IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.,	
Plaintiff,	CASE NO. 06 C 0657
v.	Judge Amy J. St. Eve
CRAIGSLIST, INC.,	Magistrate Judge Jeffrey Cole
Defendant.	

SURREPLY BRIEF IN OPPOSITION TO CRAIGSLIST'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This Court is compelled to take a critical look at the statutory language and legislative history and determine what Congress meant in Section 230. In doing so, the Court cannot do as Amici and craigslist have opted to do: virtually ignore the actual wording of Section 230 and the only Seventh Circuit case discussing it. Rather, guided by what the Seventh Circuit has already said, we believe that this Court must recognize that Congress—through text, context and its own legislative explanation—intended Section 230 to provide a limited immunity to ISPs and websites who block and screen offensive materials.[1]

The statutory text and legislative history make one thing clear: Congress was not focused on and did not even remotely contemplate discriminatory housing advertisements (let alone immunizing ISPs or websites from the Fair Housing Act) when it passed Section 230. Instead, Congress focused exclusively on obscenity and the perverse incentives created by common law defamation principles. More specifically, Congress understandably found it troubling that the courts had decided to find liable under state defamation law an online publisher (Prodigy) who screened for offensive third-party content, but had allowed an online publisher (CompuServe) who did no screening whatsoever to escape liability.

Section 230's text and legislative history make plain that Congress intended to immunize only efforts to block and screen offensive material. If Congress meant, as argued by Amici and craigslist, that Section 230 "bars any claim based on the dissemination of third-party content that would 'treat' a service provider as a 'publisher or speaker' of that content" (Br. of Amici in Supp. of Def.'s Mot. 4), Congress would have stated so, and the "good faith" and "blocking and

[1] *Doe v. GTE Corp.*, 347 F.3d 655, 660 ("Yet 230(c), which is, recall, part of the 'Communications Decency Act,' bears the title 'Protection for 'Good Samaritan' blocking and screening of offensive material,' hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.")

screening" language never would have appeared. What Congress actually did in Section 230 was set forth a comprehensive statutory scheme that must be read as a whole. Amici and craigslist pretend that Section 230 consists of only Section 230(c)(1) and ignore the structure and other words and sentences in Section 230. Congress certainly knew how to grant the broad and absolute immunity argued for by Amici and craigslist. The reason no such language appears is that Congress chose not to do so. The only discussion of protection from liability is located, not in Section 230(c)(1) which preoccupies the attention of Amici and craigslist, but rather in Section 230(c)(2) for blocking and screening offensive material.

ARGUMENT

1. Section 230 Provides Two Types of Protection: Immunity for Good Samaritan Screening Efforts and Preemption of State Law Liability for Publication of Third-Party Content.

Amici and craigslist argue that one of Congress' essential objectives in passing Section 230 was to give absolute protection from liability to online publishers for any and all third-party content. In fact, the statute does not set forth any such blanket immunity and to read it into the statute would mean that most of the other words in the statute have no meaning. Plaintiff's analysis of Section 230 gives full effect to all of the words used by Congress and respects both Congress' concern about liability for third-party content and the statutory purpose of encouraging online publishers to screen out offensive content.[2]

[2] Amici and craigslist deride Plaintiff's position as "radical" and "incoherent," insults which might make for lively reading but which cannot substitute for actual and sound statutory analysis. Plaintiff's position on Section 230 is shared by the Seventh Circuit, as found in the *Doe* opinion, HUD (which has decided to accept jurisdiction and investigate a number of complaints against Internet publishers) (*see* Group Ex. 2 attached to Pl.'s Mem. in Opp'n to Def.'s Mot.), the Department of Justice (which sued a website for publishing a discriminatory advertisement and resolved the case by requiring the website employees to screen for discriminatory advertisements) (*see* Ex. 3 attached to Pl.'s Mem. in Opp'n to Def.'s Mot.), and Judge Norgle (who enjoined a website from publishing—despite a vigorous Section 230 defense) (*see* attached Ex. 1, Def.'s Resp. to Mot. For a Temp. Restr. Order, an Order to Show Cause Regarding Prel. Inj., dated Oct. 5, 2004; *see also* Ex. 10 attached to Pl.'s Mem. in Opp'n to Def.'s Mot.).

In Section 230, Congress created two types of protection for online publishers: (1) an immunity for "Good Samaritan" efforts to block and screen offensive third-party content; and (2) preemption of any state law claim that is inconsistent with the screening immunity. The first protection, set forth in Section 230(c)(1) and (2), protects "Good Samaritan efforts to block and screen." Like any Good Samaritan law, the immunity derives from efforts to help third parties—in this case, efforts to screen out offensive material that would harm children and others.

The second source of protection is found in Section 230(e)(3), which preempts any state law that is inconsistent with the above quoted Good Samaritan protections. Section 230(e)(3) states "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." Section 230(e) thus explicitly preempts any contrary state law claim, such as a defamation claim, which at the time of Section 230's enactment, imposed liability on an online publisher that undertook to screen third-party content—and thus would discourage screening and would be contrary to Section 230(c)'s stated purpose. By explicitly preempting inconsistent state law, Congress took steps to protect online publishers from defamatory third-party content while still encouraging them to screen for other types of offensive material posted by third-party users.[3]

[3] craigslist misreads a House report on the subsequently enacted Dot Kids Implementation and Efficiency Act. That report states that Section 230 was intended to protect online publishers from incurring defamation or negligence liability simply because they screen for third-party content. "The courts have correctly interpreted Section 230(c), *which was aimed at protecting against liability for such claims as negligence* (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) *and defamation* (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)." H.R. REP. No. 107-449, at 13 (2002) (emphasis added) (Ex. 9 attached to Pl.'s Mem. in Opp'n to Def.'s Mot.).

2. The Interpretation Advanced by Amici and craigslist Would Make Section 230 a Self Defeating Nullity.

Amici and craigslist, by contrast, argue for a self-contradictory interpretation of the statute. They argue that Congress immunized those who block and screen in Section 230(c)(2) and at the same time immunized those who fail to block screen Section 230(c)(1). It is frankly hard to imagine that Congress would create an incentive to block and screen offensive material in Section 230(c)(2) and then remove that incentive in Section 230(c)(1) by granting immunity for doing nothing.

In this case, it is equally incomprehensible to imagine that Congress meant to grant total and absolute immunity to ISPs and websites who allow others to post discriminatory housing advertisements on their sites in a statute Congress titled "Protection for private blocking and screening of offensive material," and in a subsection Congress titled "Protection for 'Good Samaritan' blocking and screening of offensive material." The "Civil liability" subsection of the statute does not suggest an absolute immunity, but rather states there is no liability for "action voluntarily taken in good faith to restrict access" to offensive material. *See* 47 U.S.C.A. 230(c)(2)(A) (2001). If Congress meant something different, as argued by Amici and craigslist, one would expect to find it in the statute.

3. A Blanket Immunity for Posting Third-Party Content is Not Necessary to Encourage Screening and in Fact Would Discourage Screening.

Amici and craigslist do not dispute that Congress wished to encourage screening, but they argue that a blanket immunity for publishing third-party content actually provides such encouragement to online publishers. More remarkably, they claim that, absent a broad immunity, ISPs and websites will not screen for third-party content for fear of becoming liable for that content. Of course, Amici and craigslist do not explain how a broad grant of immunity for doing nothing whatsoever to block and screen offensive content does anything other than

remove the incentive to block and screen and encourage no action. It is nonsense to argue that a broad immunity requiring no action would encourage ISPs and websites to block and screen offensive content. In Section 230, Congress explicitly rewards the acts of blocking and screening by offering immunity for such good-faith efforts. As Judge Easterbrook forcefully pointed out, the broad immunity that Amici and craigslist advance would defeat the purpose of encouraging screening. *Doe*, 347 F.3d at 660.

