

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

David Blockowicz, Mary Blockowicz, and Lisa
Blockowicz, individuals,

Plaintiffs,

v.

Joseph David Williams and Michelle Ramey,
individuals,

Defendants.

Civil Action 1:09-cv-03955

Judge Holderman

Magistrate Judge Cox

**NON-PARTY XCENTRIC VENTURES, LLC'S SUR-REPLY TO
MOTION FOR THIRD PARTY ENFORCEMENT OF INJUNCTION**

I. INTRODUCTION

In its original pleading, Xcentric raised five core issues:

1. Plaintiffs' position is based on disputed facts which cannot be resolved without an evidentiary hearing;
2. Rule 65(d) does not allow enforcement of an injunction against a non-party under an "aiding and abetting" theory unless an enjoined party is actually violating the injunction;
3. Plaintiffs have offered no proof that Defendants are the actual authors;
4. The Communications Decency Act Precludes Injunctive Relief; and
5. The Enjoined Statements Were Non-Actionable.

Upon reviewing Plaintiffs' reply, Xcentric intended to submit a short sur-reply explaining various problems in each of Plaintiffs' counter-points. However, because the Court has requested briefing on the specific issue of privity, this sur-reply will focus primarily on that issue with a few short closing remarks on the issue of CDA immunity.

II. ARGUMENT

a. Plaintiffs Have Offered No Evidence That The Named/Enjoined Defendants Are In Privity With Xcentric

Plaintiffs begin by arguing that Xcentric's Terms of Service are a contract which is sufficiently active in nature to support a finding that Xcentric is "in concert" with its users for the purposes of Rule 65(d). Before addressing the other flaws in that position, Xcentric again notes that Plaintiffs have not offered any proof to support a finding that the enjoined parties (Defendants Williams and/or Ramey) are actually the people who created and posted the statements at issue. The only "proof" on this issue is a default judgment which is binding on Mr. Williams and Ms. Ramey but not on Xcentric.

Because the judgment has no evidentiary value as to Xcentric, there is simply no proof to support Plaintiffs' claims of privity. Thus, even if Plaintiffs' legal theory was correct, they have failed to establish the facts supporting that theory.

As before, Xcentric notes that its records reflect that the postings were made by three individuals using three different names, addresses, phone numbers and email addresses. It is possible that these were merely pseudonyms used by Mr. Williams and/or Ms. Ramey, but it is equally possible they were not. Based on *Rockwell Graphic Systems, Inc. v. Dev Industries, Inc.*, 91 F.3d 914, 920–21 (7th Cir. 1996), it is clear that this factual question cannot be resolved on the pleadings. Indeed, the case relied upon by Plaintiffs concurs—more process is required. *See SEC v. Homa*, 514 F.3d 661, 675 (7th Cir. 2008) (observing "this is not a case in which the district court relied on sparse background information ... the court drew its conclusions from extensive hearings.")

b. “Privity” For Purposes Of Rule 65(d) Is Narrow

Turning to the substance of their argument, Plaintiffs’ Reply accurately observes that the Ripoff Report Terms of Service create a contract between Xcentric and its users. After quoting some points from these terms, Plaintiffs summarily suggest: “this legal agreement between Defendants and Xcentric is more than mere passive behavior ... it is sufficient to establish active concert and participation in Defendants’ ongoing violation¹ of the Court’s injunction.” No authority is cited to support this position. Apparently, Plaintiffs’ position is that the existence of *any* past contractual relationship between a party and a non-party is “privity” sufficient for purposes of Rule 65(d) to treat them as a single indistinguishable entity. This is not the law.

First, Rule 65(d) has been held applicable “in a very limited number of cases,” and only under narrow circumstances. *Texas Utilities Co. v. Santa Fe Indus., Inc.*, 553 F.Supp. 106, 112 (D.C.Tex. 1982) (citing *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930)). Moreover, “privity” (in the common contractual sense) is not the applicable standard. *See* 11A CHARLES ALAN WRIGHT *et al.*, *Federal Practice and Procedure* § 2956, at 340 (1995) (emphasis added) (explaining “[a]lthough the rule itself does not speak of ‘privity,’ the concept frequently is used by the federal courts as synonymous with the enumeration in Rule 65(d) of nonparties who may be bound.”) Instead, in this context the word privity has a very narrow and specific meaning.

¹ Xcentric again notes that Plaintiffs have offered no evidence whatsoever showing that *actual notice* of the injunction has been provided to Defendants Williams and/or Ramey. Thus, it is patently incorrect for Plaintiffs to claim that Defendants are violating the injunction.

