COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
CIVIL ACTION NO. 11-618

Nancy Curving,)
Plaintiff)
v.)
)
Peter Frei,)
Defendant)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS

The basis for this motion is as follows:

- Peter Frei, thereafter defendant, is a resident of the Town of Holland and the owner and operator of an "interactive computer service," "The Holland Blog," at http://www.01521.com.
- An anonymous third party user of the Holland Blog left a comment on the Holland Blog accusing Nancy Curving to have "propositioned" to him/her to purchase "CRACK the drug…"
- The defendant neither knows the plaintiff, Nancy Curving, nor does he know who the anonymous third party user is that posted said comment.
- The defendant is neither the author of said comment nor the author of any of the related comments subject to this action.
- On July 27, 2011, plaintiff summoned the defendant to answer plaintiff's complaint which accuses the defendant of having

"made" and "allowed the publication of the comment" which allegedly is defamatory and libelous. Plaintiff's complaint, Count I, par. 13-15, page 2.

- § 230 of Title 47 of the United States Code (47 USC § 230) provides in part:

  "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."

HISTORY of § 230:

§ 230 of the Communications Decency Act (CDA) was not part of the original Senate legislation, but was added in conference with the House of Representatives, where it had been separately introduced by Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) as the Internet Freedom and Family Empowerment Act and passed by a near-unanimous vote on the floor.

Unlike the more controversial anti-indecency provisions which were later ruled unconstitutional, this portion (§ 230) of the CDA remains in force, and enhances free speech by making it unnecessary for Internet Service Providers (ISPs) and other service providers to unduly restrict users' actions for fear of being found legally liable for users' conduct.

The CDA was passed in part in reaction to the 1995 decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct.), which suggested that service providers who assumed an editorial role with regard to user content, thus became publishers, and legally responsible for libel and other torts committed by users.

This CDA was passed to specifically enhance service providers' ability to delete or otherwise monitor content without themselves becoming publishers.

In *Zeran v. America Online, Inc*. (infra), the Court noted:

> Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, **Congress enacted § 230's broad immunity** "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (1997).

In addition, *Zeran* (supra) notes:

> The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obviously chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect. *Zeran,* supra, at 331.

ARGUMENT:

Immunity Under The Communications Decency Act

The Communications Decency Act of 1996 (CDA)\[1]/ is a landmark piece of Internet legislation in the United States, codified at 47 U.S.C. § 230.

§ 230 provides 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 (user). § 230(c)(1).

An "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet." § 230(f)(3). The prototypical service qualifying for this statutory immunity is an online messaging board (or blog) on which Internet subscribers post comments and respond to comments posted by others. See *Zeran v. Am. Online, Inc*., (supra) (discussing operation of messaging board and holding that it was "clearly protected by § 230's immunity"), cert. denied 524 U.S. 937 (1998).

The CDA also preempts state law. "In a clear exercise of its Commerce Power, Congress preempted any contrary state law provisions: "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." *Donato v. Moldow*, 374 N.J. Super. 475, 486 (App. Div. 2005) (quoting § 230(e)(3)).

In passing that Act, Congress intended "to preserve the vibrant and competitive free market that presently exists for the Internet and other

[1] A common name for Title V of the Telecommunications Act of 1996.

interactive computer services unfettered by Federal or State regulation." § 230(b)(2).

Because of this provision and Congress' expressed desire to promote unfettered speech on the Internet, the sweep of § 230 preemption includes common law causes of action, *Zeran*, supra, at 334.

By its plain language, the CDA creates a federal immunity to any causes of action that would make service providers liable for information originating with a third-party user of the service. *Donato*, supra, at 490 (quoting *Zeran*, supra, at 330-331). Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. 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. Id.

The language of § 230 sets forth three criteria to qualify for the immunity provided:

(1) Immunity is available only to a "provider or user of an interactive computer service." § 230(c)(1).

(2) The liability must be based on the defendant having acted as a "publisher or speaker." Ibid.

(3) Immunity can be claimed only with respect to "any information provided by another information content provider." Ibid.

In analyzing the availability of the immunity offered by § 230(c)(1) courts generally apply this three-prong test which creates the following three dispositive issues:

(1) Whether defendant is a "provider or user of an interactive computer service."

(2) Whether, by his conduct, the defendant acted, and the plaintiff treated defendant as a "publisher or speaker."

(3) Whether the libelous comment(s) were "provided by another information content provider," (third party user.)

In order to be immune from liability under § 230, the defendant needs to comport with all three dispositive issues \[2]/:

(1) The defendant is a "provider or user of an interactive computer service." The defendant is the owner of the domain name www.01521.com and provides "The Holland Blog," at this Uniform Resource Locator (URL), an interactive computer service.

(2) The defendant acted, and the plaintiff treated defendant as the "publisher or speaker" of said comment(s) which allegedly is defamatory and libelous. Plaintiff's complaint, count I, par. 13-15, page 2.

