § 509, 47 U.S.C.A. § 230.

[9] Courts ↻12(2.5)

106k12(2.5) Most Cited Cases

General jurisdiction subjects a non-resident defendant to suit on virtually any claim, even when the cause of action does not arise out of or relate to the defendant's activities in the forum state.

[10] Courts ↻12(2.5)

106k12(2.5) Most Cited Cases

General jurisdiction applies only when the non-resident defendant has substantial or continuous and systematic contacts with the forum

state.

[11] Courts ↻12(2.10)

106k12(2.10) Most Cited Cases

Arizona courts exercise specific personal jurisdiction over a non-resident defendant to the extent permitted by the Due Process Clause of the United States Constitution. U.S.C.A. Const.Amend. 14; 16 A.R.S. Rules Civ.Proc., Rule 4.2(a).

[12] Constitutional Law ↻305(5)

92k305(5) Most Cited Cases

Due process is satisfied and an Arizona court can exercise specific personal jurisdiction over a non-resident defendant if the following three requirements are met: (1) the defendant performed some act or consummated some transaction within Arizona by which he purposefully availed himself of the privilege of conducting activities in Arizona; (2) the claim arises out of or results from the defendant's Arizona-related activities; and (3) the exercise of jurisdiction would be reasonable. U.S.C.A. Const.Amend. 14; 16 A.R.S. Rules Civ.Proc., Rule 4.2(a).

[13] Courts ↻12(2.5)

106k12(2.5) Most Cited Cases

When determining whether it can exercise personal jurisdiction over a defendant from a foreign country, in addition to determining whether the defendant had minimum contacts with Arizona a court must consider whether it is reasonable to subject the defendant to Arizona jurisdiction, which requires the court to weigh several factors; the burden of transoceanic litigation, Arizona's interest in resolving the action, the plaintiff's interest in obtaining relief in Arizona, and another nation's procedural and substantive interests in Arizona's exercise of jurisdiction. U.S.C.A. Const.Amend. 14 ; 16 A.R.S. Rules Civ.Proc., Rule 4.2(a).

[14] Constitutional Law ↻305(5)

92k305(5) Most Cited Cases

[14] Courts ↻12(2.25)

106k12(2.25) Most Cited Cases

Assuming that business owner's competitor purposefully availed himself of Arizona's laws by

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contacting interactive computer service company located in Arizona to host his website, exercising personal jurisdiction over competitor in defamation action that owner of travel business brought after computer service company refused to remove allegedly defamatory statements posted on competitor's website would not be reasonable, as neither owner nor his competitor resided in Arizona, both parties were located in Bali, Arizona had no interest in resolving the dispute, Bali law governed owner's claim, and Arizona had no interest in the substantive law of Indonesia. U.S.C.A. Const.Amend. 14; 16 A.R.S. Rules Civ.Proc., Rule 4.2(a).

[15] Costs ↪260(5)102k260(5) Most Cited Cases
for

Position of owner of travel business, in appeal in defamation action brought against interactive computer service and competitor that used service to host his website after computer service refused to remove allegedly defamatory statements from the website concerning business owner, that service was not immune from liability under the Communications Decency Act of 1996 (CDA) and that Arizona could exercise personal jurisdiction over competitor though competitor and owner resided in Bali, was not unreasonable, groundless or made in bad faith, and thus service company and competitor would not be awarded attorney fees on appeal. Communications Decency Act of 1996, § 509, 47

U.S.C.A. § 230; A.R.S. § 12-349.

*391 Britt & Bluff, P.C., By Edward H. Britt, Kathryn A. Battock, Phoenix, Attorneys for Plaintiff-Appellant.

Hopkins & Kreamer L.L.P., By Stephen M. Hopkins, Gregorio M. Garcia, Phoenix, Attorneys for Defendants-Appellees.

OPINION

PORTLEY, Judge.

**1 ¶ 1 We are asked to determine whether section 509 of the Communications Decency Act of

1996 [FN1] (the "CDA") bars a defamation claim and related state tort claims against an interactive computer services provider. [FN2] We also examine whether the court had personal *392 jurisdiction over John M. Daniels ("Daniels"), a resident of Bali, Indonesia. For the reasons discussed below, we affirm the superior court's rulings.

FN1. 47 U.S.C. § 230 (1996).

FN2. The CDA defines an "interactive computer service" as "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). There is no dispute that CrystalTech falls within this definition.

BACKGROUND

¶ 2 Mark A. Austin ("Austin") and Daniels operate separate travel-related businesses in Bali. CrystalTech Web Hosting ("CrystalTech"), an Arizona corporation, operates an internet website hosting company in Maricopa County, and provides website services for Daniels' business, Bali Discovery Tours.

¶ 3 Austin sued Daniels after an article appeared on the Bali Discovery Tours' website alleging that Bali officials were going to file criminal charges against Austin. He sued CrystalTech because it refused to remove the allegedly defamatory statements from the Bali Discovery Tours website.

¶ 4 CrystalTech moved for summary judgment, and argued that the CDA granted it immunity from Austin's state court claims. Daniels then moved to dismiss the complaint for lack of personal service and lack of personal jurisdiction. [FN3] The superior court granted CrystalTech's motion, and dismissed the claims against Daniels because he did not have sufficient minimum contacts with Arizona

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to establish personal jurisdiction. [FN4]

FN3. Although the motion's caption indicated both CrystalTech and Daniels sought dismissal, the motion only addressed the claims against Daniels.

FN4. The superior court did not address Daniels' argument regarding lack of personal service.

¶ 5 Austin appealed the signed minute entry order. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

I. Communications Decency Act

¶ 6 Austin challenges the superior court's determination that CrystalTech was entitled to summary judgment as a matter of law. We review the ruling *de novo*. *Ariz. Joint Venture v. Ariz. Dep't. of Revenue*, 205 Ariz. 50, 53, ¶ 14, 66 P.3d 771, 774 (App.2002).

¶ 7 CrystalTech contends that the CDA grants it immunity from state tort claims. Austin challenges that interpretation, and argues that because the federal statute only applies to claims against the primary publisher of defamatory material, CrystalTech is still liable as a distributor of defamatory material.

[1][2][3][4] ¶ 8 At common law, those who publicize another's libel may be treated: (1) as primary publishers (such as book or newspaper publishers); (2) as conduits (such as a telephone company); or (3) as distributors (such as a book store, library, or news dealer). Primary publishers are generally held to a standard of liability comparable to that of authors because they actively cooperate in publication. *See Prosser & Keeton on Torts* 810 (W. Page Keeton, ed., West Group 5th ed.1984); *see also* Restatement (Second) of Torts ("Restatement") § 581(1) cmt. c (1977). Conduits lack the ability to screen and control the information being communicated and are therefore ordinarily immune from liability. *See Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242, 701

N.Y.S.2d 684, 723 N.E.2d 539, 542 (1999); *see also* Restatement § 581(1) cmt. f. Distributors are, however, subject to an intermediate standard of responsibility, and may be held liable as publishers if they know or have reason to know of the defamatory nature of the matter they disseminate. *See* Restatement § 581(1) cmts. d, e.

**2 [5][6] ¶ 9 The internet, however, has challenged the conventional analysis, and courts have attempted to apply common law principles to the new medium. *See* Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-Mail Defamation*, 84 A.L.R. 5th 169 (2000). Congress intervened and enacted Title V of the Telecommunications Act of 1996, the CDA. Although its "primary goal ... was to control the exposure of minors to indecent material," *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir.2003), Congress wanted to "remove disincentives for the development and utilization of blocking and filtering technologies" and to encourage the development of technologies that allow users to control the information *393 they receive. 47 U.S.C. § 230(b)(3)-(4). To effectuate its goals, Congress chose to "override[] the traditional treatment of publishers, distributors, and speakers under statutory and common law." *Batzel*, 333 F.3d at 1026.

[7] ¶ 10 Section 230(c) of the CDA provides:

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material

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described in [subparagraph (A)].
47 U.S.C. § 230(c). Thus, Congress sought to remove disincentives to self-regulation and "encourage service providers to self-regulate the dissemination of offensive material over their services" without fear they would incur liability as a result of their trouble. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir.1997).

[8] ¶ 11 Austin contends, however, that the immunity in § 230(c) is limited by the plain language of the statute to publishers, and does not apply to distributors. We disagree.

¶ 12 The Fourth Circuit Court of Appeals was the first appellate court to consider this issue, and concluded that Congress intended § 230(c) to immunize both publishers and distributors (as a subset of publishers) from liability for defamatory content provided by others. *Zeran*, 129 F.3d 327. *Zeran* brought an action against America Online, Inc. ("AOL"), an interactive computer service provider, alleging that AOL had failed to timely remove defamatory messages posted by a third party. *Id.* at 328. *Zeran* argued that § 230 does not preclude liability for internet intermediaries who have notice of defamatory material posted through their services. *Id.* The Fourth Circuit ruled that § 230 "creates a federal immunity to any cause of action that would make [internet] service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role." *Id.* at 330. The court found that § 230 was enacted, in part, to "maintain the robust nature of internet communication" and limit government interference with the medium. *Id.*; see also 47 U.S.C. § 230(b)(1)-(2). The court determined that Congress had made a policy choice not to deter harmful online speech by imposing tort liability on internet intermediaries for third parties' potentially injurious speech. *Zeran*, 129 F.3d at 330-31.

**3 ¶ 13 *Zeran* argued, as Austin does now, that § 230 immunity eliminates only publisher, and not distributor, liability. *Id.* at 331. The court noted that everyone who takes part in a publication is

considered to be a publisher and, accordingly, "distributors are considered to be publishers for purposes of defamation law." *Id.* at 332. The distinction between a publisher and a distributor "signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned." *Id.*

¶ 14 The court determined that notice alone could not transform an original publisher into a distributor, stating, "once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher," and must decide whether to publish, edit, or withdraw the material. *Id.* The court concluded that were it to adopt *Zeran's* proposed interpretation of § 230, it would lead to the incongruous result of imposing liability on AOL for "assuming the role for which § 230 specifically proscribes liability--the publisher role." *394 *Id.* at 332- 33. The court found that Congress had spoken directly to the issue by "employing the legally significant term 'publisher,' which has traditionally encompassed distributors and original publishers alike." *Id.* at 334. The court held that distributor liability is a subset of publisher liability and therefore specifically foreclosed by § 230. *Id.* at 332. [FN5]

FN5. Austin urges us to reject the *Zeran* analysis and instead follow *Barrett v. Rosenthal*, 9 Cal.Rptr.3d 142 (App.2004). The California Supreme Court granted review of *Barrett*, and as a result it was depublished pursuant to California Rule of Court 976(d)(1) ("Unless otherwise ordered ... an opinion is no longer considered published if the [California] Supreme Court grants review..."). As a result it may not be cited to this court and we will not consider it. *Fed. Deposit Ins. Corp. v. Adams*, 187 Ariz. 585, 593, 931 P.2d 1095, 1103 (App.1996). Austin also relies on *Grace v. eBay, Inc.*, 16 Cal.Rptr.3d 192 (App.2004), but it too has been depublished.