4. The Legislative History Clearly Supports Plaintiff's Interpretation.

Not surprisingly, neither Amici nor craigslist mention the official Congressional Conference Reports on Section 230, which is the authoritative legislative history. *Garcia v. U.S.*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . . We have eschewed reliance on the passing comments of One Member . . . , and casual statements from the floor debates.") (citations omitted). The Conference Reports clearly support Plaintiff's interpretation of Section 230 and describe the original House bill as a bill that "protects from civil liability those providers or users of interactive computer services *for actions to restrict or to enable restriction of access to objectionable on-line material*." H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (Ex. 5 attached to Pl.'s Mem. in Opp'n to Def.'s Mot.); S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.) (Ex. 6 attached to Pl.'s Mem. in Opp'n to Def.'s Mot.). The Reports continue, "The conference agreement adopts the House provision with minor modifications as a new Section 230 of the Communications Decency Act. This Section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service *for actions to restrict or to enable restriction of access to objectionable material*." H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep); S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.) (emphasis added).

Notably, there is nary a whisper anywhere in the Conference Report of the type of immunity advocated by Amici and craigslist: a blanket immunity for publishing any third-party content and immunity from the Fair Housing Act. As plain as the Conference Reports are, the title of Section 230—"Protection for private blocking and screening of offensive material"—is even plainer.[4]

While ignoring the official Conference Reports, as well as the title and text of Section 230, craigslist and Amici selectively quote an excerpt from a single House representative—Representative Goodlatte—to argue that Congress believed that online publishers should not be liable for third-party content. But Amici and craigslist fail to accurately quote Rep. Goodlatte's testimony. Goodlatte repeatedly used the words "obscene" and "indecent" material, "pornography," and "smut," showing his concern for online pornography. Rep. Goodlatte nowhere argued for total and absolute immunity. In fact, his attention was directed at arguing against giving the federal government control over online obscenity. Congress rejected his position and passed the Exon amendment, which gave the FCC power to regulate online obscenity. (*See* Pl.'s Mem. in Opp'n to Def.'s Mot. at 12-14.) His comments do not reflect the intent of Congress as a whole.

[4] As discussed above, there is no reasoned basis to argue that Congress intended to repeal or limit the Fair Housing Act when it passed Section 230(c). There is simply no mention of discriminatory housing advertisements, or of any other civil rights issue, in the text or legislative history of Section 230. Where two federal statutes appear to conflict, courts should harmonize the statutes, unless Congress has clearly indicated that it intended to abrogate or repeal one of those statutes. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citing *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (courts find an implied repeal only where two statutes are in irreconcilable conflict or where the latter statute covers entire subject of and was clearly intended as a substitute for the former)); *Morton v. Mancari*, 417 U.S. 535, 549-5 (1974) (court must give effect to both federal statutes absent clearly expressed intent to abrogate or repeal).

5. The Seventh Circuit's Reading of Section 230 is Correct and Belies the Interpretation Advocated by Amici and craigslist.

As argued in Plaintiff's response brief, Congress used the terms "protection for blocking and screening" *seven times* in Section 230. Here, Congress meant what it said and said what it meant.

To interpret Section 230(c), this Court need only take Congress at its word. craigslist disputes the Seventh Circuit's reading of the statute and maintains that 230(c)(1) reads more like a "prohibition" than a "definition" because Section 230(c)(1) falls outside 230(f), the definition subsection, and because the text of (c)(1) has an imperative, rather than a definitional, ring.

As discussed in Plaintiff's response brief in detail, Section 230(c)(1) is best understood as a definitional clause in the sense that Section 230(c)(1) describes who may claim (c)(2) protection from liability (as is made clear by its placement under the overall 230(c) title "Protection for 'Good Samaritan' blocking and screening of offensive material"). Thus, if as Section 230(c)(1) makes clear, it is the service provider who creates the content at issue, that provider cannot claim the (c)(2) screening immunity for his own offensive material.

To be sure, the Section 230(c)(1) text does not appear in Section 230(f), the definition subsection, but that is obviously because Section 230(f) is reserved for terms such as "Interactive computer service" and "Access software provider," which are used throughout Section 230. "Publisher" and "speaker" do not appear throughout Section 230 and are found only in 230(c)(1). But even assuming that the isolated, single sentence of 230(c)(1) is open to interpretation, any ambiguity quickly evaporates when that sentence is folded into the context of the rest of the statutory text. There is no way Section 230(c)(1) can be read to be a broad, total and unconditional immunity from civil liability for all third-party content. Section 230(c)(1) appears entirely outside the "Civil liability" subsection and under the "Protection for 'Good Samaritan'

blocking and screening of offensive material" title. In short, Judge Easterbrook's "definitional" reading of 230(c)(1) best squares with the statute, as a whole, harmonizing its text with its caption and with its structure, legislative history and purpose.[5]

6. The Fact That the Fair Housing Act is a Federal Rather Than a State Law is Important.

Amici and craigslist argue that this Court should apply precedents from other judicial circuits that do not involve the Fair Housing Act and that it is irrelevant that this case arises under the federal Fair Housing Act rather than under state law. But Section 230 treats federal and state law very differently. Section 230(e) does not contain any language abrogating any federal law claim. Judge Easterbrook acknowledges this critical difference in *Doe* when he repeatedly notes that Section 230 preempts only state law. *Doe*, 347 F. 3d at 658–60. In short, the only judge to consider the issue before this Court is the judge in the *Roommates.com*, who clearly felt constrained by prior Ninth Circuit precedent.[6]

[5] craigslist rejects Judge Easterbrook's definitional reading of 230(c)(1) on another ground: that 230(c)(1) was intended to preclude only lawsuits by a censored customer. (Def.'s Reply Mem. in Supp. of Mot. 7.) Section 230(c) does not limit the screening immunity to suits brought by censored customers. craigslist's own position is belied later in the same brief (*Id.* at 12) when it points out that Congress must have intended to preclude parties other than censored customers from suing, as Congress wished to reverse the decision in the *Stratton Oakmont* case, in which Prodigy screened and was sued, not by a censored customer, but by someone harmed by the display of third-party content.

[6] Congress could have abrogated contrary federal law but did not do so. Even if Congress had abrogated contrary federal law, Section 3604(c) of the Fair Housing Act would not be abrogated as it is consistent with Section 230(c). Liability under Section 3604(c) does not depend upon whether the printer of the discriminatory advertisement exercised editorial control, and thus liability for third-party content would not discourage on-line printers and publishers from screening. *See, e.g., Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (Recorder of Deeds could be liable under 3604(c) for recording restrictive covenants); ROBERT G. SCHWEMM, "DISCRIMINATORY HOUSING STATEMENTS AND § 3604(C): A NEW LOOK AT THE FAIR HOUSING ACT'S MOST INTRIGUING PROVISION," 29 Fordham Urban LJ 187 (October 2001). Or, as Judge Easterbrook put it, Section 230 would not preempt a law that requires an ISP to protect third parties, because that law would not be inconsistent with Section 230(c). *Doe*, 347 F.3d at 660 (". . . 230(e)(3) would not preempt state laws or common law doctrines that induce or require ISPs to protect the interests of third parties, such as the spied on plaintiffs, for such laws would not be 'inconsistent with' this understanding of 230(c)(1)."). Section 3604(c) of the Fair Housing Act requires printers and publishers of housing advertisements to protect the interest of third parties, i.e. their readers, who would be stigmatized and dissuaded from seeking housing by discriminatory advertisements. *See* 42 U.S.C.A. 3604(c) (2001). The FHA is not inconsistent with Section 230(c).

7. A Ruling From This Court That Section 230 Immunizes Only Efforts to Screen Offensive Third-Party Content Will Not Discourage the Internet's Growth.

Finally, Amici insist that a blanket immunity for third-party content is necessary to promote robust development of the Internet. That is simply not so. Because Section 230(c) does not limit the effect of criminal law, other online publishers already either screen or face liability for third-party content in advertisements or other text involving prostitution, or the sale of guns and drugs. This choice has not shut down their business or hampered the ferocious development of the Internet. Other websites that advertise housing, such as that owned by the National Association of Realtors, have long ago accepted responsibility for screening discriminatory housing advertisements without adverse effects. (*See* Ex. 2.)

