IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

craigslist, Inc. Plaintiff, vs. Henry D. McMaster, in his official capacity as the Attorney General of the State of South Carolina; David Pascoe; Barbara R. Morgan; C. Kelly Jackson; Jay E. Hodge, Jr.; W. Barney Giese; Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett, in their official capacities as South Carolina Circuit Solicitors, Defendants.	Civil Action No. 2:09-cv-01308-CWH DEFENDANTS' REPLY TO PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

At the hearing on February 23, 2010, this Court asked the parties to brief two very specific issues: 1) whether the Court has subject matter jurisdiction of the Declaratory Judgment Act claim in the event the constitutional claims are dismissed; and 2) whether there is a sufficient case or controversy for Article III jurisdiction. The parties submitted their supplemental pleadings on March 10, 2010, and Defendants submit this Reply in response to Plaintiff's Supplemental Brief in Opposition to Defendants' Motion to Dismiss.

II. ARGUMENT

A. Declaratory Judgment

1. §1331 Jurisdiction

Plaintiff concedes the Declaratory Judgment Act does not provide an independent basis for federal court subject matter jurisdiction over Plaintiff's CDA preemption claim, but asserts the Court has jurisdiction under 28 U.S.C. §1331 because the CDA claim arises under the Constitution, laws, or treaties of the United States. In support of its assertion, Plaintiff relies on Ex Parte Young, 209 U.S. 123 (1908), and Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), for the proposition federal courts have jurisdiction to enjoin state officers from violating federal constitutional or statutory rights. Defendants acknowledge federal courts have jurisdiction and authority to enjoin state officers in certain limited circumstances; however, as pled by Plaintiff, this case does not present such a circumstance.

The cases on which Plaintiff relies, including Young and Shaw, involve either specifically enumerated constitutional rights, or an extensive and comprehensive federal statutory scheme clearly intended to completely preempt all state law causes of action. Young (due process, equal protection and Commerce Clause issues); Shaw (ERISA preemption); *see also* Verizon Md. Inc. v. Public Service Comm'n, 535 U.S. 635 (2002) (Telecommunications Act specifically provided for federal court review of state utility commission's determination regarding validity and enforcement of compensation agreement between carriers); Lorillard Tobacco C. v. Reilly, 533 U.S. 525 (2001) (First Amendment claims and comprehensive federal scheme governing advertising and promotion of cigarettes); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) (comprehensive federal scheme governing water quality and pollution); H&R Block Eastern Enterprises, Inc. v. Raskin, 591

F.3d 718 (4th Cir. 2010) (National Bank Act preemption); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001) (federal antitrust laws). Plaintiff's preemption claim in this case is premised on one sentence in §230(e)(3), rather than a comprehensive federal scheme intended to occupy the entire field and preempt all state law, whether consistent or inconsistent with the federal law at issue.

Contrary to the federal statutes at issue in the cases cited above, nothing in §230 indicates a Congressional intent to occupy the entire field of Internet service provider liability, or to create an affirmative cause of action enforceable in federal court.[1] At most, Plaintiff's claim is premised on conflict preemption, which is a defensive claim that cannot be used as a foundation for §1331 jurisdiction. *See* Vaden v. Discover Bank, 129 S.Ct. 1262, 1272 (2009) (well pleaded complaint rule applies to federal court's original and removal jurisdiction, and federal court jurisdiction cannot be predicated on actual or anticipated defense to state court action); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809-810 (1986) (whether a claim arises under federal law for federal question jurisdiction purposes is determined by reference to the well-pleaded complaint, and a defense raising a federal question is inadequate to confer federal jurisdiction); Lontz v. Tharp, 413 F.3d 435, 440-441 (4th Cir. 2005) (citations omitted) (complete preemption is a narrow exception to well-pleaded complaint rule, while conflict preemption is a defense to state allegations and does not confer federal jurisdiction); Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 818 n. 6 (4th Cir. 2004) (*citing* Sonoco Products Co. v. Physicians Health Plan, Inc., 338 F.3d 366 ([4th Cir. 2003]) (conflict preemption is a defense to a cause of action, and well-pleaded complaint rule bars its use as foundation for federal question jurisdiction).

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[1]Plaintiff's construction of §230 would completely occupy the field of state criminal law as to interactive computer service providers. No such intent is expressed in §230. Indeed, the language of §230 clearly precludes such an interpretation.

