JOSEPH R. GANLEY (5643)
jganley@hutchlegal.com
CHRISTIAN M. ORME (10175)
corme@hutchlegal.com
HUTCHISON & STEFFEN, LLC
10080 West Alta, Suite 200
Las Vegas, NV 89145
Telephone: (702) 385-2500
Fax: (702) 385-2086

I. NEEL CHATTERJEE (admitted *Pro Hac Vice*)
nchatterjee@orrick.com
THOMAS J. GRAY (admitted *Pro Hac Vice*)
tgray@orrick.com
THERESA A. SUTTON (admitted *Pro Hac Vice*)
tsutton@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

Attorneys for Defendant
FACEBOOK, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JONATHAN B. GOLDSMITH,

Plaintiff,

v.

JORDAN R. COOPER, an Individual; CHERYL COOPER DRISCOLL, an Individual; FACEBOOK, INC., a foreign corporation,

Defendants.

Case No. 2:10-cv-01845-RLH-PAL

DEFENDANT FACEBOOK, INC.'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Goldsmith's request for preliminary relief against Facebook should be denied.[1] First, Goldsmith completely ignores the balance of the equities and public interest factors that he must establish weigh in his favor if he is to prevail. For that reason, the Court should deny his motion.

With respect to the only two factors Goldsmith chose to address, he hopelessly fails to carry his burden to show that he is likely to succeed on his claims against Facebook or the presence of any irreparable harm. Goldsmith only alleges that the individual defendants created and published the allegedly improper comments and "stole" his photos. He does not allege that Facebook published or stole anything. As alleged, Facebook is immune from Goldsmith's tort claims under the Communications Decency Act, 47 U.S.C. § 230. Accordingly, he cannot succeed on those tort claims and preliminary relief is not justified.

As to Goldsmith's Wiretap Act allegations, he cannot establish that anyone "intercepted" his photographs, he ignores the fact that the Wiretap Act does not provide for secondary liability, and Goldsmith has not identified any irreparable harm that he has suffered at the hands of Facebook or, if such harm exists, any actions by Facebook that could be enjoined to prevent further irreparable harm.

Accordingly, Facebook respectfully requests that the Court deny Goldsmith's request for preliminary relief against Facebook.

II. FACTUAL BACKGROUND

Facebook, Inc. operates the free and popular online network available at facebook.com, and provides its service to over 500 million monthly active users. Among other features, the Facebook website allows users to communicate among themselves through various messaging tools, including functionality that allows users to post notes on their friends' "Walls." An example of a "Wall" is depicted in Exhibit 2 to Goldsmith's Motion for Preliminary Injunction.

[1] Goldsmith was a Facebook member from January 5, 2005 until October 7, 2010. In order to become a member, Goldsmith was required to agree to Facebook's Terms of Use, which includes a forum selection clause, mandating that all disputes be resolved in California. Such clauses are presumptively valid and enforceable. *Levesque v. Trans Union, LLC*, No. 2:09-cv-01393-RLH-LRL, 2010 WL 3522264, *2 (D. Nev. Sept. 1, 2010). This motion was improperly filed in Nevada and should be denied for that reason alone.

See Dkt. No. 11.

Goldsmith alleges that Defendants Cooper and Cooper Driscoll posted "defamatory and demeaning statements" on one or more user's Facebook "Wall." FAC ¶ 8. Based on this he concludes that "Facebook facilitated, published or neglected to mitigate the defamatory or harassing statements and comments published by Defendant Cooper and Defendant Cooper Driscoll" (FAC ¶ 14) and that Facebook is liable for slander[2] and libel. FAC ¶¶ 29-64. Goldsmith does not allege that Facebook created or otherwise assisted in the creation of the "statements and comments."