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¶ 15 The Fourth Circuit's approach has been followed in two other circuits. See *Green v. Am. Online*, 318 F.3d 465 (3d Cir.2003) (holding that § 230 barred a tort action against AOL for its failure to remove allegedly defamatory material (erroneous stock information) from its network); *Ben Ezra, Weinstein & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir.2000) (holding that § 230 proscribed a defamation claim against AOL based on material created by a third party). [FN6] We have found no published opinions to the contrary, and find the interpretation of a federal statute by federal courts to be persuasive. See *First Nat'l Bank of Ariz. v. Carruth*, 116 Ariz. 482, 483, 569 P.2d 1380, 1381 (App.1977). Consequently, because the CDA provides immunity to interactive computer service providers, like CrystalTech, we affirm the trial court's grant of summary judgment against Austin.

FN6. The Seventh Circuit Court of Appeals and Ninth Circuit Court of Appeals have not directly addressed distributor immunity but noted that every appellate court to reach the issue has followed the Fourth Circuit's approach in *Zeran. Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir.2003); *Batzel*, 333 F.3d at 1027 n. 10.

II. Personal Jurisdiction

¶ 16 Austin also challenges the superior court's determination that it did not have personal jurisdiction over Daniels. [FN7] We review the dismissal *de novo*, and view the facts in the light most favorable to the plaintiff. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 566, 569, 892 P.2d 1354, 1355, 1358 (1995).

FN7. For purposes of our personal jurisdiction analysis, we treat Daniels and Bali Discovery Tours as one entity and refer to them collectively as "Daniels."

[9][10] ¶ 17 Arizona may exercise either general or specific personal jurisdiction over a non-resident defendant. "General jurisdiction subjects the defendant to suit on virtually any claim, [e]ven when the cause of action does not arise out of or

relate to the [defendant's] activities' " in Arizona. *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987) (quoting *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). General jurisdiction applies only when the defendant has "substantial" or "continuous and systematic" contacts with Arizona. *Id.* (quoting *Helicopteros*, 466 U.S. at 414, 104 S.Ct. 1868). Austin does not contend Arizona has general jurisdiction over Daniels; therefore, we only address whether specific jurisdiction applies. See *Uberti*, 181 Ariz. at 569, 892 P.2d at 1358.

**4 [11][12] ¶ 18 Arizona courts exercise specific personal jurisdiction over a non-resident defendant to the extent permitted by the Due Process Clause of the United States Constitution. Ariz. R. Civ. P. 4.2(a); *id.* Due process is satisfied if the following three requirements are met: (1) the defendant performed some act or consummated some transaction within Arizona by which he purposefully availed himself of the privilege of conducting activities in Arizona; (2) the claim arises out of or results from the defendant's Arizona-related activities; and (3) the exercise of jurisdiction would be reasonable. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir.1997) (citing *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995)); *Williams v. Lakeview Co.*, 199 Ariz. 1, 3, ¶ 7, 13 P.3d 280, 282 (2000).

¶ 19 Austin argues that Daniels purposefully availed himself of our laws by using the *395 website hosting services of CrystalTech. Daniels contends that he should not be haled into Arizona solely as a result of random, fortuitous, or attenuated contacts. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

[13] ¶ 20 In this case, in addition to determining whether Daniels had minimum contacts with Arizona,

we must consider whether it is reasonable to subject [Daniels] to Arizona jurisdiction. This requires us to weigh several factors: [Daniel's] burden of transoceanic litigation, Arizona's

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interest in resolving this [defamation] action, [Austin's] interest in obtaining relief in Arizona, and another nation's procedural and substantive interests in Arizona's exercise of jurisdiction.

Uberti, 181 Ariz. at 575, 892 P.2d at 1364 (citing *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)).

[14] ¶ 21 We will assume, without deciding, that Daniels purposefully availed himself of our laws by contracting with CrystalTech and sending the offending article to Arizona for publication on the website, and that this claim arises out of those contacts. We then turn to whether exercising personal jurisdiction over Daniels would be reasonable.

¶ 22 The Supreme Court's decision in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) guides our analysis. There, Asahi, a Japanese corporation, manufactured tire valve assemblies and sold them to a Taiwanese company for use as components in finished tire tubes. *Asahi*, 480 U.S. at 106, 107 S.Ct. 1026. The Taiwanese company sold the finished tire tubes in the United States, including California. *Id.* After a California driver injured by an allegedly defective tire tube sued the Taiwanese company, it filed a cross-complaint seeking indemnification from Asahi. *Id.* Asahi argued California "could not exert jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment." *Id.*

¶ 23 In considering whether the California court could exercise jurisdiction over Asahi consistent with the Due Process Clause, the Supreme Court noted the burden Asahi would face in defending itself in a foreign legal system. *Id.* at 114, 107 S.Ct. 1026. The Court also stated that because the third-party plaintiff [the Taiwanese company] was not a California resident, California's legitimate interests in the dispute diminished considerably. *Id.* It held that the exercise of jurisdiction would be unreasonable and unfair in light of the "serious burdens on [the] alien defendant [which were] outweighed by minimal interests on the part of the

plaintiff or the forum State." *Id.* at 115-16, 107 S.Ct. 1026.

**5 ¶ 24 Applying the *Asahi* analysis, we find that it would be unreasonable for Arizona to exercise jurisdiction over this internet defamation case. First, neither Daniels nor Austin are Arizona residents, and neither lives here. Second, Arizona has no real interest in resolving a dispute between two Bali travel-related competitors. Third, Austin does not dispute Daniels' claim that Bali law governs the dispute; and Arizona has no interest in the substantive law of Indonesia. Consequently, because Arizona has no specific interest in the alleged wrongful conduct or the alleged harm to a British citizen that would compel an Arizona court to protect Austin's interests, personal jurisdiction over Daniels would be unreasonable.

III. Attorneys' Fees on Appeal

[15] ¶ 25 CrystalTech and Daniels request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 12-349 (2003). Because Austin's position on appeal was not unreasonable, groundless, or made in bad faith, we decline to award them fees. However, we grant their request for costs pursuant to A.R.S. § 12-342(A) (2003) upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶ 26 For the foregoing reasons, we affirm the superior court's judgment in favor of CrystalTech and dismissal of Austin's claims against Daniels.

*396 CONCURRING: PATRICK IRVINE, Presiding Judge and JOHN C. GEMMILL, Judge.

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Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court, D. Oregon.
Cecilia L. BARNES, Plaintiff,
v.
YAHOO!, INC., a Delaware corporation,
Defendant.
No. Civ. 05-926-AA.

Nov. 8, 2005.

Thomas R. Rask, Kell, Alterman & Runstein,
Portland, Oregon, for plaintiff.
Jeffrey A. Johnson, Cosgrave Vergeer Kester LLP,
Portland, Oregon, Patrick Carome, Samir Jain,
Wilmer Cutler Pickering Hale & Dorr LLP,
Washington, D.C., for defendant.

OPINION AND ORDER

AIKEN, J.

*1 Defendant filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) alleging that defendant is immune from liability pursuant to 47 U.S.C. § 230(c)(1). Defendant's motion is granted and this case is dismissed.

BACKGROUND

Plaintiff filed this case alleging personal injury against defendant Yahoo! Inc. ("Yahoo!"). Plaintiff's complaint alleges that plaintiff's former boyfriend engaged in a campaign to harass the plaintiff using the Internet by setting up a series of online "profiles." Profiles are publicly available web pages on which a person typically displays personal information about herself such as name, address, age, hobbies, pictures, or other content. The profiles at issue contained information about the plaintiff and appeared to have been posted by her. These profiles included nude pictures of the

plaintiff and information about how to contact her at her workplace. Plaintiff also alleges that her former boyfriend impersonated plaintiff in discussions in online chat rooms, "soliciting" other men by directing them to the unauthorized profiles, which resulted in plaintiff being visited and harassed at her workplace by various men.

Plaintiff brought suit against Yahoo! alleging that her former boyfriend used Yahoo!'s Internet-based services to post the profiles and engage in the chat room conversations. Plaintiff concedes that although Yahoo! had no "initial responsibility to act," she alleges that Yahoo! assumed a legal duty to act when one of its employees allegedly told plaintiff that Yahoo! would "stop" the unauthorized profiles, and that Yahoo! then failed to fulfill that "duty."

Yahoo! is an interactive computer service provider with "over 165 million registered users" and "345 million unique visitors ... each month. Complaint, ¶ 10. Any person with access to the Internet may, at no charge, register as a Yahoo! user, obtain an online Yahoo! identifier and account, and then engage in various online activities, such as sending and receiving email, participating in Yahoo! chat room discussions, and posting a self-authorized online "profile."

Plaintiff alleges that she tried for several months to get Yahoo! to remove the allegedly unauthorized profiles. Specifically, beginning in January 2005, on several occasions, plaintiff "mailed ... a signed statement" to Yahoo! "denying any involvement with the unauthorized profiles" and asking Yahoo! to "remove" them. Complaint, ¶¶ 4-6. Each time, Yahoo! allegedly "did not respond." *Id.* Nearly three months later, at the end of March, plaintiff's former boyfriend's actions were continuing so plaintiff contacted a local Portland news program, who decided to publicize a report about plaintiff's situation. Complaint, ¶ 7. Plaintiff alleges that the upcoming news report "precipitated" a telephone

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call from Mary Osako, a Yahoo! employee, to the plaintiff. *Id.* Plaintiff alleges that Ms. Osako asked plaintiff to fax her the statements about this problem including any statements that plaintiff had previously sent to Yahoo!. Plaintiff alleges that Osako pledged that she would “walk the statements over to the division responsible for stopping unauthorized profiles” and that “Yahoo! would put a stop to the unauthorized profiles.” *Id.*

*2 Plaintiff alleges that once Osako undertook to assist her, Yahoo! “assumed an affirmative duty to do so with care.” *Id.* at ¶ 7. Plaintiff alleges that Yahoo! breached that duty when it “negligently and carelessly failed to remove the unauthorized profiles and prohibit them from being posted again.” *Id.* at ¶ 9. Plaintiff further alleges that because she relied on Yahoo! to provide assistance, she “made no other arrangements for assistance.” *Id.* at ¶ 8.