(3) The libelous and slanderous comment(s) where "provided by another information content provider," (user.)

The defendant therefore meets all the requirements of the three prong test, (see also footnote 2).

---

[2] Defendant, in support of his motion to dismiss and this memorandum offers attached Affidavit affirming that defendant is a "provider or user" of an "interactive computer service;" that defendant is, and plaintiff treats defendant "as the publisher or speaker" of the allegedly libelous information at issue (count 1 par. 13-15, page to plaintiff's complaint); the defendant is not the author or "information content provider" of any of the comments mentioned under paragraph 2, page 3, or reproduced in exhibit A on page 1 and page 2 in plaintiff's complaint.

The Immunity § 230 Provides Is A Sweeping One:

Most frequently "interactive computer service providers" enjoy immunity from civil suits for libel under § 230. See e.g., *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004). Many other causes of action can be premised on the publication or speaking of, what can be called, "information content." An information services provider might get sued for violating anti-discrimination laws, see e.g., *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); for fraud, negligent misrepresentation and ordinary negligence, see e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), cert. denied, 129 S.Ct. 600 (2008); for false light, see, e.g., *Flowers v. Carville*, 310 F.3d 1118 (9th Cir. 2002); or even for negligent publication of advertisements that cause harm to third parties, see, e.g., *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11 Cir. 1992). § 230 not only protects information services providers from liability for simply publishing "information content;" § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions, "lawsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred. The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998). In *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-53 (D.D.C. 1998), the court upheld AOL's immunity from liability for defamation. The Court noted that Congress made a policy choice by "providing immunity even where the

interactive service provider has an active, even aggressive role in making available content prepared by others"\[3]/. AOL's agreement with the contractor allowing AOL to modify or remove such content did not make AOL the "information content provider" because the content was created by an independent contractor. In *Zeran*, supra (4th Cir. 1997), immunity was upheld against claims that AOL unreasonably delayed in removing defamatory messages posted by third party, failed to post retractions, and failed to screen for similar postings. “Thus, what matters is not the name of the cause of action — defamation versus negligence versus intentional infliction of emotional distress — what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, § 230 precludes liability.” *Barnes v. Yahoo!, Inc.*, 565 F.3d 560, 566 (9th Cir. 2009).

The defendant’s blog does includes the following disclaimer, see page 3, exhibit A of plaintiff’s complaint:

> Peter Frei and guest writers of the Holland Blog are not responsible for the content of comments posted or for anything arising out of use of the comments or other interaction among the users. We reserve the right to screen, refuse to post, remove or edit user-generated content at any time and for any or no reason in our absolute and sole discretion without prior notice, although we have no duty to do so or to monitor any public forum.

---

[3]) In par. 4, page 1 of plaintiff’s complaint, plaintiff states as fact that defendant “solicits comments from members of the community.

Defendant's disclaimer is consistent with the protections granted to the defendant as a, "provider or user of an interactive computer service" under § 230 of Title 47 of the United States Code.

"None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability." *Zeran*, supra at 330.

Plaintiff, by her letter dated July 20, 2011, demanded "name, e-mail address and address of the party that posted the items," and, "that you [defendant] remove the above listed posts forthwith." Plaintiff threatened with legal action if defendant would fail to comply by July 5, 2011. Plaintiff's letter attached to complaint as exhibit B. (The letter dated July 20 was obviously written on June 20, 2011.)

Minutes after defendant received plaintiff's letter, defendant called plaintiff's attorney and informed his secretary that defendant was not in the possession of the requested information and that defendant would not delete the comments. Defendant stated that he would call to let plaintiff know so no time would be wasted in finding the culpable party to give him/her an opportunity to verify his claim or to take responsibility if his comment is in fact libelous.

As "provider or user of an interactive computer service," defendant respects the first Amendment rights of its users and refrains from censoring content provided by its users. If defendant would simply delete any comments alleged to be defamatory or libelous by the targeted individual, users would not really have a voice.

Defendant's "interactive computer service," the Holland Blog, is hosted on a server of **Lanset America Corp. /Hostik, 10321 Placer Lane, Sacramento, CA 95827, phone: (916) 366 0170.**

Hostik is required to maintain logs of IP addresses of users accessing their servers over the internet, whether these users just access information or act as information content provider.

To protect the privacy of every individual, IP addresses are just numbers. The corresponding user names assigned to IP addresses are only available to members of the Law Enforcement Community and members of the Judiciary Branch.

WHEREFORE, the defendant moves to dismiss plaintiff's complaint in its entirety for plaintiff's failure to state a cause of action.

Respectfully submitted by the defendant,

Peter Frei
101 Maybrook Road
Holland, MA 01521
phone (413) 245 4660
August 2st, 2011

_____
Peter Frei

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following by hand delivery:

E. John Anastasi, Esquire
Anastasi & Associates, P.C.
P.O. Box 552, 245 Main Street
Oxford, MA 01540
August 2st, 2011

_____
Peter Frei