A helpful explanation of the meaning of privity under Rule 65(d) is found in the district court's decision in *Petersen v. Fee Int'l, Ltd.*, 435 F.Supp. 938 (W.D.Okla. 1975). *Petersen* involved a patent infringement claim relating to tools (wrenches) manufactured and sold by the defendant, Fee. At trial the plaintiff established that Fee's wrenches infringed Petersen's patent. As a result, the district court enjoined Fee, its agents, and those in privity with it, from any further sale of the infringing wrenches. See *Petersen*, 435 F.Supp. at 939–40.

Prior to the lawsuit, Fee entered into a contract for the sale of wrenches to non-party Mitsubishi. After the injunction was entered against Fee, Mitsubishi continued selling wrenches it had previously purchased from Fee even though Mitsubishi admitted it was aware of the injunction. See *id.* at 940. Upon learning of this, Petersen brought an action seeking to hold Mitsubishi in contempt on the basis that it was “in privity” with Fee and was therefore bound pursuant to Rule 65(d).

Following an evidentiary hearing the court agreed that Mitsubishi *was* in contractual privity with Fee but it found this was *not* sufficient to bind Mitsubishi under Rule 65(d). This ruling was based, in part, on a case from the Northern District of Illinois:

Plaintiffs herein urge that privity of contract is a sufficient basis for holding Mitsubishi in contempt. The evidence clearly establishes privity of contract between Defendants and Mitsubishi. Mitsubishi purchased 50,000 FD-800 wrenches from Defendants. This is a successive relationship to the same right of property. Defendants' grant of license to Mitsubishi is in a sense mutual relationship to the same right of property; for, even though Defendants did not have the right to license Mitsubishi, Defendants claimed ownership of '939 and Mitsubishi's claim was derived therefrom. Thus privity exists between Defendants and Mitsubishi in the sense of mutual or successive right of ownership to the same right of property. This is, however, in and of itself insufficient to create liability for contempt on the part of Mitsubishi. As is

clearly stated in *Alemite Mfg. Corporation v. Staff*, *supra*, and *Blatz v. The Fair*, *supra*, the degree of privity required to bind a respondent to the terms of a decree of injunction in which he is not named as a party is that the named defendant and respondent be so identified in interest as to represent the same legal right. This is because the non-party is entitled to his day in court. Thus, if the non-party is to be held bound, the appearance of the party in court must be tantamount to the appearance of the non-party as well. In this case it can hardly be said that the Defendants' appearance in this court in the infringement action is tantamount to the appearance of Mitsubishi. The evidence before the Court indicates that Mitsubishi and the Defendants were and are distinct entities involved in arms length transactions. The Court cannot hold that Defendants and Mitsubishi were so identified in interest as to represent the same legal rights.

Petersen, 435 F.Supp. at 943–44 (emphasis added) (citing *Blatz v. The Fair*, 178 F.Supp. 691 (N.D.Ill. 1959)). In reaching this result, the court explained that “privity” under Rule 65(d) is a narrow term with a different meaning than common contractual privity:

Although Rule 65 ... makes no mention of it, the word “privity” is often used as a synonym for the persons mentioned in Rule 65 as being “their officers, agents, servants, employees and attorneys” and “in active concert or participation.” This is unfortunate because “privity” is a word with many meanings and only some of these meanings express the relationship which must exist between a defendant and a third party if the third party is to be held in contempt for doing the act which the defendant is prohibited to do. In its broadest sense “privity” is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. The meaning attached to the word “privity” in its use as a synonym for the parties described in Rule 65 is the latter relationship, such an identification of interest of one person with another as to represent the same legal right and generally not the first relationship.

Id. at 942 (emphasis added). Numerous other cases have adopted this logic. *See Adcor Indus., Inc. v. Bevcorp, LLC*, 2006 WL 2460864 (N.D.Ohio 2006) (in order to establish privity under Rule 65(d), “The relevant inquiry is whether the person sought to be bound was directly involved in shaping the outcome of the prior litigation such that his interests were adequately represented.”) (quoting *Saga Int'l, Inc. v. Brush and Co., Inc.*, 984

F.Supp. 1283, 1287 (C.D.Cal. 1997) (citing *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1109 (6th Cir. 1981)).

Applying these standards here and even accepting all of Plaintiffs' allegations as true (e.g., that the enjoined Defendants posted something defamatory on Ripoff Report in 2003 and 2009 and therefore agreed to abide by Xcentric's Terms of Service), these isolated events are not sufficient to find that Xcentric is bound under Rule 65(d) because the facts establish nothing more than passive contractual privity between two distinct parties. This is not the sort of active, deliberate conduct needed to show that Xcentric and Defendants have conspired together or that one represents the other. On the contrary, this case is factually analogous to the situation in *Petersen*.