By essentially ignoring it, Plaintiff attempts to completely avoid the long standing, and still applicable, well-pleaded complaint rule, even though the Court specifically alluded to it during the February 23 hearing. Rather, citing Shaw and Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), for the proposition a person subject to a federal regulatory scheme may seek declaratory relief in federal court to enjoin application of conflicting state regulations, Plaintiff makes the conclusory assertion its federal preemption claim does not arise only as a defense simply because it has brought an action under Young to enjoin Defendants from violating federal law. Significantly, the references Plaintiff cites in both cases are dicta contained in footnotes, and as discussed above, both cases involved a comprehensive federal statutory scheme (ERISA) clearly intended to completely preempt the field on issues regarding employee benefit plans.[2]

Further, neither case indicated federal jurisdiction is appropriate simply because the plaintiff seeks injunctive relief in a case involving the disputed construction and application of a state law in the absence of complete preemption by federal law, or a significant constitutional challenge.[3] If the mere request for injunctive relief against state officials is sufficient to confer federal court jurisdiction, anyone believing he has a federal defense to the enforcement of a valid state law can avoid the well-pleaded complaint rule, and other limitations on federal court jurisdiction, by simply requesting such relief.

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[2]Defendants can find no Fourth Circuit cases adopting the rationale contained in the cited footnotes.

[3]In Fleet Bank, Nat'l Ass'n v. Burke, 160 F.3d 883 (2nd Cir. 1998), the Second Circuit found subject matter jurisdiction under the Shaw footnote is not appropriate when there is a dispute regarding the construction of a state statute. *Id* at 891. The construction of South Carolina's aiding and abetting prostitution statute lies at the heart of this case because in the event the Court finds it has jurisdiction, it will necessarily have to determine whether the statute is consistent or inconsistent with §230 before addressing the preemption question.

Notwithstanding Plaintiff's efforts to obfuscate the issue, §230 does not create a comprehensive federal regulatory scheme governing interactive computer service providers. In fact, the only obligation §230 imposes on providers is to notify customers, in any manner the provider deems appropriate, of commercially available parental control protections to assist in limiting access to material harmful to minors. 47 U.S.C. §230(d). Even without comparison to the ERISA regulatory scheme at issue in Shaw and Franchise Tax Bd., §230 is no "scheme" at all, much less a comprehensive one requiring federal court intervention.

As discussed in Defendants' previously filed memoranda, §230 expressly allows enforcement of consistent state laws, and immunity under §230(e)(3) arises only as a federal defense to a state action (civil or criminal) against an interactive computer service provider that is inconsistent with §230. *See* Cisneros v. Sanchez, 403 F.Supp.2d 588, 593 (S.D. Tex. 2005) (language in §230 clearly does not rise to the level of complete preemption, but only creates a federal defense to certain state causes of action, which does not support federal court jurisdiction); *see also* Viz Media LLC v. Steven M. Spector PC, 2007 WL 1068203 (N. D. Cal. 2007) (unpublished) (assertion of declaratory relief claim based on CDA preemption, standing alone, was insufficient to establish federal question subject matter jurisdiction); R.L. Lackner, Inc. v. Sanchez, 2005 WL 3359356 (S.D. Tex. 2005) (unpublished) (CDA does not completely preempt the field of law governing communications over the Internet, but provides a federal defense which does not trigger federal question jurisdiction); In Re: Baxter, 2001 WL 34806203 (W.D. La. 2001) (unpublished) (mere presence of a federal issue does not automatically confer federal question jurisdiction, and §230 does not affirmatively provide for a cause of action or confer federal question jurisdiction). Therefore, if Counts II and III are dismissed, the well-pleaded complaint rule mandates dismissal of Count I.