The Fair Housing Act also is distinct from the other theories of publisher liability in the cases cited by Amici and craigslist. The Fair Housing Act is a federal statute, coequal to Section 230. By creating liability for the mere printing or publication of discriminatory housing advertisements, Section 3604(c) of the Fair Housing Act by its terms makes publishers of every type liable for content written by third parties. Or, to use Judge Easterbrook's phraseology, Section 3604(c) of the Fair Housing Act imposes on every publisher the responsibility to look out for third parties.

Amici and craigslist also lump together a wide range of very different electronic entities and claim that they will all be affected by this case. An Internet access provider such as Comcast provides a customer with the technology to access the Internet. A web host like GTE (mentioned in the *Doe* case) provides its customers host services such as storage space on a server. In contrast, craigslist is a website that does something very different. Like a newspaper's classified sections, craigslist is in the business of creating a centralized marketplace for housing providers and consumers to read and post housing advertisements for the purchase, sale and rental of

housing units. A decision that an entity allowing one to post housing advertisements on its website must comply with the Fair Housing Act will have no impact whatsoever on a company that merely provides the technology to access the Internet.[7]

On the other hand, a blanket immunity under all federal and state law, whether statutory or common law, for all electronic entities (websites, Internet service providers, web hosts), for all content provided by all third parties, would have very serious consequences. Plaintiff, a non-profit civil rights organization, has worked for 35 years to educate the public as to the various civil rights laws and to protect women, disabled people, people with children, and people of color from arbitrary discrimination in housing, employment, and public accommodations. A blanket immunity would seriously undercut all of that work and would roll back many important and hard fought federal civil rights protection. Employers who wished to hand pick workers based on gender or race could use craigslist to post anonymous advertisements to do so. The employers would escape liability because they could not be identified; the publisher would also escape liability. Hotels who wish to rent only to white people or only to English speakers could use Internet services to do so, by using an anonymous email address. And, as the advertisements

[7] Even though the Fair Housing Act applies regardless of the cost of compliance, there are cost-effective ways for an entity that allows online housing advertisements to avoid Fair Housing Act liability. For example, craigslist could use a computer program or other “spam filter” to screen for the words or phrases, such as "no kids" and "minority," which HUD has found to be presumptively discriminatory. craigslist could interrupt when a housing provider attempts to use those trigger words and inform the provider with a notice that says: "Your ad may violate the FHA. The FHA prohibits advertisements that indicate a preference or limitation based on race, gender, family status, religion and national origin. Courts have found that advertisements that state ‘no kids’ or ‘no minorities’ violate the FHA. Please rewrite your ad to make it clear that you will accept tenants without regard to race, gender, family status, religion and national origin. Also be informed that this site is monitored by HUD and by fair housing organizations, and if you persist in using these words, you may be sued by these agencies." This computer programmed notice would likely eliminate many, if not nearly all of the illegal advertisements, without any need for manual review. If, however, a housing provider persisted in using the trigger words in an advertisement, craigslist could respond in one of several ways: first, craigslist could manually screen these advertisements and refuse to publish the remaining advertisements (as do other online advertisers). Second, craigslist could refuse to provide the poster with an anonymous email account. The suggestion that craigslist and Amici—some of the most technologically sophisticated and well-heeled companies in the world—are not capable of taking these steps is curious and not believable.

cited in our Complaint demonstrate—advertisements that blatantly say "no minorities," "African Americans clash with me," and "no kids"—housing providers could base housing decisions on factors long ago made illegal, with no fear of detection or liability.[8]

Print publishers have effectively screened for discriminatory housing advertisements for nearly 40 years. If craigslist is not willing to accept the same responsibility for screening out blatantly discriminatory advertisements, it should not be in the business of advertising housing. That is the message Congress sent when it passed Section 3604(c) of the Fair Housing Act, which by its terms makes publishers liable for housing notices prepared by third parties.

CONCLUSION

Amici and craigslist extol Internet freedom as if mention of that value should end all discussion and trump any competing value. Congress long ago decided that our freedom to choose our customers, employees, and tenants on the basis of historically suspect grounds is

[8] Lest this Court think this only a fantasy, Plaintiff attaches discriminatory employment advertisements found from a cursory three-week-long search of craigslist's Chicago site. These advertisements specify gender for positions for which gender is not a bona fide occupational qualification or other legal qualification. (*See* attached Ex. 3.) The harm caused is immediate because these advertisements mislead readers into thinking that it is acceptable to base housing decisions on illegal criteria. craigslist argues that a law enforcement subpoena would compel it to turn over a landlord's identity. While a website might be compelled to comply with a law enforcement subpoena, it need only produce the information it has, which might not include the name of the person who posted the discriminatory advertisement and which does nothing to make certain that illegal advertisements do not appear in the first place.

tempered by our fundamental interest in fairness and equality. Based on the careful wording of Section 230, Congress has determined that the Internet should be no different.

Respectfully submitted,

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Dated: June 29, 2006

EXHIBIT 1

JKB/cjc/341429

5634-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE S. MAY INTERNATIONAL COMPANY,

Plaintiff,

v.

XCENTRIC VENTURES, LLC, RI-POFF REPORT.COM, BADBUSINESSBUREAU.COM, ED MAGEDSON, VARIOUS JOHN DOES, JANE DOES AND ABC COMPANIES,

Defendants.

No. 04 C 60

Judge Norgle

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CLERK, U.S. DISTRICT COURT

NOTICE OF FILING

TO: Bart A. Lazar, Esq.
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PLEASE TAKE NOTICE that on the 5th day of October, 2004, there was filed with the United States District Court for the Northern District of Illinois, Eastern Division, an **Defendants' Response to Motion for a Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction**, a copy of which is attached hereto and hereby served upon you.

XCENTRIC VENTURES, LLC and ED MAGEDSON

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PROOF OF SERVICE

I, the undersigned, on oath state that I served copies of the above-referenced documents upon the above-referenced parties at their addresses listed above by depositing the same in the U.S. Mail at 233 South Wacker Drive, Chicago, Illinois, before 5:00 p.m. on the 5th day of October, 2004, with proper postage prepaid.

Subscribed and Sworn to before me
on this 5th day of October, 2004

By: _____
Notary Public

OFFICIAL SEAL
CYNTHIA CLOSE
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES: 06-15-07

JKB/cic/res/cmm/341257 5634-2

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE S. MAY INTERNATIONAL COMPANY, Plaintiff, v. XCENTRIC VENTURES, LLC, RIP-OFF REPORT.COM, BADBUSINESSBUREAU.COM, ED MAGEDSON, VARIOUS JOHN DOES, JANE DOES and ABC COMPANIES, Defendants.	)	No. 04 C 6018 Honorable Judge Norgle

DEFENDANTS' RESPONSE TO MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION

Defendants respectfully request that this Court set aside the temporary restraining order entered by this Court on September 24, 2004, and deny the Plaintiff's request for a preliminary injunction on the grounds that this court lacks personal jurisdiction over the Defendants and George S. May is not likely to succeed on the merits. This response is supported by the following Memorandum of Law and the Court's file in this matter.

MEMORANDUM OF LAW

I. INTRODUCTION

This case is a defamation claim against the operator of a popular consumer advocacy site and its founder for statements posted by third parties who have legitimate complaints about the service they received from George S. May or the experience they had while employed by George S. May. Because its claims are barred by the Communications Decency Act, Plaintiff added a Lanham Act claim. By spotlighting one rogue report and relying on the emergency rules that were intended to temporarily preserve the status quo, George S. May succeeded in convincing

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this Court to exceed its jurisdiction and enter a mandatory order before having an opportunity to hear the true facts of this case. Defendants have complied with this order even though (1) it threatens the survival of the website; (2) there is no jurisdiction over these Defendants in Illinois; and (3) the order violates the Constitution of the United States and federal statutes.

For the reasons set forth herein, this Court should lift the temporary restraining order, deny the request for a preliminary injunction, and order that the bond posted by Plaintiff be turned over to Defendants in partial reimbursement for the damages George S. May has caused.