STANDARDS

Under Fed.R.Civ.P. 12(b)(6), dismissal for failure to state a claim is proper only when it appears to a certainty that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir.1984), *cert. denied*, 470 U.S. 1052 (1985). For the purpose of the motion to dismiss, the complaint is liberally construed in favor of the plaintiffs, and its allegations are taken as true. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir.1983).

DISCUSSION

Defendant alleges that plaintiff's complaint must be dismissed due to defendant's immunity from suit pursuant to 47 U.S.C. §§ 230(c)(1), (2). Section 230 generally immunizes interactive service providers such as Yahoo! from liability for harm caused by the dissemination of third-party information. The legislative history surrounding Congress's creation of § 230 represented the desire to protect online intermediaries from liability for unlawful third-party content. Congress reasoned that any liability would threaten development of the

online industry as a medium for new forms of mass communication and simultaneously create disincentives to self regulate such content by service providers. Congress therefore determined that liability should rest with the actual wrongdoers-the originators of the illegal and harmful content-and not intermediary servers whose systems are sometimes abused by wrongdoers.

FN1. Section 230 states: “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.”

There can be no dispute that in the nine years since Section 230 was enacted that courts across the country have held that Section 230 generally bars claims that seek to hold the provider of an interactive computer service liable for tortious or unlawful information that someone else disseminates using that service. In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir.2003), the court noted that “Congress ... has chosen for policy reasons to immunize from liability for defamatory or obscene speech ‘providers and users of interactive computer services’ when the ... material is provided by someone else.” *Id.* at 1020. *Batzel* noted that it was “join[ing] the consensus developing across other courts of appeal that § 230(c) provides broad immunity for publishing content provided primarily by third parties.” *Id.* Similarly, in *Carafano v. Metersplash.com, Inc.*, 339 F.3d 1119 (9th Cir.2003), the court noted that “under the statutory scheme, an ‘interactive computer service’ qualifies for immunity so long as it does not also function as an ‘information content provider’ for the portion of the statement or publication at issue.” *Id.* at 1123. *See also, Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir.1997), *cert. denied*, 524 U.S. 937 (1998)(“Section 230 ... plainly immunizes computer service providers like AOL from liability for information that originates with third parties”); and *Roskowski v. Corvallis Police Officers' Ass'n.*, Civ. No. 03-474-AS, 2005 WL 555398 (D.Or.2005)(Section 230 immunizes website operators from claims based on information that users posted directly to the operators' sites).

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*3 Plaintiff here attempts to distinguish her claim from one falling under § 230 by asserting that she is not seeking to hold defendant liable as a publisher of third-party information; instead plaintiff argues that her claim falls under the Restatement (Second) of Torts § 323 as an Oregon torts claim. Section 323 provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

Id.

Plaintiff argues that she relied upon defendant's "assumption of its affirmative duty" to remove the unauthorized profiles from its website. Plaintiff's Response, p. 5. Specifically, plaintiff alleges that defendant failed to exercise reasonable care in performing this undertaking, as the unauthorized profiles remained on the website for three months "after [defendant] undertook this duty." *Id.* Plaintiff alleges that it was not until she brought this lawsuit that the profiles were finally removed. In essence, plaintiff is seeking to hold defendant liable for the injuries she allegedly sustained as the result of defendant's "failure to fulfil its promise to remove the unauthorized profiles." *Id.* at p. 9.

Plaintiff relies on several Oregon tort cases where an actor undertook a duty, the actor was then negligent in performing that duty, resulting in negligence which ultimately caused plaintiff injury. See *Arney v. Baird*, 62 Or.App. 643, 645-47, 651, 661 P.2d 1364, rev. denied, 295 Or. 446, 668 P.2d 382 (1983) (tow truck driver instructed plaintiff to move a cone that was set up to secure the accident scene, plaintiff was hit by a car. Court held tow truck driver and service station were initially under no obligation to help plaintiff, however, once they undertook that obligation "they assumed the duty of performing the task with reasonable care. Court

held trial court did not err in submitting these allegations to the jury.).

Plaintiff's case is distinguishable from the Oregon tort cases relied on by plaintiff due to the protection afforded defendant by § 230. Specifically, this case is controlled by Ninth Circuit law holding that § 230 provides service providers such as defendant with "broad immunity for publishing content provided primarily by third parties." *Carafano*, 339 F.3d at 1123. The facts here are similar to the facts in *Zeran* where the plaintiff also alleged that when he contacted America Online (AOL) to demand that the internet postings be removed, he was allegedly "assured" by a "company representative ... that the posting would be removed." 129 F.3d at 329. When the harassment continued, plaintiff brought suit alleging that AOL was negligent in failing to act quickly enough and in preventing any further similar postings. The Fourth Circuit rejected *Zeran's* claim holding that because he was seeking to hold the service provider liable based on injuries allegedly resulting from the dissemination of third-party content, his claim necessarily and impermissible sought to treat the service provider as "publisher" of that content, regardless of the particular label attached to the claim. *Id.* at 327. The court therefore found AOL immune from suit.

*4 Plaintiff's allegations similarly fall under the broad immunity provided internet servers by § 230. Plaintiff alleges she was harmed by third-party content, and that the service provider [defendant] allegedly breached a common law or statutory duty to block, screen, remove, or otherwise edit that content. Any such claim by plaintiff necessarily treats the service provider as "publisher" of the content and is therefore barred by § 230. Plaintiff's argument that she seeks to hold defendant liable only for its alleged "failure to fulfil its promise to remove the unauthorized profiles," does not remove this case from the immunity provided by § 230. Plaintiff's claim remains an effort to hold the service provider liable for failing to perform the duties of a publisher, such as screening or removing third-party content. See also, *Schneider v. Amazon.com, Inc.*, 108 Wash.App. 454, 31 P.3d 37, 41-43 (2001) (court rejected plaintiff's claim that defendant "promised to remove" allegedly tortuous reviews,

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but then "failed to do so, and reposted the reviews rather than deleting them." Court held that § 230 barred plaintiff's claim because the "broken promise" claims were based on an alleged "failure to remove the posting," and therefore based on defendant's "exercise of editorial discretion" subject to § 230's prohibition on publisher liability).

CONCLUSION

Defendant's motion to dismiss (doc. 9) is granted. Further, defendant's request for oral argument is denied as unnecessary. This case is dismissed and all pending motions are denied as moot.

IT IS SO ORDERED.

D.Or.,2005.
Barnes v. Yahoo!, Inc.
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Briefs and Other Related Documents (Back to top)

- 2005 WL 2866561 (Trial Motion, Memorandum and Affidavit) Defendant Yahoo! Inc.'s Reply in Support of Its Motion to Dismiss the Complaint (Sep. 28, 2005)
- 2005 WL 2399767 (Trial Motion, Memorandum and Affidavit) Defendant Yahoo Inc.'s Memorandum in Support of its Motion to Dismiss the Complaint (Jul. 27, 2005)

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(Cite as: Not Reported in F.Supp.2d)

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
Division.

John DOES 1 through 30 inclusive, and Unknown
Illinois State University Football Players, Plaintiff,
v.

FRANCO PRODUCTIONS, Dan Franco,
individually and d/b/a Franco Productions, et al.,
Defendants.

No. 99 C 7885.

June 22, 2000.

MEMORANDUM OPINION

KOCORAS, J.

*1 This matter comes before the Court on Defendant PSINet's and GTE's motion to dismiss Plaintiffs' third amended complaint. For the reasons set forth below, the Court grants Defendants PSINet's and GTE's motion.

BACKGROUND

The Plaintiffs in this matter were intercollegiate athletes who, without their knowledge or consent, were videotaped in various states of undress by hidden cameras in restrooms, locker rooms, or showers. The resulting videotapes were sold by various means, including web sites hosted by Genuity.net and TIAC.Net that included still images of the Plaintiffs taken from the videotapes. At no time did any of the Plaintiffs authorize the use of their images; in fact, they did not learn of the existence of the videotapes or that they were available for purchase until a newspaper article detailed the operation. They instituted this action to obtain monetary damages and injunctive relief for intrusion into the Plaintiffs' seclusion against the defendants, the alleged producers and distributors of the videotapes, and against defendants GTE

Corporation and GTE Internetworking (together "GTE") and PSINet Inc. ("PSINet"), the respective successors to Genuity.net and TIAC .Net. The Court dismissed Plaintiffs' previous complaint against GTE, finding that GTE was a service provider and therefore immune from suit under the Communications Decency Act of 1996, 47 U.S.C. § 230 (the "CDA"). The Court also granted PSINet's oral motion to dismiss on April 20, 2000 for the same reason. After the Court granted leave to amend, Plaintiffs filed their third amended complaint. They re-alleged their previous claims, this time making their allegations against GTE and PSINet in their capacity as web site hosts. Plaintiffs also added a third-party beneficiaries claim, a public nuisance claim, and a claim for eavesdropping under the Electronic Communications Privacy Act, 18 U.S.C. § 2511(a) (the "EDPA"). Presently, GTE and Defendant PSINet move this court to dismiss the third amended complaint against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. A defendant must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.1993), cert. denied, 510 U.S. 1012, 114 S.Ct. 602, 126 L.Ed.2d 567 (1993). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78

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S.Ct. 99, 2 L.Ed.2d 80 (1957). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir.1992), cert. denied, 506 U.S. 893, 113 S.Ct. 267, 121 L.Ed.2d 196 (1992).

*2 In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings themselves. Documents incorporated by reference into the pleadings and documents attached to the pleading as exhibits are considered part of the pleadings for all purposes. See Fed.R.Civ.P. 10(c). In addition, "documents that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir.1993). It is with these principles in mind that the Court evaluates the present motion.