Goldsmith also alleges that "Defendant Cooper Driscoll created a false profile on Defendant Facebook's website using a false name and false picture, in order to gain access to Plaintiff's personal and private information." FAC ¶ 27. In so doing, according to the complaint, "Defendant Cooper Driscoll . . . has gained access to Plaintiff's private and secure information." FAC ¶ 28. Based on these allegations, Goldsmith concludes that "Facebook facilitated, published or neglected to mitigate the wiretapping violations by Defendant Cooper and Defendant Cooper Driscoll . . . ." FAC ¶¶ 102, 108.

III. ARGUMENT

Goldsmith's motion for a preliminary injunction must be denied because it fails to meet any of the requirements for injunctive relief. A plaintiff seeking a preliminary injunction must establish: (A) a likelihood of success on the merits, (B) a likelihood of irreparable harm in the absence of preliminary relief, (C) the balance of equities tips in their favor, and (D) an injunction is in the public interest. *McCurdy v. Wells Fargo Bank, N.A.*, No. 2:10-CV-00880, 2010 WL 4102943, at *5 (D.Nev. Oct. 18, 2010) *quoting Winter v. Natural Res. Def. Council, Inc*., 129 S.Ct. 365, 374 (2008). Goldsmith has not satisfied these criteria.

[2] Goldsmith's claims for slander are improper. He appears to recognize that actionable slander requires an audible statement (*see* FAC ¶¶ 30, 39) yet nowhere in his papers does he reference anything other than written content.

A. Goldsmith Cannot Succeed On The Merits Because The CDA Immunizes Facebook Against His Tort Claims

1. Facebook Is Immune From Liability For State Tort Claims

Federal law precludes Goldsmith from any recovery against Facebook under Claims 1 through 4. The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute explicitly immunizes specified entities against state tort claims by mandating that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3); *see also Two Plus Two Publ'g, LLC v. Jacknames.com*, No. 2:09-CV-002318-KJD-LRL, 2010 WL 4281791, at * 3 (D. Nev. Sept. 30, 2010) ("Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party") *quoting Carafano v. Metrosplash.com. Inc*., 339 F.3d 1119, 1122 (9th Cir. 2003). Liability for state tort claims simply cannot be imposed unless the defendant "is responsible, in whole or in part, for the creation or development of information provided through the Internet." 47 U.S.C. § 230(f)(3).

For nearly 15 years, state and federal courts have straightforwardly applied this law to shield providers of interactive computer services from "publisher" liability in tort for content posted by their users of their services and websites. *See e.g., Two Plus Two Publ'g*, 2010 WL 4281791, at * 3; *Raggi v. Las Vegas Metro. Police Dep't*, No. 2:08CV943 JCM (PAL), 2009 WL 653000, at *1 (D. Nev. Mar. 10, 2009) *citing Carafano*, 339 F.3d at 1123-25 and *Batzel v. Smith,*, 333 F.3d 1018, 1036 (9th Cir 2003); *see also Barrett v. Rosenthal*, 40 Cal. 4th 33, 62 (2006); *Ben Ezra, Weinstein, and Co., Inc. v. Am. Online Inc*., 206 F.3d 980 (10th Cir. 2000); *Zeran v. Am. Online, Inc*., 129 F.3d 327, 330-331 (4th Cir. 1997).

The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." 47 U.S.C. § 230(f)(2). Facebook, as the operator of the facebook.com website is protected. *See* Exhibit A attached hereto (*Finkel v. Facebook, Inc., et al*, No.

102578/09 (N.Y. Sup. Ct) September 16, 2009 Order); *see also, Batzel*, 333 F.3d at 1030 (stating "a website is an 'interactive computer service.'"); *Carafano*, 339 F.3d at 1123 ("online newsletter qualified as an 'interactive computer service' under the statutory definition"); *Blumenthal v. Drudge*, 992 F.Supp. 44, 49-50 (D.D.C. 1998) ("AOL is a 'provider . . . of an interactive computer service'").