II. RELEVANT FACTS

Rip-off Report has been in existence for approximately five years. (Affidavit attached as Exhibit "A"). It was founded by Ed Magedson and was previously operated by a company called badbusinessbureau.com, llc. Today it is operated by Xcentric Ventures, L.L.C., an Arizona limited liability company. Ed Magedson is still involved as the website's editor. It has grown to the most popular consumer advocacy website in the world, containing over 100,000 reports, and having had over a billion visitors. At one time, Mr. Magedson would occasionally write an editorial about a report, but has discontinued that practice because of the potential liability. Today, all reports are authored and submitted by consumers. While the staff of Rip-off Report edits the reports by removing obscenities, vulgarities, and threats of physical violence, no agent of Rip-off Report adds any content to any report. (Exhibit "A").

George S. May is a business consulting firm that has been the subject of twenty-five main reports and numerous other rebuttals or comments added to reports by other consumers. (Exhibit "B"). These reports describe unfair business practices engaged in by George S. May. Some reports contain the names and telephone numbers of the authors, who describe in detail how they were victimized by the business practices of George S. May. Other reports were filed by former employees, who describe how they were directed to use a script to lure unsuspecting business

customers into believing that they must pay George S. May large sums of money to save their businesses. Unfortunately, one of these reports accused the owner of the company of engaging in child pornography without any apparent basis. (Exhibit "B").

On August 17, 2004, a "staff executive" of George S. May, Shawn Lange, posted a rebuttal on Rip-off Report, vehemently denying the comments posted on Rip-off Report and stating that the company provides services of the highest caliber to its clients. (Exhibit "C"). When he posted that report, he agreed on behalf of the company that the courts of Arizona would have sole and exclusive jurisdiction over any disputes arising out of the posting. (Exhibit "D").

Ed Magedson resides in Arizona (Exhibit "A"). He owns no assets in Illinois, does not do business in Illinois, and has not been to Illinois except in passing through. (Exhibit "A").

Xcentric is a limited liability company organized and existing under the laws of Arizona. (Exhibit "A"). Its place of business is Arizona. (Exhibit "A"). Xcentric does not own any assets in Illinois, or have any offices or employees in the state. (Exhibit "A"). Xcentric does not do business with or within the State of Illinois. Xcentric operates a website, "The Rip-Off Report," located at www.badbusinessbureau.com and at www.ripoffreport.com. (Exhibit "A"). The website is hosted by Sterling Network Services, LLC. (Exhibit "A"). Sterling is an Arizona company whose servers are located in Arizona. (Exhibit "A").

III. THIS COURT LACKS PERSONAL JURISDICTION OVER BOTH DEFENDANTS[1]

A. The Contractual Agreement Of The Parties Calls For Jurisdiction in Arizona

As set forth above, Plaintiff's agent agreed in a binding contract that claims arising out of the posting of his report are subject to jurisdiction in Arizona. Such contracts are valid and binding. *DeJohn v. The TV Corp. Intern.*, 245 F.Supp.2d 913 (C.D. Ill. 2003) (forum selection

[1] Although there are four Defendants named, only two are legal entities, the other two are website addresses.

clauses are presumptively valid and the fact that the contract is electronic does not affect this conclusion). Plaintiff has sought an order that all false postings be removed. Plaintiff addressed allegedly false postings in its own posting. Thus, this claim arises out of the report filed by Plaintiff and, by agreement of the parties, is solely within the jurisdiction of Arizona.

B. This Court lacks Jurisdiction Even Absent the Contract

The burden of proof rests on the party asserting jurisdiction. *Mellon Bank (East) PSFS, N.A. v. Farino,* 960 F.2d 1217, 1223 (3d Cir.1992) (*citing Carteret Savings Bank v. Shushan,* 954 F.2d 141 (3d Cir.1992), *cert. denied* 506 U.S. 817, 113 S.Ct. 61, 121 L.Ed.2d 29 (1992). To meet this burden, the plaintiff must make a prima facie showing of "sufficient contacts between the defendant and the forum state." *Mellon East,* 960 F.2d at 1223 (*citing Provident Nat. Bank v. California Fed. Sav. & Loan Assoc.,* 819 F.2d 434 (3d Cir.1987).

Illinois's long arm jurisdiction statute is codified at 735 ILCS 5/2-209. It provides that the following activities submit a person to jurisdiction: (1) the transaction of business within the state; (2) the commission of a tortious act within the state; (3) the making or performance of any contract or promise substantially connected to the state. Defendants have done none of these and Plaintiff cannot satisfy Illinois' long arm statute.

In addition to satisfying the long-arm statute, Plaintiff must also satisfy the due process clause of the United States Constitution.

Due process requires that a nonresident defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "*International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (*quoting Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The contacts between the defendant and the forum state may not be "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S.Ct. 1473, 79

L.Ed.2d 790 (1984). Instead, "the sufficiency of the contacts is measured by the defendant's purposeful acts." *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 580 (7th Cir.1994). The minimum contacts with the forum state must be the result of the defendant's purposefully availing itself of the privilege of conducting business in the forum state, thereby invoking the protections and benefits of the forum state's law. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Medical Group, Inc. v. American Arbitration Ass'n, Inc.,* 312 F.3d 833, 846 (7th Cir.2002). The minimum contacts requirement serves two objectives: "[i]t protects against the burdens of litigation in a distant or inconvenient forum" unless the defendant's contacts make it just to force him or her to defend there, and "it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Depending on the nature of the contacts, a court may exercise general or specific jurisdiction. When the defendant's contacts with the state are sufficiently continuous, systematic and general, the court may exercise jurisdiction over the defendant in any suit based on any controversy. *International Medical Group,* 312 F.3d at 846. When a defendant's contacts with the state are more limited, but are related to or give rise to the specific controversy in issue, a court may exercise specific jurisdiction over the defendant with respect to that controversy. Because the implications are far greater, the constitutional standard for general jurisdiction is considerably more stringent than the standard for specific jurisdiction.

Plaintiff has asserted jurisdiction in the complaint on two grounds: (1) that Defendants direct tortious conduct at George S. May, which maintains its principal place of business in

Illinois; and (2) that Defendants operate a commercial interactive website in the District. These claims are both factually inaccurate and legally insufficient for jurisdiction.

1. Defendant Did Not Direct Tortious Conduct At George S. May

The purposeful availment requirement is satisfied when the defendant purposefully establishes sufficient minimum contacts with the forum state to create a "substantial connection" between the defendant and the forum state. *Burger King Corp.*, 471 U.S. 462 at 475-76, 105 S.Ct. 2174. A substantial connection is created when the defendant "purposefully avails itself of the privilege of conducting activities" in the forum. *Hanson,* 357 U.S. at 253, 78 S.Ct. 1228. The objective of the purposeful availment requirement is to provide predictability and give notice to the defendant that it is subject to suit in the forum state, so that the company "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. 559.

Xcentric operates a website. Plaintiff does not even allege, nor could it truthfully allege, that Xcentric or any agent of Xcentric authored the reports that are at issue. Nothing that Xcentric has done could be deemed to be a purposeful availment of the benefits of Illinois' laws that it could reasonably anticipate being haled into court in this state. "[S]pecific jurisdiction is not appropriate 'merely because a plaintiff's cause of action arose out of the general relationship between the parties; rather, the action must *directly arise* out of the specific contacts between the defendant and the forum state.' " *Id.*

The effects test, set forth by the United States Supreme Court in *Calder v. Jones,* 104 S.Ct. 1482 (1984), requires something more than just causing injury to someone harming someone in the forum state. The effects test is satisfied when the plaintiff alleges that the defendant committed an intentional tort expressly aimed at the forum state; the actions caused

harm, the brunt of which was suffered in the forum state; and the defendant knew that the effects of its actions would be suffered primarily in the forum state. *Calder,* 465 U.S. at 788-90, 104 S.Ct. 1482. Here, Xcentric operated a website. That conduct cannot rise to the level of knowing that the effects of its actions would be suffered primarily in Illinois. *See Young v. New Haven Advocate,* 315 F.3d 256 (4th Cir. 2002) (dismissing for lack of jurisdiction in case arising out of posting of defamatory article even though injury would be felt in forum state).

In *Calder* the Court emphasized that the defendants had aimed their actions expressly at California and actually knew that the "potentially devastating" effects of their article would be felt primarily in the state. *Id.* at 789-90, 104 S.Ct. 1482. Here, because Defendants did not author the allegedly defamatory matter, they could not have aimed their activities at Illinois.