DISCUSSION

Defendants GTE and PSINet move to dismiss Plaintiffs' third amended complaint, alleging that Plaintiffs amended their previous complaint to add allegations beyond those permitted by the Court when it granted Plaintiffs leave to amend. Defendants GTE and PSINet also argue that Plaintiffs' third amended complaint exceeds the boundaries of pleading provided by Federal Rule of Civil Procedure 11. In addition, Defendants GTE and PSINet assert that the allegations in Plaintiffs' third amended complaint fail to state a claim.

I. Improper Amendment and Rule 11

The Court agrees with Defendants GTE and PSINet that Plaintiffs amended their complaint to an extent beyond which Plaintiffs represented they were seeking leave to amend. Although the Court looks unfavorably on parties who do not follow the spirit of its orders, the Court is unwilling to dismiss claims that may state viable causes of action solely on this basis.

Defendants GTE and PSINet also claim that Plaintiffs' pleadings made "on information and belief" do not conform with Rule 11. Although the Federal Rules allow liberal notice pleading, they do not "allow a plaintiff to abdicate the responsibility of alleging the basic facts demonstrating his entitlement to relief." *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 353 (7th Cir.1982). Allegations made on "information and belief" are usually sufficient to meet the requirements of Rule 8. See *Chisolm v. Foothill Capital Corp.*, 940 F.Supp. 1273, 1280 (N.D.Ill.1996), citing *Hall v. Carlson*, 1985 WL 2412, at *1 (N.D.Ill. Aug. 28, 1985). Nevertheless, Rule 11 tempers the liberal pleading standards in federal court. See *Chisolm*, 940 F.Supp. at 1280. Rule 11 requires attorneys to conduct a "reasonable inquiry" into the facts and law of a complaint before filing it with the court. See *id.* (citations omitted); Fed.R.Civ.P. 11(b). The Advisory Committee Notes to the 1993 amendments to Rule 11 provide:

Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Fed.R.Civ.P. 11, 1993 Advisory Committee Notes.

*3 Plaintiffs push the boundaries of Rule 11 by making such general and nonspecific allegations with respect to GTE and PSINet, which suggest that Plaintiffs did not conduct a reasonable preliminary inquiry before filing its third amended complaint.

For example, Plaintiffs allege:

As web site hosts, GTE and PSI engage in varying degrees of designing or creating or maintaining the web site, ranging anywhere from completely creating, writing, organizing and originally editing content before it is posted and changing, updating, adding or deleting content thereafter, to providing the template or architecture of the web site. The exact degree of involvement by GTE and PSI in creating and designing the web sites at issue is known only to the defendants and cannot be ascertained by the Plaintiffs without the right of

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discovery, but after a reasonable opportunity for further investigation or discovery, there is likely to be evidentiary support that GTE and PSI were responsible at least in part for the creation or development or design of the web site or web pages, including the web pages which advertised the videos for sale.

Essentially, Plaintiffs are alleging that they have no idea what GTE and PSINet do in their capacity as web hosts and it could be just about anything, but if given the opportunity, Plaintiffs can figure out what GTE and PSINet do, and it will probably include at least partial responsibility for the creation or development or design of the web site or web pages, based upon which Plaintiffs seek to hold GTE and PSINet liable. Plaintiffs further allege in their third amended complaint, "depending on the exact range of involvement in the creation or design of the web site, GTE and PSI may have created or designed actual content of the web site." This allegation suggests that Plaintiffs do not even possess a current belief based on any information that GTE or PSI did create or design the actual content of the web site, but rather, they hope and speculate that they may be able to demonstrate it if they end up uncovering certain information. Moreover, Plaintiffs arguments in its response to GTE's and PSINet's motion to dismiss, seem to confirm that Plaintiffs do not have a reasonable belief that GTE and PSINet created the web site or contributed to its contents, but rather that it is probable that GTE and PSINet helped provide the framework necessary for others to create a web site. Thus, Plaintiffs argue that "the Host Server Defendants in their capacity as such more likely than not helped to create the web site, including by developing the graphics, the photo utilization, and the information and materials related to credit card transactions necessary to the sale for the illegal videotapes."

These allegations press the limits of the liberal pleading standards and come up against the provisions of Rule 11. They indicate little preliminary inquiry by Plaintiffs into their allegations before filing their third amended complaint and little known information upon which to base belief in certain factual allegations.

However, the Court will not dismiss Plaintiffs' third amended complaint for its stretching of Rule 11's provisions. Sanctions are the appropriate remedy for violation of Rule 11, not dismissal. *See Chisolm*, 940 F.Supp. at 1280-81. Because, however, the Court does not find that Plaintiffs' allegations are insufficient to place Defendants GTE and PSINet on notice as to the nature of Plaintiffs' claims, the Court will not dismiss Plaintiffs' third amended complaint based on pleading deficiencies under Rule 8. *See Fed.R.Civ.P.* 8; *Veazey v. Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir.1999).

II. Failure to State a Claim

A. Immunity under the CDA

*4 Plaintiffs assert that they are not seeking to hold GTE and PSINet liable as publishers or speakers of information provided by another under § 230(c)(1), thus whatever immunity that section may supply is irrelevant. Rather, Plaintiffs assert that it is seeking to hold GTE and PSINet liable for their "own conduct" in "knowingly failing to restrict content" under § 230(c)(2). Section 230(c)(2) provides immunity to those who restrict or enable restriction to objectionable material. *See* 47 U.S.C. § 230(c). Thus, Plaintiffs reason because GTE and PSINet did not restrict or enable restriction of objectionable material, they are not entitled to immunity under this section. However, what Plaintiffs ignore is that by seeking to hold GTE and PSINet liable for their decision not to restrict certain content it is seeking to hold them liable in a publisher's capacity. Section 230(c)(1) 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." This "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service ... 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." *See Zeran v. America Online*,

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Inc., 129 F.3d 327, 330 (4th Cir.1997); *see also Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980, 985-86 (10th Cir.2000) (§ 230 forbids imposition of liability for exercise of editorial functions). Thus, because Plaintiffs seek to hold GTE and PSINet liable for their "own conduct" as publishers, GTE and PSINet may avail themselves of the CDA's immunity in this action under § 230(c)(1).

Moreover, Plaintiffs have recast the dismissed claims raised in their previous complaint by alleging that they are bringing the instant suit against GTE and PSINet in their capacity as "web site host[s]" rather than service providers. In this capacity as web hosts, Plaintiffs claim that GTE and PSINet acted as "information content provider[s]" and would, thus, not be immune from suit under the CDA. GTE and PSINet argue that Plaintiffs' amended claims still fail to state a claim because web site hosting activities are immunized under the CDA.

The Court agrees with Defendants GTE and PSINet. The CDA creates federal immunity against any state law cause of action that would hold computer service providers liable for information originating from a third party. *See Franco Productions*, No. 99 C 7885, at *4-5 (unpublished Apr. 20, 2000); *Ben Ezra*, 206 F.3d at 984-85. After the Court ruled that GTE as a service provider is immune from suit under the CDA, Plaintiffs severed out and focused on the allegedly separate role of web host played by GTE and PSINet, claiming that a suit against an entity based on its capacity as a web host is not barred by the CDA. This is because as web hosts GTE and PSINet are "information content provider[s]" according to Plaintiffs. Thus, Plaintiffs essentially argue that although GTE and PSINet are acting as service providers, they are also content providers in their role as web hosts and that in its third amended complaint Plaintiffs only seek to hold GTE and PSINet liable in their separate capacity as content providers as manifested in their role as web hosts. However, not only did the Court previously find that GTE was acting as a service provider for purposes of this action, but the Court specifically rejected the notion that GTE was acting as a content provider in this action as well. *See*

Franco Productions, No. 99 C 7885, at *7. The Court reiterates its previous holding finding GTE, and now similarly PSINet, service providers whose immunity or status as service providers under the CDA is not vitiated because of their web hosting activities, whether viewed in combination with their roles as service providers or in isolation. Immunity under the CDA is not limited to service providers who contain their activity to editorial exercises or those who do not engage in web hosting, but rather, "Congress ... provid[ed] immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Blumenthal v. Drudge*, 992 F.Supp. 44, 52 (D.D.C.1998).

*5 Thus, Plaintiffs' new characterization of GTE's and PSINet's activities as web hosts do not alter this finding. The deficiency in Plaintiffs' allegations is the notion that involvement in web hosting activities transforms an entity into an information content provider. Plaintiffs believe that by focusing on Defendants GTE's and PSINet's web hosting activities, GTE and PSINet can essentially be characterized as information content providers. However, Plaintiff has pointed to no authority which provides that involvement in these web hosting activities makes an entity an information content provider.

Perhaps the Court is obtuse in its consistent "misunderstanding of Plaintiffs' cause of action," but it is still "at a loss to understand how GTE's [and PSINet's] role[s] in the descriptions or presentation of the images on the Web site impact the creation or development of the images and videotapes themselves." *Franco Productions*, No. 99 C 7885,* 8-9. Plaintiffs' explain that "the culpable conduct is not only the taking of the videotapes but also disseminating them on the Internet and offering them for sale and selling them. The Plaintiffs were harmed, not just by the posting of their illegally taken images on the web page, but also by the sale and dissemination of the videotapes because of the web page ." (Emphasis in original) This makes no clearer Plaintiffs' theory that GTE and PSINet were somehow content providers. Plaintiffs do not allege that GTE or PSINet themselves sold or offered for sale the videotapes at issue. Plaintiffs simply allege

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that GTE and PSINet, as web hosts, provided a medium through which others could sell or offer for sale the videotapes at issue. However, by offering web hosting services which enable someone to create a web page, GTE and PSINet are not magically rendered the creators of those web pages. See 47 U.S.C. (c)(1).

As such, Plaintiffs' new characterization of GTE and PSINet as web hosts neither prevents these defendants from being deemed service providers protected by immunity under the CDA nor makes them content providers unprotected by the CDA's immunity. Moreover, this immunity extends to Plaintiffs' newly alleged public nuisance claim.

In addition, Plaintiffs' claims for injunctive relief, although not precluded by the CDA, fail to state a claim. See *Mainstream Loudoun v. Board of Trustees*, 24 F.Supp.2d 552, 561 (E.D.Va.1998). Plaintiffs fail to elucidate what activities of GTE and PSINet they seek to enjoin. It appears that the offending images at issue are no longer available on any web site hosted by GTE or PSINet. Moreover, Plaintiffs do not suggest that there is a likelihood that GTE or PSINet will engage in any offending activity against Plaintiffs. As such, Plaintiffs have failed to make allegations that would demonstrate their entitlement to injunctive relief.