Exactly like in *Petersen*, the allegation here is that a transaction occurred between a non-party (Xcentric) and a party (Mr. Williams and/or Ms. Ramey) long before the court's injunction was issued. Exactly like in *Petersen*, after that transaction was completed, Plaintiffs obtained an injunction against Mr. Williams and Ms. Ramey who are the only enjoined parties. Exactly like in *Petersen*, Xcentric's one-time pre-suit relationship with these enjoined parties is patently insufficient to bind it under Rule 65(d); "The Plaintiffs have totally failed in their proof as to both the Defendants and Mitsubishi. There is no evidence that Mitsubishi and Defendants have done anything together since the entry of the permanent injunction." *Petersen*, 435 F.Supp. at 944.

Just as the district court explained in *Petersen*, this sort of one-time, arm's length pre-trial contract with an enjoined party cannot, as a matter of law, support a finding that Xcentric's interests have been resolved by the judgment. In addition, as Xcentric

explained in its previous brief, Plaintiffs cannot bind Xcentric by claiming that it is “aiding and abetting” the Defendants absent a showing that Defendants are actually violating the injunction; “As Plaintiffs have not shown that Defendants have done anything to make them in contempt of Court, it is not possible for Mitsubishi to be guilty of aiding and abetting the Defendants.” *Petersen*, 435 F.Supp. at 944; *see also Dart v. Craigslist, Inc.*, ___ F.Supp.2d ___, 2009 WL 3416106, *5 (N.D.Ill. October 20, 2009) (recognizing, “[Online] intermediaries are not culpable for ‘aiding and abetting’ their customers who misuse their services to commit unlawful acts.”)

Neither of the two cases cited by Plaintiffs supports a different result. *SEC v. Homa*, 514 F.3d 661 (7th Cir. 2008) involved a massive \$165,000,000 Ponzi scheme in which the enjoined defendant (Mr. Homa) instructed his non-party business partners to transfer millions of dollars out of a frozen bank account in direct violation of an injunction. This type of classic “aiding and abetting” bears no similarity to the facts here.

Likewise, Plaintiffs cite only one case—*Wilder v. Bernstein*, 645 F.Supp. 1292 (S.D.N.Y. 1986)—for the principle that “[t]he existence of a contractual relationship such as Defendants’ and Xcentric’s is more than sufficient to establish the necessary privity for this court to order Xcentric, pursuant to Rule 65(d), to remove the defamatory statements.” Plaintiffs’ Reply (Doc. #31) at 2. However, *Wilder* stands for no such proposition.

Spanning 60 pages, the decision in *Wilder* approved a class action settlement in a 13-year long case involving civil rights claims brought by black Protestant children against the City of New York and various related entities. To make a long story short,

the outcome in *Wilder* was simply that the district court approved the settlement over the objection of certain defendants who claimed that the stipulated injunction required by the agreement was too broad because it required the settling defendants to alter some aspects of their ongoing contractual relationships with non-parties.

In passing dicta, the court commented that this was not automatically beyond the court's power because the defendants could be bound by an injunction and any non-parties acting in concert with the defendants could, in appropriate circumstances, be bound under Rule 65(d). However, because none of those issues were actually before the court, nothing in the ruling discusses the matters further. *See Wilder*, 645 F.Supp. at 1317–1320 (discussing why the stipulated injunction was not facially unenforceable). Given the different facts, *Wilder's* dicta do not support Plaintiffs' theory.

In sum, Plaintiffs' arguments are founded entirely on the concept that by simply using the Ripoff Report website and agreeing to Xcentric's Terms of Service, this "contract" between the author(s) and Xcentric is sufficient "privity" to bind Xcentric under Rule 65(d). This argument is essentially identical to the position considered and rejected by the district court in the well-reasoned *Petersen* decision. None of the authority cited in Plaintiffs' Reply supports a different result.

c. The CDA Applies Here

Pages 5–8 of Plaintiffs' Reply are devoted to explaining why the Communications Decency Act, 47 U.S.C. § 230 does not prohibit the result they are seeking. Because the CDA *does* preclude the result sought, a few comments on this important issue are needed.