Goldsmith's sole basis for his claims against Facebook is that Facebook "facilitated, published, or neglected to mitigate the defamatory and harassing statements and comments published by Defendant Cooper and Defendant Cooper Driscoll." *See, e.g.*, FAC ¶ 14. According to the Amended Complaint, Defendants Cooper and Cooper Driscoll "published statements about Plaintiff, including that Plaintiff is a 'faggot' and a 'pedophile.'" FAC ¶ 12. Based on these allegations, Defendants Cooper and Cooper Driscoll, not Facebook, created and developed the allegedly defamatory statements. FAC ¶ 12. Thus, Defendants Cooper and Cooper Driscoll, not Facebook, are the information content providers. 47 U.S.C. § 230(f)(3). Facebook is the interactive service provider and merely provides a service for its subscribers to post unedited messages to each other. 47 U.S.C. § 230(f)(2).

Batzel is instructive here. In *Batzel*, defendant Smith sent an email to the operator of an electronic bulletin board, Mosler, which contained allegedly defamatory statements about the plaintiff. The BBS operator posted the email, after making minor edits, and hundreds of BBS viewers had access to and viewed the defamatory email. The plaintiff sued defendants Smith, Mosler and others for defamation. The BBS operator filed an Anti-SLAPP motion (i.e., motion to strike the complaint). To defeat the motion to strike, Batzel was required "to establish a reasonable probability that [she] will prevail on [her] defamation claim," just as Goldsmith is required to do here. *Batzel*, 333 F.3d at 1024.

In reversing the District Court the Ninth Circuit Court of Appeals found, as has virtually every other court faced with these facts, that the CDA immunizes websites with respect to defamatory content provided by a third party. *Batzel*, 333 F.3d at 1035; *see also, e.g., Doe v. SexSearch*, 502 F. Supp. 2d 719, 725 (N.D. OH. 2007) ("[n]ear-unanimous case law holds that Section 230(c) affords immunity to [interactive computer services (ICSs)] against suits that seek

to hold an ICS liable for third-party content") *quoting Eckert v. Microsoft*, Case No. 06-11888, 2007 U.S. Dist. LEXIS 15295, at *6 (E.D. Mich. Jan. 8, 2007) and *Chi. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006). Because Goldsmith cannot demonstrate a likelihood of success on the merits, he is not entitled to an injunction.

Goldsmith also contends, without any support, that Facebook "neglected to mitigate the defamatory and harassing statements and comments." FAC ¶ 14. Under the CDA, Facebook is not required to "mitigate" any such postings. *See Zeran*, 129 F.3d at 330 (rejecting contention that defendant AOL "had a duty to remove [a] defamatory posting," holding that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content – are barred"); *see also, Green v. Am. Online (AOL)*, 318 F.3d 465, 468 (3rd Cir. 2003).

2. Goldsmith Cannot Establish That Facebook "Intercepted" Anything

In Claims 10 and 11, Goldsmith alleges that Facebook violated Sections 2511(a) and (c) of the Wiretap Act. Goldsmith cannot establish the requisite facts to support these claims.[3]

a. Goldsmith Cannot Establish Interceptor Liability Under Section 2511(a) or (c)

Section 2511(a) makes it illegal to "intentionally intercept[,] endeavor[ ] to intercept, or procure[ ] any other person to intercept" a communication. Section 2511(c) prohibits the intentional disclosure or attempt to disclose "the contents of any wire, oral, or electronic communication, *knowing or having reason to know* that the information was obtained through the interception . . . in violation of this Act." 18 U.S.C. § 2511(c) (italics added). Both asserted Sections require an unlawful "interception" before liability can be imposed.