B. Third-Party Beneficiary Claim

Plaintiffs base their intended third-party beneficiaries claim on the contracts between GTE and PSINet and the other defendants in this action, which provide that the other defendants would not use the services of GTE and PSINet to violate federal or state law, or infringe the rights or others, or distribute child pornography or obscenity over the Internet. Plaintiffs reason that because the contract provides that the other defendants would not infringe the rights "of others," Plaintiffs are intended third-party beneficiaries because they qualify as "others." This is insufficient to state a claim as an intended third-party beneficiary. Plaintiffs must allege express language in the contract identifying the third-party beneficiary or imply a showing where "the implication that the

contract applies to third parties [is] so strong as to be practically an express declaration." *Quinn v. McGraw-Hill Companies, Inc.*, 168 F.3d 331, 334 (7th Cir.1999). Plaintiffs' allegations fail to accomplish this. Accordingly, Plaintiffs fail to state a claim as third-party beneficiaries.

C. Eavesdropping Claim

*6 Plaintiffs seek to hold Defendants GTE and PSINet liable for eavesdropping under the ECPA. Although the CDA does not preclude an action under the ECPA, see 47 U.S.C. § 230(e)(4), Plaintiffs' allegations fail to state a claim. Plaintiffs allege that GTE and PSINet "endeavored to disclose, or knowingly aided and abetted, the intentional disclosure or endeavor to disclose [sic] the oral communications of the Plaintiffs." However, Plaintiffs' factual allegations with respect to GTE and PSINet belie the notion that GTE or PSINet themselves endeavored to disclose any intercepted communication. See *Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir.1993) (court is not required to ignore facts alleged in complaint that undermine plaintiff's claim). Plaintiffs do not allege that GTE or PSINet themselves posted any of the communications at issue on the web sites or that they in any way endeavored to disclose any such images. Rather, Plaintiffs' allegations suggest that GTE and PSINet as service providers were merely acting as conduits. See *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir.2000) (Internet service providers are merely conduits). Thus, Plaintiffs are left to resort to creating a new cause of action—"aid[ing] and abett[ing] the intentional disclosure" or endeavoring to disclose oral communications. See 18 U.S.C. § 2511. The ECPA does not recognize such a cause of action. Accordingly, Plaintiffs have failed to state a claim under the ECPA.

CONCLUSION

For the reasons set forth above, the Court grants Defendants GTE's and PSINet's motion to dismiss.

N.D.Ill., 2000.

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C

United States District Court, C.D. California.
FAIR HOUSING COUNCIL OF SAN
FERNANDO VALLEY; Fair Housing Council of
San Diego, individually and on behalf of the General
Public, Plaintiffs,

v.

ROOMMATE.COM, LLC, Defendant.
No. CV 03-09386PA(RZX).

Sept. 30, 2005.

ORDER GRANTING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

ANDERSON, J.

*1 Before the Court are cross-motions for summary judgment. Plaintiffs Fair Housing Council of San Fernando Valley and Fair Housing Council of San Diego (collectively "Plaintiffs") have filed a Motion for Summary Judgment (Docket No. 47) ("Plaintiffs' Motion"). Defendant Roommate.Com, LLC ("Roommate") has also filed a Motion for Summary Judgment (Docket No. 44) ("Roommate's Motion").

Plaintiffs' Motion seeks a ruling that Roommate is liable for making and publishing "discriminatory statements that indicate preferences based on race, religion, national origin, gender, familial status, age, sexual orientation, source of income, and disability, all in violation of fair housing laws." Plaintiffs' Memorandum of Points and Authorities, p. 2, ll. 11-13. Roommate's Motion seeks a judgment that it is immune from suit pursuant to section 230 of the Communications Decency Act ("CDA") because Plaintiffs seek to make it liable for the publication of content provided by third parties. Roommate alternatively argues that Plaintiffs' claims are barred by the First Amendment.

I. FACTUAL BACKGROUND

Roommate owns and operates www.roommates.com, an Internet website which provides a roommate locator service for individuals who have residences to share or rent out, and individuals looking for residences to share. The website allows those with residences, and those looking for residences, to post information about themselves and available housing options on a searchable database. Basic membership is free and allows a user to create a personal profile, conduct searches of the database, and send "roommail"—a type of internal e-mail system—to other users. Paid memberships allow users to view the free-form essay "comments" posted by other users, view full-size photos, and receive roommail from other users. Roommates.com currently receives over 50,000 visits and 1,000,000 page views per day. Approximately 40,000 users are offering rooms for rent, 110,000 users are looking for a residence to share, and 24,000 users have paid for upgraded memberships.

To become a member of Roommate's service, a person must author a personal profile. The profile includes information, much of which is entered by selecting from among a number of predetermined options provided by Roommate, concerning, among other things, the person's age, gender, sexual orientation, occupation, and number of children. A user must provide a response for each inquiry. Roommate's questionnaire makes no inquiries concerning a user's race or religion. Users create their own nicknames, can attach photographs, and may add a free-form essay to personalize the entry by describing themselves and their roommate preferences. When listing a room for rent, the user responds to prompts which result in the posting of specific details about the area, rent and deposit information, date of availability, and features of the residence. Information may also be posted about the current occupants of the household and roommate preferences for the incoming roommate. In addition

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to admittedly non-discriminatory information such as cleanliness, smoking habits, and pet ownership, these preferences can, when selected, include the user's responses to Roommate's questions about age, gender, sexual orientation, occupation, and familial status.

*2 Under its terms of service, Roommate informs users that it does not screen postings. The terms of service also inform users that they are "entirely responsible" for all content and that Roommate is not the author of the information posted on the website. As soon as a new user completes the questionnaire, the resulting profile is made available online to other users. Although Roommate does not review or edit the text of users' profiles, Roommate does review photographs before they are posted to make sure that they do not contain images that violate the terms of service.

II. DISCUSSION

Plaintiffs filed their Complaint on December 22, 2003 and a First Amended Complaint on April 21, 2004. The First Amended Complaint alleges a claim under the Fair Housing Act ("FHA"), 42 U.S.C. section 3604(c), and state law causes of action for violations of the California Fair Employment and Housing Act and the Unruh Civil Rights Act, and claims for unfair business practices and negligence. Plaintiffs seek monetary damages, punitive damages, declaratory and injunctive relief, disgorgement of profits, and attorneys' fees.

Plaintiffs contend that Roommate violates state and federal fair housing laws in three ways. First, Plaintiffs object to the nicknames which some users have picked for themselves. These nicknames include: ChristianGrl, CatholicGirl, Asianpride, Asianmale, Whiteboy, Chinesegirl, Latinpride, and Blackguy. Second, Plaintiffs object to the free-form essays written by some users which indicate at least potentially discriminatory preferences. Some of the essays include statements such as: "looking for an ASIAN FEMALE OR EURO GIRL"; "I'm looking for a straight Christian male"; "I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims or mortgage

brokers"; and "Here is free rent for the right woman ... I would prefer to have a Hispanic female roommate so she can make me fluent in Spanish or an Asian female roommate just because I love Asian females." Third, Plaintiffs contend that the questions posed by Roommate's questionnaire, by requiring the disclosure of information about a user's age, gender, sexual orientation, occupation, and familial status, violate the fair housing laws. Roommate argues that it is entitled to the grant of immunity provided by the CDA notwithstanding any potential violations of the fair housing laws.

A. Plaintiffs' Federal Fair Housing Act Claim

Plaintiffs' federal claim seeks to make Roommate liable for making unlawful inquiries into the personal characteristics of people looking for a place to live which are then published. The FHA makes it unlawful:

To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

*3 42 U.S.C. § 3604(c). Plaintiffs' FHA claim deals solely with section 3604(c)'s prohibition against making or publishing of discriminatory statements. Plaintiffs have neither alleged nor presented any facts in support of their FHA claim which do not relate to Roommate's role as a publisher.

B. CDA's Immunity for Content Provided by Third Parties

Roommate argues that the CDA shields it from liability for Plaintiffs' claims. The immunity provision of the CDA at issue here 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). The CDA clarifies its effect on other laws and specifically

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exempts federal criminal laws, laws pertaining to intellectual property, and the Electronic Communications Privacy Act of 1986. 47 U.S.C. § 230(e). State laws which are consistent with the CDA are not barred, but “[n]o 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).

This is apparently the first case to address the relationship between the CDA's grant of immunity and the FHA's imposition of liability for the making or publishing of discriminatory real estate listings. The FHA is not among the types of laws which are specifically exempted from the CDA. As such, and without evidence of contrary legislative intent, a court may not create an exemption for the fair housing laws without violating the maxim *expressio unius est exclusio alterius*. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 447, 151 L.Ed.2d 339 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910, 64 L.Ed.2d 548 (1980)). In the absence of contrary legislative intent, therefore, the Court finds that the CDA applies to shield Roommate from liability for the FHA violations alleged by Plaintiffs to the extent that Plaintiffs seek to make Roommate liable for the content provided by its users.

As the Ninth Circuit has indicated, “reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’ Under the statutory scheme, an ‘interactive computer service’ qualifies for immunity so long as it does not also function as an ‘information content provider’ for the portion of the statement or publication at issue.” *Carafano v. Metrosplash.Com. Inc.*, 339 F.3d 1119, 1123 (9th Cir.2003). In *Carafano*, the Ninth Circuit applied the CDA's immunity provision to invasion of

privacy, defamation, and negligence claims brought against Matchmaker.com arising out of a false listing on Matchmaker's website. As in this case, the questionnaire at issue there contained both multiple choice and essay questions. *Id.* at 1121. In the multiple choice section, members could select from answers to more than fifty questions from menus providing between four and nineteen options. *Id.* “The actual profile ‘information’ consisted of the particular options chosen and the additional essay answers provided.” *Id.* at 1124.

*4 In *Carafano*, the Ninth Circuit concluded that Matchmaker “was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph.” In those circumstances, Matchmaker could not be “considered an ‘information content provider’ under the statute because no profile has any content until a user actively creates it.” *Id.* The Ninth Circuit went on to find that “the fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a ‘developer’ of the ‘underlying misinformation.’” *Id.*

Plaintiffs express a concern that application of the CDA might eviscerate the FHA. Though mindful of that concern, the most that can be said is that operators of Internet sites such as Roommate have an advantage over traditional print media because websites, unlike newspapers, are exempt from 42 U.S.C. section 3604(c) and the related state fair housing laws for publishers. This is a concern created by Congress' adoption of the CDA, and is not unique to the FHA. Instead, it is identical to the numerous other federal and state statutes and common law remedies for which the CDA's immunity provision applies. *See Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir.2003) (“The specific provision at issue here, § 230(c)(1), overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. As a matter of policy, ‘Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for

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publishing or distributing obscene or defamatory material written or prepared by others.' Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory test, and, indeed, at least with regard to publishers, even if unaware of the statement. Congress, however, has chosen to treat cyberspace differently." (quoting *Blumenthal v. Drudge*, 992 F.Supp. 44, 49 (D.D.C.1998)).

