Jeffrey B. Smith
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
jbsmith@garlington.com
Attorneys for Defendant, Lee Enterprises, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY, Plaintiff, v. BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., and BOONE KARLBERG P.C., Defendants.	Cause No. CV-11-064-M-DWM DEFENDANT LEE ENTERPRISES, INC.'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE RE PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"), through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully files its Response to Plaintiff's Objection to Court Findings; In Re: Preliminary Injunctive Relief (Dkt. 91.)

INTRODUCTION

On August 3, 2011, the U.S. Magistrate Judge entered Findings and

Recommendations (Dkt. 79) regarding Plaintiff, Michael Spreadbury's ("Spreadbury") Request for Preliminary Injunctive Relief.

The U.S. Magistrate recommended Spreadbury's motion for a preliminary injunction be denied. With regard to Lee Enterprises, the U.S. Magistrate pointed out that the Court has already recommended dismissal of the majority of Spreadbury's claims, and his remaining claims as to the "comments" allegedly published by Lee Enterprises could also be dismissed under the Communications Decency Act. Ultimately, the U.S. Magistrate recommended Spreadbury's request for a preliminary injunction be denied, since Spreadbury has not identified serious questions as to the merits of his claim, has not demonstrated the balance of hardships tips in his favor, and has not shown he will suffer irreparable harm. (Dkt. 79.)

Spreadbury objected to the Court's Findings and Recommendations. (Dkt. 91.) However, Spreadbury's objections are without merit and it would be an abuse of discretion for the Court to reject or modify the U.S. Magistrate Judge's recommendations.

ARGUMENT

I. The U.S. Magistrate's Findings and Recommendations Should Be Affirmed.

The U.S. Magistrate correctly recommended Spreadbury's request for preliminary injunction should be denied, because Spreadbury has failed to satisfy

the requirements for a preliminary injunction.

"A party seeking a preliminary injunction must demonstrate (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest." *Earth Is. Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (citing *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7 (2008)). "A preliminary injunction is an 'extraordinary and drastic remedy'; it is never awarded as of right." *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1105 (9th Cir. 2011) (internal quotation and citation omitted).

A. Spreadbury Is Not Likely to Succeed On the Merits.

Spreadbury is not likely to succeed on the merits of his claims against Lee Enterprises; evidenced by the U.S. Magistrate already recommending dismissal of the majority of Spreadbury's claims, since the articles published by the *Ravalli Republic* were privileged pursuant to Montana Code Annotated § 27-1-804(4). (*See* Dkt. 75.)

Further, as articulated in Lee Enterprises' Response Brief in Opposition to Spreadbury's First Request Injunctive Relief, Lee Enterprises cannot be liable for Spreadbury's remaining allegations because the comments made on the *Ravalli Republic's* website were made by thirty party, on-line readers, not the *Ravalli Republic*. (*See* Dkt. 84.)

"Section 230 of the CDA [Communications Decency Act] immunizes providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). Specifically, § 230(c) provides: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c) (1998). "The CDA is intended to facilitate the use and development of the Internet by providing certain services an immunity from civil liability arising from content provided by others." *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). "Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement." *Batzel v. Smith*, 333 F.3d 1018, 1026-1027 (9th Cir. 2003).

Lee Enterprises should be considered an "interactive computer service" as to the claims that Lee Enterprises published defamatory comments about Spreadbury on the *Ravalli Republic* website. As such, they cannot be liable for comments made by third parties on the *Ravalli Republic* website. Consequently, Spreadbury is not likely to succeed on the merits of his remaining claims against Lee Enterprises.

Further, even if the *Ravalli Republic* is considered an "information content provider" under the CDA, it is still immune from liability regarding the comments because they were made by third parties and the *Ravalli Republic* did not create or develop the comments. *See Carafano v. Metrosplash.com.Inc.*, 339 F.3d 1119 (9th Cir. 2003) (even if a party is considered an information content provider, § 230(c) precludes treatment of a publisher if the information was provided by another information content provider).