2. §1983 Jurisdiction

Recognizing the tenuous nature of its §1331 jurisdiction argument in light of the well-pleaded complaint rule, Plaintiff also asserts 42 U.S.C. §1983 provides an additional and independent basis for federal court subject matter jurisdiction.[4] On the contrary, §1983 does not confer federal court jurisdiction, but merely creates a cause of action, and the mere existence of a cause of action under §1983 does not confer subject matter jurisdiction. Garraghty v. Virginia Retirement System, 200 Fed.Appx. 209, 211 (4th Cir. 2006) (mere existence of a cause of action under §1983 does not confer subject matter jurisdiction on the federal courts); Blue v. Craig, 505 F.2d 830, 836 (C.A.N.C. 1974) (§1983 is not a jurisdictional statute).[5]

It is well established "[f]ederal courts are courts of limited jurisdiction and are empowered to act only in those specific instances authorized by Congress." Goldsmith v. Mayor & City Council of Baltimore, 845 F.2d 61, 63 (4th Cir.1988). "Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to §1983 exists every time a federal rule of law pre-empts state regulatory authority." Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 108 (1989). If Congress intends to completely displace ordinarily applicable state law and confer federal jurisdiction, "it may be expected to make that atypical intention clear." Empire Healthchoice Assur.,

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[4]Plaintiff's implication the Complaint asserted §1983 as a basis for jurisdiction is plainly wrong. The Complaint only referenced §1331 and §1343 as the basis for jurisdiction, and merely cited §1983 as support for the "remedies" sought.

[5]The jurisdictional counterpart for §1983 was traditionally 28 U.S.C. §1343, both parts of the Civil Rights Act of 1871, which gave both a right of action and a grant of federal jurisdiction over that action, and created an enforcement mechanism to secure the equal rights and equal protection of the laws granted by the Fourteenth Amendment. The 1871 Act was separated into substantive and jurisdictional provisions in 1875, but the substantive and jurisdictional sections were still intended to be co-extensive. Blue, 505 F.2d at 836.

Inc. v. McVeigh, 547 U.S. 677, 698, (2006).

As discussed above, §230 does not create a private cause of action for interactive computer service providers to enforce the limited immunity provided therein, and it does not expressly confer federal court jurisdiction. As the Supreme Court stated in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), allowing declaratory judgment actions in federal courts merely because of an anticipated defense based on federal law "would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." *Id.* at 673-674. The Court's warning of 1950 is even more relevant in today's litigious society, and adopting Plaintiff's expansive interpretation of §1983 will open the federal courthouse doors to anyone asserting a federal defense to a state cause of action, and federal jurisdiction over state law claims will become the rule rather than the exception. *See* Fleet Bank, 160 F.3d at 892 ("In almost every area in which state law regulates private conduct, some federal statute can arguably be invoked by the private party to provide the basis for a preemption claim.").[6]

B. Case or Controversy

Again attempting to avoid directly confronting the jurisdictional issues in this case, Plaintiff resorts to arguing the merits of its §230 interpretation rather than addressing the realities of its contentions, and cites case law regarding enforcement of state laws that allegedly violated

[6]Plaintiff relies on Voicenet Communications, Inc. v. Corbett, 2006 WL 2506318 (E.D. Pa. August 30, 2006) (unpublished), as the basis for its assertion §230 creates a right enforceable in a §1983 action. Voicenet appears to be an aberration, and no other court has adopted that court's analysis regarding the scope of §230. Further, the Voicenet court merely addressed whether §1983 provided a cause of action, not whether it gave the federal court subject matter jurisdiction. As discussed above, the mere existence of a cause of action under §1983 is not sufficient to confer federal court jurisdiction.

constitutionally guaranteed rights as support for its assertion there is a justiciable case or controversy in this case. The reality is that when Plaintiff initiated this action, at most there was a difference of opinion between Plaintiff and Defendant McMaster regarding the scope of immunity afforded by §230 as it relates to South Carolina's aiding and abetting prostitution law.[7]

Plaintiff cherry picks statements from the exhibits attached to its Complaint to argue it faces the real threat of imminent prosecution in South Carolina. Taken as a whole, however, the exhibits clearly reveal prosecution was not imminent when Plaintiff ran to this Court in the pre-dawn hours of May 20, 2009, and as stated at the hearing, no prosecution is imminent now. Further, the exhibits and arguments at the hearing reveal it is possible Plaintiff will never face the prospect of prosecution in South Carolina if it indeed took the remedial steps it so loudly proclaims it voluntarily initiated to better monitor the adult services category on its web sites.[8]

The Court specifically asked the parties to brief the jurisdictional issues assuming the constitutional claims in Counts II and III of the Complaint were dismissed. If the constitutional claims are dismissed, the mere "threat" of prosecution under a valid state law is not a sufficient case or controversy to invoke federal court jurisdiction. *See* North v. Walsh, 656 F.Supp. 414, 418-419 (D.C.D.C. 1987) (pending criminal investigation did not present a sufficiently ripe case for federal court jurisdiction). As stated in Defendants' Supplemental Memorandum, because no prosecution

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[7]Plaintiff's repeated contention Defendant McMaster seeks to prosecute it for ad content posted by third parties is patently misleading. As stated at the hearing, if any prosecution is initiated, it will be based on Plaintiff's own knowing conduct, not the "content" of any posted ad.