The Ninth Circuit's decision in *Carafano* compels the conclusion that Roommate cannot be liable for violating the FHA arising out of the nicknames chosen by its users, the free-form comments provided by the users, or the users' responses to the multiple choice questionnaire. Plaintiffs' federal claims against Roommate are therefore barred by the CDA. This result does not, however, leave Plaintiffs without a remedy under the fair housing laws. Any individual user of Roommate's service who posts discriminatory preferences is not shielded from liability by the CDA. The users who posted the descriptions and preferences of which Plaintiffs complain are responsible for the content they have provided. Moreover, the FHA's safe harbors for single family homes and four-unit dwellings rented by an owner do not apply to section 3604(c). 42 U.S.C. § 3603(b). As a result, Plaintiffs could, if they so decided, pursue actions against Roommate's users and members without running afoul of the CDA's immunity provision.

C. Roommate's First Amendment Argument

*5 Having found that Plaintiffs' FHA claim is barred by the CDA, the Court declines to reach Roommate's alternative argument which seeks to invalidate the FHA as an unconstitutional abridgement of the First Amendment's free speech guarantee. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 1322, 99 L.Ed.2d 534 (1998); see also *United States v. Lamont*, 330 F.3d 1249, 1251 (9th Cir.2003) ("This principle

means that 'a decision on a constitutional question is appropriate only after addressing the statutory questions.' Here, our statutory analysis resolves the issue and there is thus no cause to reach the constitutional question.") (quoting *United State v. Odom*, 252 F.3d 1289, 1293 (11th Cir.2001)).

D. Plaintiffs' Remaining Supplemental State Law Claims

The only basis for jurisdiction alleged in the Complaint was federal question jurisdiction based on the FHA claim. Plaintiff's remaining causes of action brought pursuant to California's Fair Employment and Housing Act, Unruh Act, negligence, and unfair business practices claims, however, raise only state law causes of action. "The district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Once supplemental jurisdiction has been established under section 1367(a), the district court "can decline to assert supplemental jurisdiction over a pendant claim only if one of the four categories specifically enumerated in section 1367(c) applies." *Executive Software v. U.S. Dist. Court for Cent. Dist. of California*, 24 F.3d 1545, 1555-56 (9th Cir.1994).

The four bases to decline supplemental jurisdiction under section 1367(c) are: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates the claims over which the district court has original jurisdiction, (3) the district court dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *Id.* at 1556. This Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims as the only claim over which it had original jurisdiction is now dismissed. See 28 U.S.C. § 1367(c)(3). The Court additionally declines to exercise supplemental jurisdiction because Plaintiffs' claim that Roommate has aided and abetted its users' violations of the Fair Employment and Housing Act raises a novel issue

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of California law. The parties should, as a first resort, have access to California's courts to resolve the state law issues. Accordingly, the Fair Employment and Housing Act, Unruh Act, negligence, and unfair business practices claims, which can be brought in state court, are dismissed without prejudice.

FN1. 28 U.S.C. § 1367(d) provides that:
The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

III. CONCLUSION

*6 For all of the foregoing reasons, the Court finds that Plaintiffs' FHA claim is barred by the immunity provision of the CDA. The Court therefore grants Roommate's Motion for Summary Judgment as to the FHA claim. Plaintiffs' state law claims, over which this Court declines to exercise supplemental jurisdiction, are dismissed with prejudice. Plaintiffs' Motion for Summary Judgment is denied.

IT IS SO ORDERED.

C.D.Cal.,2005.
Fair Housing Council of San Fernando Valley v. Roommate.Com, LLC.
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Briefs and Other Related Documents

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United States Court of Appeals, Fourth Circuit.
Saad S. NOAH, Plaintiff-Appellant,

v.

AOL-TIME WARNER, INCORPORATED;
America Online, Incorporated,
Defendants-Appellees.
No. 03-1770.

Submitted Nov. 14, 2003.
Decided March 24, 2004.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, District Judge. (CA-02-1316-A).

Saad S. Noah, Appellant, pro se.
Charles Colin Rushing, Wilmer, Cutler & Pickering, Washington, D.C., for Appellees.

Before NIEMEYER, LUTTIG, and TRAXLER,
Circuit Judges.

UNPUBLISHED

PER CURIAM.

*1 Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

Saad S. Noah appeals the district court's order granting Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and dismissing Noah's cause of action. Noah also appeals from the scheduling order entered by the magistrate judge. We have

reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Noah v. AOL Time Warner, Inc.*, No. CA-02-1316-A (E.D.Va. May 15, 2003). We deny the motion to dismiss. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

FN* Noah's notice of appeal was docketed by the district court on June 17, 2003, one day after the expiration of the thirty-day appeal period. Fed. R.App. P. 4(a). Noah, however, has submitted a delivery receipt from the United States Postal Service confirming a delivery to the district court on June 16, 2003. This document suggests that Noah filed a timely notice of appeal.

AFFIRMED

C.A.4 (Va.), 2004.
Noah v. AOL-Time Warner, Inc.
Slip Copy, 2004 WL 602711 (C.A.4 (Va.))

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• 03-1770 (Docket) (Jun. 23, 2003)

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Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

Greg Lloyd SMITH, et al

v.

INTERCOSMOS MEDIA GROUP, INC., et al

No. Civ.A. 02-1964.

Dec. 17, 2002.

ORDER AND REASONS

FN1. Bryan Owens, a second year law student at Loyola Law School, assisted in the research and preparation of this decision. BERRIGAN, J.

*1 This matter comes before the Court on motion for summary judgment filed by the defendant, Intercosmos Media Group, Inc. D/b/a directNIC.com ("Intercosmos"). Having considered the record, the memoranda of counsel and the law, the Court has determined that summary judgment is appropriate for the following reasons.

The plaintiffs, Greg Lloyd Smith and Kestel Trading Corporation, sue Intercosmos in diversity for defamation and libel. Specifically, the plaintiffs claim that Intercosmos, an interactive internet service provider, is liable for the actions of one of its customers who registered three second-level domain ("SLD") names with Intercosmos. The plaintiffs claim that this Intercosmos customer used various domains or universal resource locators ("URLs") to defame the plaintiffs. The plaintiffs claim to have determined that the name of the registrants for the domains were fictitious and so advised Intercosmos, which has nonetheless failed to permanently "block" the websites and has not revoked the registrations for the domain names.

[The plaintiffs] have been and are continuing to be damaged in their reputation and their business by

the continuing defamation and libel of an unidentified person or persons that has been facilitated by Intercosmos's reckless disregard by failing to enforce its own contractual agreement and policies to make sure that domain name registrants are publicly and accurately identified.

FN2. Complaint, ¶ 17

The defendant argues that the plaintiffs' claims for defamation and libel and for damages and injunctive relief are preempted by the 1996 Communications Decency Act, 47 U.S.C. § 230 ("CDA"), and that the CDA provides immunity for all claims made by the plaintiffs. The plaintiffs in their opposition maintain that they have viable claims for (a) negligent performance of duties of a domain-name registrar under La. Civ. Code art. 2315; and (b) injunctive-relief claim for defamation.

FN3. Plaintiffs title their opposition as "Memorandum in Support of the Response to Defendant's Motion for Summary Judgment." The Court will refer to it as their opposition.

FN4. The Court construes the opposition as abandoning any claim for damages for defamation and libel. These were the only claims made by the plaintiffs in the complaint. However, the Court will assume that the claim for negligence articulated in the opposition has been properly plead for purposes of this motion. Rec. Doc. 19.

For the first time in their opposition, the plaintiffs allege "negligence and fault" based on La. Civ. Code art. 2315. They argue that Intercosmos was negligent in: (1) unblocking access to the websites through domains that contained false and fraudulent registration information; (2) failing to

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revoke registrations that contain false and fraudulent registration information when it is possible to do so; and (3) maintaining defamatory content on its own servers.

With regard to the negligence claim, the plaintiffs argue that the contract between Intercosmos and the Internet Corporation for Assigned Names and Numbers ("ICANN") provides the duty to correct inaccurate registrant information upon which the negligence action is based. Intercosmos replies that even this negligence-based action is barred by the CDA and that the plaintiffs do, in fact, seek to obtain third-party enforcement of the contract between Intercosmos and ICANN, which is precluded by the CDA.

Section 230(c) provides:

(1) Treatment of publisher or speaker

*2 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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Section 230(e)(3) provides in relevant part, "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."

FN5. The defendant argues in supplemental memorandum that Louisiana state law mirrors the CDA and also provides support for its defense. La.Rev.Stat. § 51:300.21.

I. The Purpose of the CDA.

To determine if Intercosmos is immune it is helpful to understand the rationale for the CDA. By passing the Communications Decency Act, Congress recognized the ever increasing role that the internet plays in worldwide communication. Congress pointed to "the availability of educational and informational resources to our citizens" that the internet provides, 47 U.S.C. § 230. It also hailed the internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" Id.

Congress saw the burgeoning internet as a benefit to all Americans. It also recognized that one reason the internet played such a beneficial role in American society was that the internet flourished "with a minimum of government regulation."

Because the internet is so beneficial to American life, Congress made it a policy of the United States "to promote the continued development of the internet and other interactive media, unfettered by federal or state regulation." Id. Clearly, the purpose of the Act is to promote the free flow of information on the internet.

II. Does the CDA Immunize the Defendant from State Law Claims?

In their opposition, the plaintiffs contends that Intercosmos can be held liable for "the negligent performance of defendant's duties as a domain name registrar." The crux of this claim is that the defendant's negligence allowed the defamation to continue. The defendant claims this is not a valid cause of action because the CDA immunizes them from liability for such actions.

For purposes of the CDA immunity, the party claiming the immunity must be, first, a provider or user of an interactive computer service. Second, the alleged defamatory statement must be made by a third party. Third, the defamation claim the party seeks immunity from must treat the interactive computer service as the publisher or speaker of the

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alleged defamatory statement.