2. That George S. May Maintains its Principal Place of Business in Illinois is Of Little Significance

Even if Plaintiff could meet the express aiming requirement, Plaintiff cannot show that it has suffered the brunt of its alleged injury in Illinois, or that Defendants could have known that the effects of their actions would be suffered primarily in Illinois. The Court should not assume that Plaintiff's injury is in Illinois just because its principal place of business is in Illinois. When an injured party is an individual, it is reasonable to infer that the brunt of the injury will be felt in the state in which he or she resides. This is not necessarily the case when the injured party is a corporation. "A corporation does not suffer harm in a particular geographic location in the same sense that an individual does." *Core-Vent Corp. v. Nobel Industries AB,* 11 F.3d 1482, 1486 (9th Cir.1993). *Calder,* 465 U.S. at 789, 104 S.Ct. 1482, still requires that the harm be particularized to the forum state. *See Janmark,* 132 F.3d 1200 (7th Cir. 1997). Even if a corporation has its principal place of business in the forum state, it does not follow necessarily that it makes more sales in that state than any other or that harm to its reputation will be felt more strongly in that

state. *Hy Cite Corporation v. badbusinessbureau.com, L.L.C.*, 297 F.Supp.2d 1154 (W.D. Wisc. 2004) (dismissing claim against the previous operator of the Rip-off Report website and rejecting Hy Cite's argument that a tort occurred in Wisconsin because the harm occurred in Wisconsin).

Here, George S. May has offices in Nevada, New York, San Francisco, Canada, and Europe. They boast that their clients are located "in virtually every corner of America as well as Canada." (Exhibit "E").

Thus, the fact that Illinois is Plaintiff's principal place of business is not proof that Plaintiff suffered the brunt of an injury in the state. *See, e.g., Dole Food Co., Inc. v. Watts,* 303 F.3d 1104, 1112 (9th Cir.2002); *IMO Industries, Inc. v. Kiekert AG,* 155 F.3d 254, 265 (3d Cir.1998); *Far West Capital, Inc. v. Towne,* 46 F.3d 1071, 1079 (10th Cir.1995); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir.1991).

Further, even if George S. May shows that despite having clients and offices all over the world, it suffered the brunt of its injury in Illinois, it cannot show that Defendants knew this when they allowed the reports to be posted.

3. Defendants Do Not Operate a Commercial Interactive Website in Illinois

The most often-cited case in analyzing jurisdiction based on Internet activities is *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997), which established the sliding scale test for jurisdiction arising out of Internet activities.

The *Zippo* court recognized that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations

> where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. (citations omitted).

(*Id.*) Here, all Xcentric did was host a website upon which third parties posted reports. The postings were free. Xcentric did not engage in any commercial transaction out of which this claim arises. Its purpose is to make information available. This case should be analyzed the same as a passive web site because the claims arise out of Xcentric's passive activity of merely making information available. In addition, even if the court analyzes this case under the test for an interactive web site, the level of interactivity here is simply that the author posted a complaint on the website and there was no commercial nature to the exchange of information because there was no money exchanged. Rather, the posting was a classic exercise of non-commercial free speech.

Plaintiff's assertion that Defendants operate the website "within the district" is inaccurate. Xcentric operates the website in Arizona where its agents work and where its servers are located. While it is true that the website can be viewed in Illinois, if that were the test there would be jurisdiction over every website owner everywhere in the world where the Internet can be accessed. That position has been uniformly rejected by the courts. "Courts have insisted upon more than mere access to the website to sustain specific jurisdiction." *Best Van Lines, Inc. v. Walker*, 2004 WL 964009 (S.D.N.Y. 2004); *GTE New Media Services, Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000) ("personal jurisdiction surely cannot be based solely on the ability of [forum] residents to access Defendant's websites"); *Realuyo v. Villa Abrille*, 2003 WL 21537754 (S.D.N.Y. 2003) (Internet news service not subject to jurisdiction in New York

for posting allegedly defamatory article written by another – sheer availability of article over the internet was insufficient for jurisdiction).

To the extent that Plaintiff asserts general jurisdiction, such a claim borders on the frivolous. In order to exercise general jurisdiction, the defendant's contacts with the forum "must be so extensive to be tantamount" to the defendant's "being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in an [Illinois] court in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue Research Foundation,* 338 F.3d at 787. Here, there is nothing even approaching that requisite test. Xcentric has no contacts with Illinois at all except that its website can be accessed in Illinois (as well as anywhere else in the world). The Illinois Court of Appeals has rejected the contention that Internet activities alone are a sufficient basis for general jurisdiction. *Forrester v. Seven Seventeen HB S. Louis, 748 NE2d 834 (Ill. App. 4 Dist. 2002).*

Plaintiff argues there is jurisdiction over Defendants because the websites are a commercial vehicle for selling Defendants' products. First, that argument applies only to Xcentric, not to Ed Magedson personally. Also, the advertising Plaintiff refers to is a pop-up ad for the Rip-off Revenge Guide. Defendant, Xcentric, markets that guide for a separate company, Consumer Media Publishing, LLC. Xcentric does not fill the orders or sell the books. Xcentric is paid a fee from Consumer Media to market the guides. Thus, the sale of the books is not evidence of doing business in any other state. Further, this claim does not arise out of the sale or marketing of the books. Thus, unless Plaintiff intends to try to prove that the marketing of books over the internet rises to the level of general jurisdiction, marketing books is irrelevant.

IV. THE TEMPORARY RESTRAINING ORDER WAS IMPROPERLY ISSUED AND SHOULD BE LIFTED AND THE PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

A. The Purpose of Rule 65 Is To Maintain the Status Quo

A temporary restraining order or a preliminary injunction is an extraordinary remedy intended to preserve the status quo until the merits of a case may be resolved. *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir. 2001). Here, the Court has issued a temporary restraining order and the Plaintiff has requested an injunction that does not preserve the status quo, but rather mandates that the Defendants take action. For that reason alone, the temporary restraining order was unwarranted and should be set aside. With only fax notice just days before the hearing, and an inadequate opportunity to be heard, Defendant was forced to make changes to its Rip-off Report website. Defendant reluctantly complied despite the far reaching and devastating impact such a ruling may have on its website.

B. Defendants' Harm Outweighs The Harm To Plaintiff

While Defendants understand that George S. May convinced this Court that removing reports would cause no harm to Defendants, that is simply inaccurate. Hundreds, if not thousands, of businesses that are the subject of complaints about their business practices have threatened to sue Rip-off Report's operators for defamation and seek injunctive relief. If businesses locate a decision wherein the court issued injunctive relief against Xcentric Ventures, it will be an invitation to file suit and attempt to force Xcentric to remove postings about their company. Xcentric is not financially in the position to defend hundreds of lawsuits and would be forced out of business. The result would be that the single most important source for consumer information would no longer be available to the public. If Xcentric were to remove every report that businesses claimed were false and threatened to sue over, the website would no longer have value to consumers.

On the other hand, the harm to George S. May is minimal. The report that accuses the owner of George S. May of child pornography is not credible on its face. Indeed, the very next posting was a consumer stating that the report appeared to be false. The report is so ridiculous that it is not likely to be believed by anyone reading it.

C. Plaintiff Is Not Likely To Succeed On The Merits

1. Counts II, III and IV are Barred by The Communications Decency Act

47 U.S.C. §230 prohibits civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties. *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001). The federal statute, which was passed by Congress with the desire to "promote unfettered speech," provides in relevant part that:

> 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; *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

The operation of an Internet website upon which others post statements is an activity which is unequivocally protected by the Communications Decency Act, 47 U.S.C.A. §230. *Carafano v. Metrosplash.com, Inc. 339 F.3d 1119* (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash.App 2001).

Every Federal court that has considered the issue has held that the Communications Decency Act immunizes a website operator for defamation it publishes if it is not the information content provider of the content at issue. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green v. America Online*, 318 F.3d 465 (3rd Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983-84 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997). In four other circuits – the Fifth, Seventh, Eighth and District of Columbia – the district

courts have interpreted section 230 to bar lawsuits such as this. *Patentwizard, Inc. v. Kinko's Inc.*, 163 F.Supp.2d 1069 (D.S.D. 2001); *Smith v. Intercosmos Media Group, Inc.*, U.S.Dist.LEXIS 24251 (E.D.La. 2002); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930 (N.D. Ind. 2001); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998).