In his objections Spreadbury again fails to establish the likelihood of success on the merits of his claim, continuing to ignore that the articles published by Lee Enterprises were privileged and that Lee Enterprises cannot be liable for the comments made by third parties on its website.

Accordingly, Spreadbury has not shown a likelihood of success on the merits of his claims against Lee Enterprises and the U.S. Magistrate correctly recommended Spreadbury's request for preliminary injunctive relief be denied.

B. Spreadbury Is Not Likely to Suffer Irreparable Harm.

Similarly, the U.S. Magistrate correctly recommended denial of Spreadbury's request for preliminary injunctive relief, because Spreadbury has not shown a likelihood of suffering irreparable harm.

"Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an

extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, (1997) (*per curiam*); *see also Winter*, 555 U.S. at 22 ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury.") (internal quotation and citation omitted).

Spreadbury seeks an injunctive relief "to stop defamation of character from Defendant Lee Enterprises Inc, . . ." (Dkt. 70:2.) However, Spreadbury's request for preliminary relief and his objections do not provide any claim of irreparable harm which will occur if the preliminary injunction is not granted.

The U.S. Magistrate's recommendations should be upheld.

C. The Balance of Equities Does Not Tip in Spreadbury's Favor, and an Injunction Is Not in the Public's Interest.

Finally, Spreadbury has not demonstrated the balance of hardships tips in his favor. As such, the U.S. Magistrate correctly recommended dismissal of Spreadbury's request for preliminary injunctive relief.

"In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest." *High Sierra Hikers Ass'n v. Moore*, 561 F. Supp. 2d 1107, 1112 (N.D. Cal. 2008) (internal quotation and citation omitted). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,' paying particular attention to the public consequences." *U. S.*

v. Ariz., 703 F. Supp. 2d 980, 1007 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011) (internal quotation and citation omitted). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (internal quotation omitted)); *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1086 (S.D. Cal. 2010), *aff'd*, 645 F.3d 1109 (9th Cir. 2011). "[T]he less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Nat. Resources Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 847 (C.D. Cal. 2007) (internal quotation and citation omitted).

In balancing the equities, Spreadbury has failed to demonstrate the scale tips in his favor. On the contrary, the scale should tip heavily in favor of Lee Enterprises, not Spreadbury, since granting the injunction would prevent Lee Enterprises from publishing privileged information and would be in direct contradiction to the purpose of § 230 of the CDA.

CONCLUSION

The U.S. Magistrate's Findings and Recommendations regarding Spreadbury's request for a preliminary injunction are correct and should be affirmed. Spreadbury is not likely to succeed on his defamation claim because the

articles published by Lee Enterprises were privileged and the comments were made by third parties. Spreadbury has also not shown a likelihood of suffering irreparable harm in the absence of preliminary relief, and the balance of equities tips in favor of Lee Enterprises, not Spreadbury.

DATED this 17th day of August, 2011.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this *Defendant Lee Enterprises, Inc.'s Response to Plaintiff's Objections to Findings and Recommendations of U.S. Magistrate Judge Re Plaintiff's Request for Injunctive Relief* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 1435 words long, excluding Caption, Certificate of Service, and Certificate of Compliance.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2011, a copy of the foregoing document was served on the following persons by the following means:

1, 3 CM/ECF
_____ Hand Delivery
2 Mail
_____ Overnight Delivery Service
_____ Fax
_____ E-Mail

1. Clerk, U.S. District Court

2 Michael E. Spreadbury
P.O. Box 416
Hamilton, MT 59840
Pro Se Plaintiff

3. William L. Crowley
Natasha Prinzing Jones
Thomas J. Leonard
bcrowley@boonekarlberg.com
npjones@boonekarlberg.com
tleonard@boonekarlberg.com
Attorneys for Defendants Bitterroot Public Library, City of Hamilton, and Boone Karlberg P.C.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.