1. Intercosmos is an Interactive Service Provider

*3 The CDA defines interactive computer service as "any information service, system, or access software 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 purpose of the CDA and case law present a clear picture of the type of activities a service provider must perform to qualify for CDA immunity. The purpose of the CDA is "to promote the continued development of the internet" by allowing it to expand "unfettered by federal or state regulation." 47 U.S.C. § 230. "Courts have broadly construed the ISP [internet service provider] immunity broadly, in the spirit of the CDA's stated purpose of promoting rather than impeding technology and Internet use." Sewali K. Patel, *Immunizing Internet Service Providers from Third Party Internet Defamation Claims: How Far Should the Courts GO?*, Vanderbilt Law Review, March, 2002, at 661.

Case law shows that the type of activities alleged to have been performed by the defendant here are similar and in some aspects identical to the functions performed by other defendant internet access providers that have been granted immunity by the CDA. Specifically, the defendant's role as information service providers and web-hosting service providers describes an internet service provider for purposes of CDA immunity. *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wn.App.2001); *Does 1-30 v. Franco Productions*, 2000 WL 816779, *1(N.D.Ill.). or purposes of CDA immunity, the defendant is an interactive computer service provider.

2. Statements Were Made by a Third Party

In the complaint, the plaintiffs refer to the source of the alleged defamatory statements at issue here as "[a]n as yet unknown and unnamed individual." In

the motion for summary judgment, the defendant states "In the present case, nowhere in the complaint is it alleged or suggested that Intercosmos authored or created the alleged defamatory statements made against the plaintiffs."

FN6. Complaint, ¶ 8.

FN7. Rec. Doc. 4, p. 8

The plaintiffs and the defendant concede that the alleged defamatory statements were made by a third party.

3. The Complaint Treats the Defendant as the Publisher of the Alleged Defamatory Statements

For CDA immunity from state and federal claims, the defendant must be treated as the publisher of the alleged defamatory statements. In the opposition, the plaintiffs claim that the defendant "allowed the defamation to continue." In so doing, they are treating the defendant as publisher of the alleged defamatory statements. The Restatement (Second) of Tort § 577 defines publication:

FN8. Rec. Doc. 19, p. 5.

- (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
- (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

*4 Thus, "the law also treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control." *Zeran v. America Online, Inc.*, 958 F.Supp. 1124, 1132.

The basis of the plaintiffs' claim is that the defendant allowed the defamation to continue by

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failing to take reasonable steps to remove the alleged defamatory statements. The law treats such a party as a publisher.

The defendant is immunized from liability for this state claim of negligence because the defendant meets the three requirements of the CDA immunity. First, the defendant qualifies as an interactive service provider. Second, the defendant is not the source of the alleged defamatory statements. Third, the claim against the defendant treats the defendant as publisher of the alleged defamatory statements.

III. Injunctive Relief

The plaintiffs also maintain that their claims for injunctive relief are not precluded under the CDA, apparently relying on cases cited by the Intercoms in its motion, *Does 1-30 v. Franco Productions*, 2000 WL 816779 (N.D.Ill.), and *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F.Supp.2d 552, 561 (E.D.Va.1998). A reading of the *Does* case indicates no discussion of the issue at all, only a citation to the *Loudoun* case. The cited *Loudoun* case, however, is merely a denial of reconsideration of the original decision on the issue, at 2 F.Supp.2d 783, 790. The defendant in *Loudoun* was a local library and the plaintiffs brought a First Amendment action under 42 U.S.C. § 1983 for the defendant's regulation of content on library computers with the use of site-blocking software. Noting that the CDA defines "interactive computer service" to include "a service or system that provides access to the Internet offered by libraries or educational institutions," the original *Loudoun* decision distinguished between private and governmental defendants.

Thus, as its name implies, § 230 was enacted to minimize state regulation of Internet speech by encouraging *private* content providers to self-regulate against offensive material; § 230 was not enacted to insulate government regulation of Internet speech from judicial review. Even if § 230 were construed to apply to public libraries, defendants cite no authority to suggest that the "tort-based" immunity to "civil liability" described by § 230 would bar the instant action, which is for

declaratory and injunctive relief."

Loudoun, 2 F.Supp.2d at 790(emphasis original). It is important to note that the immunity sought by the defendant in *Loudoun* was under § 230(c)(2), which is not applicable in this matter at all.

Furthermore, *Loudoun* has been challenged even it its distinction between private and governmental agency. In *Kathleen R. v. City of Livermore*, 87 Cal.App.4th 684 (Cal.App. 1st Dist.2001), the plaintiffs sought injunctive relief against a governmental defendant under a number of state law claims as well as Section 1983. With regard to the state law claims, that court found that the *Loudoun* discussion of § 230(c)(2) immunity "cannot be stretched to deprive governmental entities of immunity under section 230(c)(1)." *Livermore*, 87 Cal.App. 4th at 693.

*5 Thus, any suggestion in *Loudoun I* that section 230 could never be applied to public libraries would have been dicta. In any event, there can be no doubt that the *Loudoun* court thought that public libraries could claim immunity under section 230(c)(1) because the court ventured in *Loudoun II* that this immunity should alleviate any concern the library might have had with potential criminal liability.

Id., 87 Cal App. 4th at 693-694. The *Livermore* court directly addressed the plaintiffs' arguments that immunity can not apply to claims for injunctive relief: We reject these arguments and hold that the respondent is immune from all of appellant's state law claims. *Loudoun I* is distinguishable, again, because it involved immunity under section 230(c)(2), not section 230(c)(1). Whereas section 230(c)(2) prohibits interactive computer service providers from being "held liable for specified conduct, and that language may arguably refer only to damage claims, *no such limiting language appears in section 230(c)(1)*."

Id., 87 Cal.App.4th at 697-698 (emphasis added). It continued: Section 230 provides broadly that [n]o cause of action may be brought *and* no liability may be imposed under any State or local law that is inconsistent with this section.... Thus, even if for purposes of section 230 "liability" means only an award of damages ... the statute by its terms also

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precludes other causes of action for other forms of relief.

Id., 87 Cal.App.4th at 698 (emphasis original). See also *Ben Ezra, Weinstein & Co., Inc. V. America Online, Inc.*, 1999 WL 727402 (D.N.M.1999), *aff'd*, 206 F.3d 980 (10th Cir.2000).

This Court adopts the sound reasoning of the court in *Livermore*, and concludes that any claim made by the plaintiffs for damages or injunctive relief with regard to either defamation and libel, or negligence and fault under Article 2315, are precluded by the immunity afforded by Section 230(c)(1), and subject to dismissal.

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by the defendant, Intercosmos Media Group, Inc. D/b/a directNIC.com is GRANTED.

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Briefs and Other Related Documents (Back to top)

- 2002 WL 32716702 (Trial Motion, Memorandum and Affidavit) Supplemental Memorandum in Support of Summary Judgment (Nov. 20, 2002)
- 2002 WL 32716698 (Trial Motion, Memorandum and Affidavit) Reply Memorandum to Plaintiffs' Opposition to Summary Judgment (Oct. 21, 2002)
- 2002 WL 32716693 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of the Response to Defendant's Motion for Summary Judgment (Oct. 15, 2002)
- 2002 WL 32716685 (Trial Pleading) Reply to Counterclaim (Jul. 24, 2002)
- 2002 WL 32716689 (Trial Pleading) Reply to Counterclaim (Jul. 24, 2002)
- 2002 WL 32716682 (Trial Motion, Memorandum and Affidavit) Memorandum in Opposition of Motion to Continue Defendant's Motion for Summary Judgment (Jul. 22, 2002)
- 2002 WL 32716679 (Trial Pleading) Answer and Affirmative Defense and Counterclaim (Jul. 12,

- 2002)
- 2002 WL 32716671 (Trial Pleading) Complaint (Jun. 25, 2002)
- 2:02CV01964 (Docket) (Jun. 25, 2002)

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(Cite as: 2000 WL 1705637 (Cal.Superior))

▷ Superior Court San Francisco County, California.
 Randall STONER Plaintiff,
 v.
 EBAY INC., a Delaware Corporation; et al.,
 Defendants.
 No. 305666.
 Nov. 1, 2000.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

POLLAK, J.

*1 Defendants' Motion for Summary Judgment came on regularly for hearing on October 10, 2000. The question to be decided is whether eBay enjoys immunity under the Communications Decency Act ("CDA"), 47 U.S.C. § 230, for the conduct underlying plaintiff's claims. Having reviewed the evidence, law and argument, the Court concludes that eBay is immune from any liability arising from plaintiff's claims, and therefore grants defendant's motion.

eBay is an online auction company. Plaintiff claims that eBay "has developed a method of operation that allows it to knowingly reap massive profits from the sale of bootleg and other unauthorized 'infringing' sound recordings in violation of Business and Professions Code § 17200." (Plaintiff's Memorandum of Points and Authorities ("Plaintiff's P & A") p. 1.) Specifically, plaintiff claims that eBay violates section 17200 in that "(1) eBay actually sells, or at minimum, advertises and offers for sale, and causes the sale of, various bootleg and other infringing sound recordings, in direct violation of several applicable Penal Code Provisions (Pen.Code, §§ 653h, 653s, 653w); (2) eBay, independent of its users, engages in unfair business practices in that, knowing full well that infringing sound recording auctions are prevalent

on its site, eBay actively promotes and enables those auctions and takes a commission on each sale, even though it could eliminate said infringing auction if it wanted to; and (3) eBay itself engages in conduct likely to deceive the public in that it knows about and actively facilitates infringing sound recording auctions even though, as it also knows, many of the ultimate purchasers of the recordings truly do not realize they are buying illegal items with no resale value. (Plaintiff's P & A, p. 11-12, citing Second Amended Complaint ¶¶ 8- 25.)

Defendant's immunity claim is based on 47 U.S.C. § 230(c)(1), which states that "[n]o 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," and section 230(e)(3) which provides in part that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Section 230 "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party. 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." (*Zeran v. America Online* (4th Cir.1997) 129 F.3d 327, 330.)