"Intercept" is defined in the Wiretap Act as the "aural or other acquisition of the contents

[3] In his opening papers it does not appear that Goldsmith is moving for preliminary relief as to the Wiretap Act claims. In an abundance of caution, Facebook has included a discussion of those claims here. Further, Goldsmith's failure to so move signifies Goldsmith's true motivation for asserting these claims against Facebook. Recognizing that the CDA immunizes Facebook from the state tort claims, Goldsmith amended his complaint to assert wiretapping violations against Facebook. To the extent these claims are merely state tort claims in disguise, the CDA also should immunize Facebook as to Sections 2511(a) and (c).

of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). "Interception" requires "acquisition contemporaneous with transmission." *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002); *see U.S. v. Steiger*, 318 F.3d 1039, 1047 (11th Cir. 2003). *Steiger* is instructive. In *Steiger*, an anonymous source accessed Steiger's computer hard drive through a computer virus (which the source uploaded to an online news group), "stole" Steiger's pictures, and then transmitted them to law enforcement, which then used the "stolen" photographs to indict Steiger for violating a series of federal statutes. In denying Steiger's motion to suppress the evidence, the court held

> there is nothing to suggest that any of the information provided in the source's emails to [law enforcement] was obtained through contemporaneous acquisition of electronic communications while in flight. Rather, the evidence shows that the source used a Trojan Horse virus that enabled him to access and download information stored on Steiger's personal computer. This conduct, while possibly tortious, does not constitute an interception of electronic communications in violation of the Wiretap Act.

Steiger, 318 F.3d at 1050.

Like *Steiger*, Goldsmith cannot establish the threshold fact – that someone "intercepted" his pictures while they were being transmitted. At best, Goldsmith can establish that Ms. Driscoll retrieved photos from his Facebook account or elsewhere on the Internet after he provided her access to those photos. FAC ¶¶ 10, 27; *see also* Dkt. No. 11-1, Ex. 3. This same theory was rejected in *Steiger*.

Furthermore, because Goldsmith cannot establish that anyone "intercepted" his photographs, any "disclosure" of them also does not violate Section 2511(c) of the Wiretap Act.

Even if Goldsmith could establish the requisite "interception," he cannot demonstrate that Facebook disclosed any of Goldsmith's supposedly intercepted information. Nor can Goldsmith show, as he must, that Facebook was aware of Ms. Driscoll's activities at all, as Facebook did not learn of the alleged wrongdoing until it was served with Goldsmith's original Motion for Preliminary Injunction. Without that knowledge, his claims fail. *See United States v. Wuliger*, 981 F.2d 1497, 1501 (6th Cir. 1992) (knowledge or reason to know that the interception itself violated the Wiretap Act in essential element of § 2511(1)(d) offense).

b. The Wiretap Act Does Not Provide Secondary Liability

Goldsmith's claims also fail because the Wiretap Act does not provide for secondary liability and his only claims as to Facebook is that it purportedly "facilitated, published or neglected to mitigate the wiretapping violations by Defendant Cooper and Defendant Cooper Driscoll via Defendant Facebook's internet servers." FAC ¶¶ 102, 108. The Wiretap Act does not provide for secondary liability. *See Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1005 (9th Cir. 2006) (declining to expand civil liability under §§ 2702 and 2707 of the ECPA to include conspirators as well as aiders and abettors); *Doe v. GTE Corp*., 347 F.3d 655, 658-59 (7th Cir. 2003) (Easterbrook, J.) (*citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A*., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994)); *Motise v. Am. Online, Inc*., No. 04-1494, 2005 WL 1667658, at *4 (E.D. Va. 2005). Thus, Goldsmith cannot succeed, under any theory, against Facebook for violating the Wiretap Act.

B. Goldsmith Cannot Show Irreparable Harm

Goldsmith has not identified any behavior on Facebook's part that can be enjoined and, thus, cannot show irreparable harm absent injunctive relief. Facebook is not posting any materials – defamatory or otherwise – about Goldsmith. Instead, Goldsmith alleges only that Defendants Cooper and Cooper Driscoll are posting defamatory and harassing statements. FAC ¶ 12. To the extent the Court enjoins the individual defendants in this matter from posting content on Facebook or elsewhere on the Internet, Goldsmith's concerns will be alleviated. Facebook need not be enjoined.