In the case at bar, Xcentric Ventures and Ed Magedson are alleged to be website operators who have published defamatory statements about Plaintiff.

"Three elements are thus required for §230 immunity: the defendant must be a provider or user of an interactive computer service; the asserted claims must treat the defendant as a publisher or speaker of information; and the information must be provided by another information content provider." *Schneider*, 31 P.2d at 39.

Web hosts are recognized as Section 230 providers of interactive computer services. *See Schneider*, 31 P.2d at 40. The legislative history of Section 230 makes clear that Congress intended to extend immunity to all civil claims. *Id.* at 42. As the Fourth Circuit explained in *Zeran*, Congress deliberately chose not to deter harmful online speech by means of civil liability on "companies that serve as intermediaries for other parties' potentially injurious messages." *Id.*

The state law claims that are asserted here seek to treat Defendants as publishers of the allegedly defamatory statements. Defendants are not the information content providers, and they are immune from claims that require them to be a publisher or speaker of the information as an element of the claim.

Here, Defendants are not the information content providers because they did not author the reports that are alleged to be defamatory. Recently, the Ninth Circuit confirmed that even where the website provided a detailed form and a menu of prepared responses that the user could chose from, the website was not the information content provider because the user made the

choice as to which answers would be provided. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. August 13, 2003).

Further, it is well settled that to be an information content provider, the entity must have developed the information at issue. "The development of information, therefore, means something more substantial than merely editing portions of an email and selecting material for publication." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003). The exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, post, or alter content does not transform an individual into an information content provider. *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997). Indeed, the very purpose of the CDA was to overrule case law that had held web hosts liable because they exercised editorial decisions. *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003). Congress' express intent was to remove the disincentive that web hosts previously had to refrain from editorial decisions. *Id.*

The only way that Defendants can be found to be an information content provider is if they created the actual content that Plaintiff claims is false or misleading. *Carafano*, 339 F.3d at 1125. It is not enough that it provided other content on the website. *Id.*

It is of no help to Plaintiff if it alleges that Defendants exercised control over the publication of the allegedly defamatory content. "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." *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D. D.C. 1998).

Case law makes clear that the immunity extends to protect website operators from claims based on the operator's failure to investigate postings or failing to edit or remove inaccurate

postings, and claims based on the website operator making editorial decisions on what to post or not post. *Batzel v. Smith,* 2003 WL 21453358 (9th Cir. 2003).

The Communications Decency Act also prohibits injunctive relief against web site operators. In the case of *Kathleen R. et al v. City of Livermore*, the California Court of Appeals dismissed claims for declaratory and injunctive relief, holding that section 230(c)(1) of the Act prohibited claims for injunctive relief as well as damages. 87 Cal App.4th 684, 697-98, 104 Cal.Rptr.2d 772, 780-81 (2001) (*citing Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983-84 (10th Cir. 2000). In *Ben Ezra, Weinstein, & Co.*, the Tenth Circuit upheld dismissal of state law claims for injunctive relief as well as damages. *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 983-84.

Congress has chosen for policy reasons to immunize from liability for defamatory speech, providers or users of interactive computer services when the defamatory material is provided by someone else. *Id.* One of these policy reasons is to "prevent lawsuits from shutting down websites and other services on the Internet." *Id.*

The Communications Decency Act preempts state law to the extent that state law allows claims against website operators for content they did not create. "Preemption is required where state law conflicts with the express language of a federal statute." *Doe v. America Online*, 783 So.2d at 1015. Further, the Communications Decency Act applies even where the website operator had notice and refused to remove the offending material. *Id.* at 1012-1013.

2. Count I Fails to State A Claim Upon Which Relief Can Be Granted

a. The Elements of a Claim Under 15 U.S.C. §1125

Because the Communications Decency Act contains an exception for intellectual property claims, Plaintiff has included a claim under 15 U.S.C. § 1125, which provides liability against any person who, in connection with any services, uses any false representation of fact, which, in

commercial advertising or promotion, misrepresents the nature, characteristics, or qualities, of another person's services. 15 U.S.C. §1125 also provides that non-commercial use of the mark and all forms of news reporting and news commentary are not actionable under that section.

The false advertising section of the Lanham Act "is intended to prevent confusion, mistake, or deception regarding the characteristics or qualities of goods or services.' *Connecticut Mobilecom*, 2003 WL 23021959, at *9.

b. Prudential Standing is Lacking on the False Advertising Portion of the Lanham Act Claim

In order to bring a Lanham Act claim, the Plaintiff must have standing. There are two components to the standing doctrine. The traditional component refers to Article III standing, requiring a party to show injury, causation, and redressability. *Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001). Beyond constitutional requirements, federal courts also adhere to a second component that bears on the question of standing – a set of prudential principles. *Bauer v. Texas*, 341 F.3d 353, 357 (5th Cir. 2003); *McClure v. Asheroft*, 335 F.3d 404, 411(5th Cir. 2003) (*quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982)).

Prudential standing is a set of rules forming an integral part of judicial self-government. *General Instrument Corp. v. Nu-Tek Electronics*, 197 F.3d 83, 87 (3rd Cir. 1999). The requirements "help courts identify proper questions of judicial adjudication, and further define the judiciary's role in the separation of powers." *McClure*, 335 F.3d at 411 (*quoting Ruiz*, 161 F.3d at 829 n.22). Specifically, those requirements address 'whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit.' *Bennet v. Spear*, 520 U.S. 154, 162 (1997).

As a matter of statutory interpretation, Congress is presumed to have incorporated prudential standing principles, unless the statute expressly negates them. *Conte Bros. Automotive v. Quaker State-Slick 50,* 165 F.3d 221, 227 (3rd Cir. 1998). "Congress did not intend to abrogate prudential standing principles with respect to the Lanham Act." *Logan v. Burgers Ozark County Cured Hams, Inc.*, 263 F.3d 447, 460 n.9 (5th Cir. 2001) (*citing Procter & Gamble*, 242 F.3d at 560-61).

Accordingly, this Court should consider whether the Lanham Act was intended to confer standing upon plaintiffs who allege that they suffered injury by virtue of a non-competitor's allegedly defamatory remarks transmitted via an Internet website. Under those facts, the Northern District of Texas and the Eastern District of Pennsylvania have determined that Congress did not intend for the Lanham Act to be invoked. *Nevyas v. Morgan,* 309 F.Supp.2d 673 (E.D. Pa. 2004) ("despite the fact that plaintiffs may have suffered an injury to their commercial interests, they have not sustained competitive harm. We conclude that plaintiffs here cannot satisfy the prudential requirements to maintain standing to sue under the Lanham Act.") Here, as in the *Nevyas* case, the Defendants are alleged to have defamed the Plaintiff but Defendants are not commercial competitors with the Plaintiff. The Lanham Act is only intended to redress competitive harm. *Id.* at 680.

In *MCW, Inc. v. badbusinessbureau.com, llc,* 2004 WL 833595 (N.D. Tex. 2004), the District Court dismissed Lanham Act claims as against the previous operator of Rip-off Report based on the prudential standing doctrine. The District Court, in a detailed decision, explained why the factors that courts consider weighed heavily in favor of finding that prudential standing was lacking. The injury complained of by plaintiffs – the erosion of plaintiffs' goodwill and reputation and lost sales from potential customers because of the defendants posting of false,

misleading, disparaging, and deceptive messages – is not one that Congress sought to redress through the Lanham Act, because it is not the type of injury that the Lanham Act is aimed at. *Id.* The *MCW* Court recognized that although the plaintiffs' injuries were commercial in nature, the were not competitive in nature. Regarding the Act's second purpose, the *MCW* court found that plaintiffs' alleged reputational harm was not the type of harm addressed by the Lanham Act. Similarly the *MCW* court found that the lack of directness of the alleged injury also suggested that plaintiffs had no prudential standing to bring a claim under § 43(a) of the Lanham Act. Finally the *MCW* court found that another factor considered – the proximity of the party to the alleged injurious conduct – weighed against standing.