Immunity under the CDA requires proof of three elements. Defendant must establish (1) that eBay is an interactive computer services provider; (2) that eBay is not an information content provider with respect to the disputed activity; and (3) that plaintiff seeks to hold eBay liable for information originating with a third-party user of its service. (*Ibid.*) For purposes of this motion it is undisputed

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that eBay is an interactive computer service provider as defined in section 230(f)(2). (Plaintiff's Separate Statement of Undisputed Material Facts ("Plaintiff's Material Facts"), ¶ 10, pg. 6.) Additionally, eBay has satisfied its burden of establishing that it is not an information content provider as defined in section 230(f)(3). The undisputed facts establish that the descriptions of the goods and services auctioned over the eBay service are created entirely by the sellers. (Plaintiff's Material Facts, ¶ 2, pg. 2.) eBay is not responsible for the creation or development of information relating to any of the products for which it provides auction services. While eBay may add additional information to its web pages, such as logos, category headings and seller ratings, this information is not unlike the information added to many web pages, the purpose of which is to facilitate ease of use and access to the content provided by the third-party. eBay, therefore, is not an information content provider or joint information content provider with respect to the description of auctioned goods.

*2 The more difficult question is whether plaintiff is seeking to hold eBay responsible for content provided by third parties. Plaintiff does not claim that there is anything improper about the manner in which eBay conducts its auction business, other than that it auctions sound recordings that may not lawfully be sold. However, plaintiff contends that eBay's services constitute more than mere publication of product descriptions prepared by others, and are instead independent acts of eBay in furtherance of illegal sales. Therefore, plaintiff claims, this suit does not seek to hold eBay responsible for the publication of information provided by others, but for eBay's own participation in selling contraband musical recordings.

Despite plaintiff's attempt to characterize eBay as an active participant in the sale of products auctioned over its service, plaintiff is seeking to hold eBay responsible for informing prospective purchasers that illegal recordings may be purchased--information that originates with the third party sellers who use the computer service. The uncontroverted facts establish that eBay's role does

not extend beyond the scope of the federal immunity. eBay provides an interactive computer service by which sellers of goods and services describe over the Internet the products they wish to sell, and sell them to the person who agrees, by submitting a bid through eBay's web site in accordance with the rules of the service, to pay the highest price for the product. eBay provides interactive computer services for which it charges a fee, just as America Online provides interactive services for which it charges a fee. eBay does not select items to be auctioned, does not inspect or come into possession of those items at any time, does not describe the items to prospective bidders, and does not determine the minimum price which the seller will accept for the item. eBay does advertise and promote its auction service, and charges a fee for the use of its service. However, neither aggressive advertising nor the imposition of a fee--including a fee based in part on the price at which an item is sold-- transforms an interactive service provider into a seller responsible for items sold. (*Cf. Blumenthal v. Drudge* (D.D.C.1998) 992 F.Supp. 44, 51-52 (America Online immune from liability for libelous statements contained in the Drudge Report even though America Online paid Drudge to include the Report on its service and actively advertised the Report by, among other things, issuing a press release which made "clear the kind of material Drudge would provide to AOL subscribers--gossip and rumor--and urged potential subscribers to sign onto AOL in order to get the benefit of the Drudge Report").)

Plaintiff points to several other features of eBay's service which he contends transform defendant from a mere computer services provider to an active participant in the sale of the auctioned goods and services. eBay provides insurance for all auctioned items up to \$200, less a \$25 deductible. (Perkins' declaration, Ex. I.) Coverage is available where a buyer pays for an item but does not receive it or where the buyer receives "an item that is less than what is described" (*Ibid.*) Providing insurance, however, is not selling, or offering to sell, the insured merchandise. Providing limited insurance for all items auctioned over its service may encourage buyers to use the service, but does not

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make eBay the seller. If a seller misrepresents an auctioned item, giving rise to coverage, the insurer will have a subrogation claim against the seller, but not against eBay. (See, e.g., *Fireman's Fund Ins. Co. v. Wilshire Film Ventures, Inc.* (1997) 52 Cal.App.4th 553, 555-556.) eBay also provides escrow and payment services, for which additional fees are charged. eBay refers users to i-Escrow, which accepts payment from the buyer, and in turn pays the seller when the buyer has received and approved the auctioned merchandise. eBay's Billpoint service enables buyers to pay for auctioned items by credit card or electronic check. Neither the escrow service nor the Billpoint, however, renders eBay a seller. Both are merely additional services which promote the provident and efficient use of eBay's auction service, irrespective of the legality or illegality of the item being auctioned. These additional features are available with respect to all goods and services auctioned--they are not limited to recordings, much less to illegal recordings.

*3 Plaintiff attempts to draw a distinction between eBay's interactive service, which he argues is based on a sales model, and other interactive services which are based on bulletin board models. While the majority of cases addressing CDA immunity may fit the bulletin board description, nothing in those cases or in the statutory language so limits the CDA's application. A principal objective of the immunity provision is to encourage commerce over the Internet by ensuring that interactive computer service providers are not held responsible for how third parties use their services. "It is the policy of the United States... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." (47 U.S.C.A. § 230(b)(2).) This policy is based in part on Congress' finding that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." (47 U.S.C.A. § 230(a)(5).) To accomplish this objective, the immunity extends beyond the publication of harmful material over the Internet, and encompasses the distribution of such material in transactions effected over the Internet. (See *Doe v.*

America Online (Fla.Dist.Ct.App.1998) 718 So.2d 385, (review granted, April 12, 1999, 729 So.2d 390) (immunity extends to action by a mother against America Online for selling and distributing pornographic material of her minor son in violation of Florida law).) Plaintiff's attempt to impose responsibility on eBay as the seller of items auctioned over its service is no different from the unsuccessful attempts that have been made to hold computer service providers liable as distributors rather than as publishers of defamatory or pornographic materials. (*Doe v. America Online, supra*, 718 So.2d 385; *Zeran, supra*, 129 F.3d 327, 332.)

At bottom, plaintiff's contention is that eBay should be held responsible for failing to monitor the products auctioned over its service. eBay must know, plaintiff asserts, that illicit recordings are being auctioned over its service. The very description of some recordings (e.g., "bootleg" tapes) identifies some as contraband so that, plaintiff contends, eBay must be deemed to have notice that these may not lawfully be sold, and by failing to intervene must be deemed to have knowingly joined in the unlawful sale. However, cases decided under the CDA uniformly have held that notice of postings which indicate illegality does not defeat immunity. (See *Zeran, supra*, 129 F.3d at 331-334, *Doe v. America Online, supra*, 718 So.2d at 388-389.) The courts have recognized that imposing liability based on notice of content in the interactive computer service context would create an incentive for providers to restrict speech and abstain from self-regulation, thereby defeating the purposes of section 230. (*Ibid.*)

The record reflects that at any given time, eBay has over 4 million listings on its website, approximately 275,000 in the music category alone. (Plaintiff's Material Facts, ¶ 12, pg. 7.) However many of these products may be contraband, and however many it might be possible for defendant to identify as such, Congress intended to remove any legal obligation of interactive computer service providers to attempt to identify or monitor the sale of such products. While such a service may be aware that a fraction of the large volume of data exchanged over

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its facilities involves unlawful activity, and might be able to detect a certain portion of those, the threat of liability for failing to monitor effectively would, in the judgment of Congress, deter companies such as eBay from making their service available as widely and as freely as possible. Moreover, removing any legal obligation to monitor was thought to encourage voluntary efforts to screen out offensive or unlawful materials that might not be made by service providers if the failure to detect an inappropriate use of their system could be a predicate for liability. (*Zeran, supra*, 129 F.3d at 331.) The record reflects that eBay has adopted procedures to curtail the use of its service to sell inappropriate items. Plaintiff contends that these measures are inadequate, but imposing liability for defendant's failure to do more would require precisely the monitoring of third party content that Congress determined should not be mandated.

*4 While the description of a recording as "bootleg" certainly suggests that the recording is one that may not lawfully be sold, an inspection of the product nonetheless may be necessary to be sure. [FN1] Moreover, if eBay were responsible for permitting the sale of unauthorized recordings over its service, the company would be obliged to investigate in countless cases where the description of the item was more ambiguous, or where information from other sources provided a basis for suspicion. And if liability were imposed for the sale of unauthorized recordings in violation of the Penal Code provisions relied on here, there is no reason why liability would not extend to the auction of any other form of contraband, or of goods or services that violated some other legal duty that eBay was bound to know or that was brought to its attention. The burden that such an obligation would place on a service such as eBay likely would force it to cease, or at least significantly restrict, its operations. If such an obligation is to be imposed, it is Congress that must be asked to re-evaluate the immunity conferred by section 230.

FN1. In some cases, falsely describing an article as illicit may add to its value. See, e.g., the lyrics to the Credence Clearwater hit song "Bootleg":

"Take you a glass of water, make it against the law,
See how good the water tastes
When you can't have any at all."
See also the Eminem hit song, "My Name Is ... (Bootleg Version)," which may be considerably more popular than the alternative version, "My Name Is..."

There is, to be sure, some point at which the existing immunity would no longer apply. Although the limits of the immunity have not yet been clearly defined, any limitation placed on the immunity presumably would begin at the point at which providing otherwise lawful goods or services with knowledge that they are being put to an illegal use becomes the commission, or the aiding and abetting, of a crime. Criminal liability in such circumstances normally requires the intent to further or facilitate the crime. (See *People v. Lauria* (1967) 251 Cal.App.2d 471; *People v. Beeman* (1984) 35 Cal.3d 547; *United States v. Blankenship* (7th Cir.1992) 970 F.2d 283.) Using the rather extreme hypothetical situation discussed at the hearing, if an interactive computer service were shown to be actively involved in the sale of drugs or other contraband, the fact that sales were consummated over the computer service would not necessarily provide a shield from liability. In order for liability to arise and the immunity to be lost, it would be necessary to show actual, rather than constructive, knowledge of illegal sales, and some affirmative action by the computer service, beyond making its facilities available in the normal manner, designed to accomplish the illegal sales. (See *People v. Lauria, supra*; *People v. Beeman, supra*; compare also *Wilcox v. First Interstate Bank of Oregon* (D.Ore.1985) 605 F.Supp. 592, 594, *affd. as mod.* (9th Cir.1987) 815 F.2d 522; *C-O-Two Fire Equipment Co. v. United States* (9th Cir.1952) 197 F.2d 489, *cert. den.* (1952) 344 U.S. 892 (mere parallel activity by competitors does not constitute illegal agreement to restrain trade absent conduct inconsistent with best interests of competitors considered independently).) The uncontroverted circumstances in this case do not rise to such a level.

*5 Accordingly, defendant's motion for summary

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judgment must be GRANTED.

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