[8]Plaintiff's assertion it has absolutely no legal obligation to undertake any measures to monitor the ads posted on its web sites flies in the face of its contention §230 constitutes a complete bar to any state action against it. Either Congress enacted a comprehensive federal scheme to regulate interactive computer service providers with the intent to completely preempt state laws, or it did not, and Plaintiff cannot bounce from one theory to the other depending on which is more convenient to the particular argument it is making at the time.

is pending, in order to address Plaintiff's claim, the Court will have to render an opinion regarding the legitimacy of Plaintiff's CDA defense based on "a hypothetical state of facts," which may, or may not, lead to state prosecution. *See* Calderon v. Ashmus, 523 U.S. 740, 746-747 (1998) (declaratory judgment as to validity of a defense the State may, or may not, raise in a habeas proceeding did not present a justiciable case or controversy). In the absence of concrete state action based on established facts, there is no justiciable case or controversy before the Court at this time.

C. Plaintiff's Requested Relief

Again ignoring the subject matter jurisdiction issues, and relying on cases involving comprehensive federal statutory schemes or specific constitutional claims, Plaintiff asserts the Court has authority to grant its request for injunctive relief anyway. Having requested a broad, permanent injunction arguably enjoining the Defendants from enforcing any state criminal laws against it, about which the Court expressed grave concerns at the February 23 hearing, Plaintiff now asks the Court "to craft relief that appropriately protects [Plaintiff's federal rights under Section 230]." (Supp. Br., p. 15). Plaintiff's assertion regarding the extent of those rights, however, requires nothing less than the broad injunction it originally requested.

While claiming the scope of its requested relief is "limited," Plaintiff asks this Court to enjoin Defendants from investigating or prosecuting it "in relation to content posted by third parties on [Plaintiff's] web site." (Supp. Br., pp. 13-15). This case amply demonstrates the incredible reach of such an injunction.

Aiding and abetting prostitution under South Carolina law does not hinge on the "content" of an ad for prostitution, regardless of who provides it, but on the aider and abettor's own knowing conduct. The requested injunction, however, would subject elected state officers to contempt

proceedings in federal court in the event any action is taken against Plaintiff under state criminal laws, not just the prostitution laws, because Plaintiff's contentions in this case demonstrate it will always assert it does not provide the "content" of the advertisements on its web sites, and any action against it is necessarily premised on "content" supplied by a third party. The extent of Plaintiff's contentions are amply corroborated by its assertion §230 protects it from liability "even if it were shown that [Plaintiff] knew of the presence of allegedly unlawful third party postings on its web site." (Supp. Br., p. 16). In other words, Plaintiff seeks an injunction prohibiting criminal action against it even for its own intentional, criminal conduct, a result Congress could not have intended when enacting §230.

Finally, Plaintiff's assertion that a ruling by the Court in this case will clarify and settle the parties' legal relations is inherently misleading. Unless this Court rules §230 bars application of **all** South Carolina criminal laws to Plaintiff, which is what Plaintiff seeks and would be contrary to the express language of §230, a ruling in this case will not settle issues regarding preemption of South Carolina criminal laws other than the aiding and abetting prosecution statute.[9] The Court's concerns regarding the scope of the injunctive relief Plaintiff seeks are well founded, and the Court should disregard Plaintiff's attempt to avoid the subject matter jurisdiction issues and the Court's concerns by simply asserting the Court should decide the case anyway.

[9]Plaintiff is seeking relief as to all state criminal laws, not just the aiding and abetting prostitution statute.

III. CONCLUSION

Based on the foregoing and the issues raised in Defendants' previously filed memoranda, Defendants submit the Court does not have subject matter jurisdiction to hear and decide the declaratory judgment claim asserted in Count I of the Complaint absent the constitutional issues raised in Counts II and III. Therefore, this action should be dismissed in its entirety pursuant to Rule 12(b)(6), FRCP.

Respectfully submitted,

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