Because the Lanham Act was not intended to be used in the manner that Plaintiff seeks to use it, Plaintiff lacks standing to assert claims under the false advertising provision of the Lanham Act.

c. Plaintiff Fails to Satisfy a Requisite Element of the Claim

Section 1125(a)(1)(B) of the Lanham Act requires that "in commercial advertising or promotion," there is a misrepresentation. The use complained of by Plaintiff is not in "commercial advertising or promotion." Although the statute does not define the phrase "commercial advertising or promotion," to qualify as "commercial advertising or promotion, most courts require that the contested representations consist of (1) commercial speech (2) made by a defendant who is in commercial **competition** with plaintiff (3) for the purpose of influencing consumers to buy defendants goods or services, and (4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry." *Nevyas v. Morgan,* 309 F.Supp.2d 673 (E.D.Pa. 2004); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.,* 314 F.3d 48 (2d Cir. 2002); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383, 1384 (5th Cir. 1996). This Court need not inquire any further than the second

and third elements to determine that the Defendants' postings on their websites do not constitute commercial advertising or promotion.

The acts complained of in the Complaint against the Defendants are surely not within the conduct contemplated by Congress in passing the Lanham Act. The Lanham Act is directed only against false representations in connection with the sale of goods or services in interstate commerce. "It has never been applied to stifle criticism of the goods or services of another by one, **such as a consumer advocate**, who is not engaged in marketing or promoting a competitive product or service." (emphasis added). *Wojnarowicz v. American Family Association*, 745 F.Supp 130, 141 (S.D.N.Y. 1990).

The legislative history makes clear that Congress did not intend the Lanham Act to apply to the conduct complained of in this case:

> Under this proposed change only false or misleading "advertising or promotion" would be actionable, whether it pertained to the advertiser itself or another party. The change would exclude all other misrepresentations from section 43(a) coverage. These others are the type which raise free speech concerns, **such as a Consumer Report which reviews and may disparage the quality ... of products, [and] misrepresentations made by interested groups which may arguably disparage a company and its products.**

(emphasis added) S. 1883, 101st Cong., 1st Sess., 135 Cong.Rec. 1207, 1217 (April 13, 1989), as cited in *Wojnarowicz*, 745 F. Supp. at 142.

Because Plaintiff cannot show that the Defendants have used the Plaintiff's marks in commercial advertising or promotion under § 43(a)(1)(B) of the Lanham Act, Plaintiff has failed to state a false advertising claim for which relief can be granted.

V. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court set aside the temporary restraining order entered on September 24, 2004, order Plaintiff's $1,000 bond paid to Defendants, and deny Plaintiff's request for a preliminary injunction.

RESPECTFULLY SUBMITTED this 5th day of October, 2004.

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See Case File For Exhibits

EXHIBIT 2

HUD studies Web sites' role in fair housing compliance

Source: Inman
Date: 10-24-2005 12:00 AM

The U.S. Department of Housing and Urban Development is reviewing complaints of Internet-based real estate postings that may violate the federal Fair Housing Act.

While there are established cases in which newspapers have been found liable for printing ads that are deemed in violation of the federal act, the department is treading in new territory as it considers the wide range of Web sites that carry real estate information.

Some Web sites are passive forums that allow users to post real estate information, for example, while other sites may play a more direct role in preparing and publishing the listings information online.

"We need to look at the actual nature of the Web site," said Bryan Greene, director of the Fair Housing and Equal Opportunity Office at the U.S. Housing and Urban Development Department. "It is a relatively new area. The Web site is a very broad category of publication. We have gotten complaints against a range of Web-page publications."

The federal act states that it is 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."

While the federal act was established decades before the arrival of the Web, Greene said its publishing provisions extend to advertising that appears in any publication, including Internet-based publications.

"Anyone who is advertising in a publication, whether it be a poster, newspaper, or on a Web page - anyone who is submitting that ad - they have to comply," he said. As for the sites that carry information that violates the Fair Housing Act, the department is still deciding how to handle those cases. "We will look individually at the parties and determine if they are liable and the extent to which they are liable."

Greene added, "It's definitely in the interest of the public for publications to make sure the advertisements that they post don't discourage different groups from renting or buying property. Whether someone is liable or not, we always encourage someone to advertise in a non-discriminatory manner." He said he did not have any statistics on whether a non-newspaper-related Web

site that carried a property listing deemed to violate fair housing laws has ever been cited for also violating the Fair Housing Act.

Brian Larson, real estate attorney

Brian N. Larson, a lawyer a who represents Realtor associations and affiliated MLSs, said that though he is not a fair housing expert, "I'm still pretty comfortable suggesting that any medium or Web site that displays discriminatory advertising is likely subject to the same liability as any other. This is consistent with the public policy goal of preventing discrimination, however it may be fostered."

Some Internet companies that maintain Web sites with real estate listings run automatic scans of real estate information to help guard against content that violates the Fair Housing Act.

Homestore, which operates home-search Web sites Realtor.com, HomeBuilder.com and RentNet.com, scans property listings at Realtor.com, said Erin Campbell, a company spokeswoman.

"Most (multiple listing services) scan base data before it is sent to us, but we also scan additional data that is submitted to Realtor.com directly by our customers or through a company feed. We will not accept any listings that do not meet criteria given to us by HUD," she said.

The automated technology enlisted at Realtor.com and other Homestore-operate sites, while it does flag and block potentially discriminatory language, is not flawless.

One real estate agent reported that the system at first rejected a property listing that included the word "Japanese" in a description of a "lovely Japanese maple" tree, for example, and another listing because it contained the word "trash" (presumably because of the "white trash" connotation) in referring to a "trash compactor" at the home. In the first example, the agent rewrote the description as "J.Maple" to bypass the computerized censor.

Campbell said Homestore has not been contacted by HUD regarding any potential fair housing complaints or investigations.

She said the company has scanned all existing, new home and rental listing content before posting it online for several years, based on criteria supplied by HUD. Customers who disagree with a decision that has been made about potentially discriminatory language in their listings can contact a customer service representative, Campbell said.

Craigslist, which operates online community sites in major markets across the globe and carries for-sale and rental property listings posted by its users, "does not monitor listings -- period," said Jim Buckmaster, Craigslist CEO.

"With more than 6 million new free classified ads each month, and a staff of 18, it is not possible for us to do so," he said, adding, "We do, however, provide something much more powerful and effective - a flagging system on every ad, so that users themselves can take action against any ad they find to be problematic. If enough users agree, the ad comes down automatically.

Craigslist immediately removes illegal ads when they are brought to the site managers' attention, he said. And Craigslist posts information and links about the Fair Housing Act in its housing sections, noting that some state and local laws have a broader definition of punishable housing discrimination.

Buckmaster also said he is aware of one current Fair Housing Act investigation involving Craigslist. "We are cooperating ... by removing the listings in question, asking for feedback on how to better inform our users about these regulations, and putting our attorneys at their disposal," he said.

City Limits Weekly reported earlier this year about several landlord postings on Craigslist, stating that people with children need not apply for certain rental units. The postings prompted a housing discrimination complaint to the New York City Commission on Human Rights. The Anti-Discrimination Center of New York filed the complaints against the landlords, according to the article.

Actions by federal lawmakers have buffered Internet sites from liability for content produced by their users, Buckmaster said. "Fortunately Congress has made the determination that it would not be beneficial for society to hold Internet services such as ours liable for postings made by their users."

Though he is not a legal expert, Buckmaster said he suspects that the bar is set higher for newspapers that publish classified ads in violation of the Federal Housing Act because "newspapers have traditionally charged a lot of money for such ads, and have approved and entered each one manually into their systems." Online classified ads can be quickly removed from a Web site, too, he said, while "once published in a newspaper, nothing can be done about a problematic ad."

Pegge McGuire, executive director for the Fair Housing Council of Oregon, a private, nonprofit agency that promotes equal housing opportunities, said she is aware of some very recent complaints against a few online services for fair housing violations based on the sites' postings. "Until there are some final decisions in court we don't really know how that all plays out, but we can make some educated guesses," she said.