Plaintiffs concede that under the CDA, “the Court cannot treat Xcentric as the publisher or speaker of the defamatory statements posted by the Defendants.” Reply at 6. Plaintiffs further concede that courts have held “claims for declaratory and injunctive relief are no less causes of action than tort claims for damages, and thus fall squarely within the section 230(e)(3) prohibition.” *Katheleen R. v. City of Livermore*, 87 Cal.App.4th 684, 698, 104 Cal.Rptr.2d 772 (Cal.App.4th 2001). Plaintiffs additionally concede that the CDA has been construed by another judge of this Court as barring injunctive relief against third-party postings on an interactive website. *See Dart v. Craigslist, Inc.*, ___ F.Supp.2d ___, 2009 WL 3416106 (N.D.Ill. October 20, 2009) (dismissing claims for, *inter alia*, injunctive relief against website used by third parties to post ads soliciting prostitution based on CDA). Finally, Plaintiffs concede that other federal courts have dismissed claims for injunctive relief against Xcentric based entirely on the CDA. *See GW Equity v. Xcentric Ventures, LLC*, 2009 WL 62173, *1 (N.D.Tex.) (granting summary judgment on all claims including one asking “the court to permanently enjoin Defendants from disseminating, using, or publishing disparaging comments about Plaintiff.”)

Despite this, Plaintiffs make the extraordinary claim that the Court may nevertheless order Xcentric to stop publishing the comments at issue because “requiring a website in privity with Defendants to assist in enforcing an injunction, pursuant to Rule 65(d), is *not* the same thing as seeking an injunction against the website.” Reply at 7.

What Plaintiffs are literally saying is this: “We know we can’t get an injunction directly against Xcentric, but we do not agree with the law so we’re going to accomplish

the same result by getting an injunction against someone else and then asking the court to force Xcentric to comply with it by claiming that we're only asking for Xcentric's 'assistance'." Similar attempts to creatively "plead around" the CDA have not fared well. *See Goddard v. Google, Inc.*, 640 F.Supp.2d 1193 (N.D.Cal. 2009) (cautioning, "mere labels and conclusions amounting to a formulaic recitation of the elements of CDA developer liability ... 'will not do.'")

Moreover, the district courts have been clear—the CDA does prohibit the imposition of injunctive relief against a website operator even when no other claims are presented; "Indeed, given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief Accordingly, under § 230, plaintiff may not seek recourse against AOL as publisher of the offending statements; instead, plaintiff must pursue his rights, if any, against the offending AOL members themselves." *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 540 (E.D.Va. 2003) (citing *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (applying § 230 to claims for injunctive relief); *Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907 (E.D.La. 2002) (holding that § 230 provides immunity from claims for injunctive relief); *Kathleen R.*, 104 Cal.Rptr.2d at 781 (same)).

While it strongly disagrees with the conclusion, Xcentric recognizes that many have argued that the CDA is "bad policy". *See Noah*, 261 F.Supp.2d at 539 note 5. However, "it is not the role of the federal courts to second-guess a clearly stated Congressional policy decision." *Id.* Indeed, as the district court aptly noted in *Global*

Royalties, “If it was an unintended consequence of the CDA to render plaintiffs helpless against website operators who refuse to remove allegedly defamatory content, the remedy lies with Congress through amendment to the CDA.” *Global Royalties*, 2007 WL 2949002, *4.

Plaintiff also asserts that the Seventh Circuit has not applied the CDA as broadly as the rest of the country and that it requires a *quid pro quo* from the web operator (that the operator filters offensive content in exchange for immunity under the CDA). This is a misinterpretation of an opinion that is admittedly difficult to follow. *Chicago Lawyers Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). The Seventh Circuit actually rejected Lawyers Committee’s *quid pro quo* argument. 519 F.3d at 669. The Seventh Circuit did state that the CDA is not a general prohibition of civil liability, but explained its statement by stating that the web operator “would become a ‘publisher or speaker’ and lose the benefits of §230(c)(2) if it created the objectionable information.” 519 F.3d at 670. Every court agrees with that proposition. The Seventh Circuit also noted that the CDA is not so broad as to protect a web operator who helps people steal copyright protected material. *Id.* That exception for intellectual property claims is found directly in the language of the statute. These two exceptions to immunity from liability are the only two that were recognized by the Seventh Circuit and are the same exceptions recognized by every circuit. Notably, the Seventh Circuit affirmed the dismissal as against Craigslist under the CDA. *Id.*

III. CONCLUSION

In closing, Xcentric concedes that Plaintiffs' arguments have some superficial appeal. They have been victimized, they say, by their daughter's ex-husband who has spread various lies about them all across the Internet. They have come to this Court seeking aid, and the defendants haven't even bothered to appear and defend their actions. No one can dispute these are highly sympathetic facts.

But Courts cannot ignore the law even when sympathy favors it. Under the facts presented here, Plaintiffs have already obtained all of the relief to which they were entitled, if not more.² As such, their motion must be denied.

Dated: November 23, 2009

Respectfully submitted,

XCENTRIC VENTURES, LLC

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² Xcentric notes that it is not seriously disputed that two of the three postings at issue here were posted in 2003 and that but-for the Defendants' default, any claims based on those statements surely would be barred by the statute of limitations.

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