In order for a preliminary injunction to issue, Goldsmith must demonstrate, among other things, that monetary damages are an inadequate remedy. *McCurdy*, 2010 WL 4102943 at *5. Here, Goldsmith demanded that Facebook pay him $25,000 in exchange for its dismissal from this action. *See* Exhibit B attached hereto. Tellingly, Goldsmith does not allege that he demanded that Facebook take any action with regard to Defendants Cooper and Cooper Driscoll. *Id*. Thus, by his own admission monetary relief of $25,000 from Facebook is an adequate remedy for Goldsmith. Consequently, an injunction is not necessary and should not issue.

C. The Balance Of The Equities Tips In Facebook's Favor

Goldsmith's request for preliminary relief also should be denied because he failed to address, as he must, the balance of equities factor. Thus, Goldsmith has provided no basis for the Court to find that he will suffer greater harm without the requested relief than Facebook would suffer if the relief were granted. *Winter v. Natural Resources Defense Council, Inc*., 129 S.Ct. 365, 376 (2008) ("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'") (citations omitted). The Court should deny Goldsmith's motion in light of his failure to address this factor.

Even if Goldsmith had discussed this factor, on balance, the equities weigh in favor of denying Goldsmith's motion as to Facebook. As discussed above, if the individual defendants are enjoined, Goldsmith will be afforded complete relief; Facebook need not be enjoined. In contrast, however, if the Court enjoins Facebook (in contravention of the CDA), this Court could be setting precedent that would allow users of the Internet claiming they have been defamed by others on the Internet to file similar, baseless lawsuits against Facebook and other service providers. Such a result would eviscerate the policies Congress found important enough to enact in the CDA. Such a result could also be interpreted as requiring Facebook and other providers to monitor content – an endeavor Congress refused to impose on interactive computer services. *See Two Plus Two Publ'g*, 2010 WL 4281791, at * 3; *Raggi*, 2009 WL 653000 at *2; *Ben Ezra, Weinstein, and Co*., 206 F.3d 980; *Zeran*, 129 F.3d at 330-331. Accordingly, the balance of equities favors denying Goldsmith's request.

D. An Injunction Is Not In The Public's Interest

In order to obtain an injunction, Goldsmith must establish that the requested relief is in the public's interest. Goldsmith also ignores this factor in his opening papers. Thus, he has failed to carry his burden and his request should be denied on this basis alone. Again, Congress carefully considered the significant public interests at stake when it enacted the CDA and provided immunity to Internet companies like Facebook, which outweigh Goldsmith's frustration with being called names and desire to name a deep pocket defendant. *See Zeran*, 129 F.3d at 330-331 (detailing the policies behind the CDA, including the desire to thwart "the threat that tort-based

lawsuits pose to freedom of speech in the new and burgeoning Internet medium"). There is no evidence that Facebook, itself, posted any of the offending material, intercepted any material, or was even aware of Goldsmith's concerns. An injunction under the circumstances would be entirely antithetical to promoting the public's interest and, consequently, Goldsmith's motion should be denied.

IV. CONCLUSION

Facebook respectfully requests that the Court deny Goldsmith's motion for preliminary injunction on the ground that he cannot demonstrate a likelihood of success on the merits and has not bothered to address two of the three other factors required for preliminary relief. His failure to do so, in spite of this Court's express admonition against filing such a motion, Dkt. No. 10, requires that this motion be denied.

Dated: November 22, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ *Theresa A. Sutton /s/*
THERESA A. SUTTON
Attorneys for Defendant
FACEBOOK, INC.

CERTIFICATE OF SERVICE

On the 22nd day of November 2010, I electronically submitted the foregoing document with the Clerk of the Court for the U.S. District Court, District of Nevada, using the electronic case filing system of the Court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

Dated: November 22, 2010

/s/ *Theresa A. Sutton* /s/
THERESA A. SUTTON