She said MLSs, as an example, are "very cautious ... sometimes even more restrictive than we would ever tell them they needed to be," about publishing information that could violate fair housing laws. "The only real difference I see between an entity like an MLS and a site like Craigslist is the potential for market penetration. If it is perceived that an MLS listing has a broader audience or likelihood to impact more people with an advertising violation, there is a higher level of concern for the liability, responsibility and potential damages and penalties that would result if a complaint were filed and the advertiser did not prevail."

Some fair housing complaints have also been filed based on Web links that were posted on a site, she added. "It seems pretty reasonable to me, if you created the link to your page, you should and would know what it said," McGuire said. "In doing training for housing providers, I frequently caution them to try to use links to Web data that cities and counties produce, rather than more subjective sources."

Craig Donato, CEO for Oodle, a search engine for classified ads that pulls real estate and other information from a range of sites and posts links for consumers to access those Web sites directly, said, "We rely on (those sites) to act appropriately. Should we receive notice that a site is not complying with these laws, we'd remove them from our index."

***

What's your opinion? Send your Letter to the Editor to glenn@inman.com; (510) 658-9252, ext. 137.

EXHIBIT 3

BUILDING TRADES APPRENTICE WANTED

Reply to: see below
No contact info listed below? Let them know.
Date: 2006-04-21, 10:31AM CDT

AMBITIOUS YOUNG MAN WANTING TO LEARN BUILDING TRADES.

PLEASE CONTACT BILL @ (312)758-7935 OR (773)935-7935

Compensation: WILL DISCUSS
no -- Principals only. Recruiters, please don't contact this job poster.
yes -- Phone calls about this job are ok.
no -- Please do not contact job poster about other services, products or commercial interests.
no -- Reposting this message elsewhere is NOT OK.

152701012

CNC group leader - 2nd shift

Reply to: job-147038621@craigslist.org
Date: 2006-03-31, 3:54PM CST

Bensenville manufacturing company looking for a trained CNC operator/set-up man that has good managment skills. Position will be responsible for troubleshooting machine, production and some personnel problems on the 2nd shift (3:30-12:00). Experience with CNC mills and lathes a must. Bilingual spanish / english would be a huge benefit

Job location is Bensenville
Compensation: $13-$18 / hour
no -- Principals only. Recruiters, please don't contact this job poster.
no -- Please, no phone calls about this job!
no -- Please do not contact job poster about other services, products or commercial interests.
no -- Reposting this message elsewhere is NOT OK.
yes -- OK to repost to Job Developers for Persons with Disabilities.

147038621

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chicago craigslist > sales jobs > Female Telemarketer Needed
last modified: Tue, 11 Apr 16:22 CDT

please flag with care : [miscategorized] [prohibited] [spam] [discussion] [best of]

email this posting to a friend

Female Telemarketer Needed

Reply to: washington_patrick@yahoo.com
Date: 2006-04-11, 4:22PM CDT

I work for XO Communications and need someone to call potential clients and schedule free telecommunication consultations.

You will be setting appointments for me to run, and will be compensated hourly plus a percentage of commission on each sale from an appointment that you set.

If you are interested, please contact Patrick at 630.371.3175

Job location is Lombard
Compensation: Hourly plus commission
Telecommuting is ok.
This is a part-time job.
no -- Principals only. Recruiters, please don't contact this job poster.
yes -- Phone calls about this job are ok.
no -- Please do not contact job poster about other services, products or commercial interests.
yes -- Reposting this message elsewhere is OK.

150344882

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chicago craigslist > retail/food jobs > BARTENDERS WANTED!
last modified: Sat, 15 Apr 07:04 CDT

please flag with care : [miscategorized] [prohibited] [spam] [discussion] [best of]

email this posting to a friend

BARTENDERS WANTED!

Reply to: bobby_barker1@sbcglobal.net
Date: 2006-04-15, 7:04AM CDT

In search of female bartenders for local pub. New ownership is taking the business in a new direction. Experience is preferred but not required. Flexible work schedule, great income, and an owner who can relate. Owner is young and an experienced bartender (5years) Come on board, bring your friends and lets have some fun and make plenty of money. The first round is on me! :)
Pleae respond via e-mail with as much detailed info about yourself. Pictures are certainly a plus as I am hiring via the computer and need to put a face with a name. The more info the better. We are located on the sw suburbs so please be geographically feasable.

Job location is SW Suburbs/ Crestwood
Compensation: Hourly plus tips
no -- Principals only. Recruiters, please don't contact this job poster.
no -- Please, no phone calls about this job!
no -- Please do not contact job poster about other services, products or commercial interests.
no -- Reposting this message elsewhere is NOT OK.

151370401

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chicago craigslist > education jobs > Part Time (Female) TUTOR needed
last modified: Tue, 4 Apr 13:56 CDT

please flag with care : [miscategorized] [prohibited] [spam] [discussion] [best of]

email this posting to a friend

Part Time (Female) TUTOR needed

Reply to: job-148135169@craigslist.org
Date: 2006-04-04, 1:56PM CDT

Need female tutor to work with high school students Monday, Wednesday and Fridays from 3:15-7:00pm in Mt Prospect tutoring center. Start Immediatley.

Call 847-759-0679 to schedule interview.

Job location is Mt Prospect
Compensation: $10-$12
no -- Principals only. Recruiters, please don't contact this job poster.
no -- Please, no phone calls about this job!
no -- Please do not contact job poster about other services, products or commercial interests.
no -- Reposting this message elsewhere is NOT OK.

148135169

Part-time waitress-

Reply to: enufsed7@aol.com
Date: 2006-03-27, 4:46PM CST

Chicago music venue seeking a vibrant and professional female who is detail oriented and networks well in a fast-paced music environment. Must have some cocktail experience and must be 21 years of age with a love for all types of music.
Please forward a current resume with picture to:

applications77@hotmail.com

Job location is Chicago, Northside-
Compensation: Hourly + tips
This is a part-time job.
no -- Principals only. Recruiters, please don't contact this job poster.
no -- Please, no phone calls about this job!
no -- Please do not contact job poster about other services, products or commercial interests.
yes -- Reposting this message elsewhere is OK.

145772939

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chicago craigslist > etcetera jobs > Spanish/English female for Auto lot in N.W. Indiana
last modified: Sun, 2 Apr 17:05 CDT

please flag with care : [miscategorized] [prohibited] [spam] [discussion] [best of]

email this posting to a friend

Spanish/English female for Auto lot in N.W. Indiana

Reply to: job-147558033@craigslist.org
Date: 2006-04-02, 5:05PM CDT

This is a great opportunity for the right person.

Newer car lot advertising in the Spanish speaking southeast chicago and Hammond area communities needs a personable spansh/english speaking female to learn this lucrative business and make a lot of money.

Will train in all aspects of this business.

If you are truly looking for an opportunity to earn more than $40,000 your first year and well over 100k for all years after please call me.

Great opportunities are hard to find. Check us out. There is no income cieling here.

Doug at 773/306-3885 anytime or 219/996-4600 weekdays

Job location is n.w. Indiana
Compensation: Salary plus commissions
This is an internship job
no -- Principals only. Recruiters, please don't contact this job poster.
no -- Please, no phone calls about this job!
no -- Please do not contact job poster about other services, products or commercial interests.
no -- Reposting this message elsewhere is NOT OK.

147558033

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last modified: Tue, 4 Apr 13:57 CDT

MALE SUMMER DAY CAMP COUNSELORS

Reply to: dweinstein@jcys.org
Date: 2006-04-04, 1:57PM CDT

Looking for a fun summer job??

North Shore Day Camp and NSDC Sports have positions open for energetic, fun-loving junior counselors and counselors . You must be at least a Junior in high school and love working with children ages 5 and up.

Call Danielle at 847-433-6001 x3 or email at dweinstein@jcys.org.

Job location is Highland Park
Compensation: competitive!!!
no -- Principals only. Recruiters, please don't contact this job poster.
no -- Please, no phone calls about this job!
no -- Please do not contact job poster about other services, products or commercial interests.
no -- Reposting this message elsewhere is NOT OK.

148151281
