IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT AT NASHVILLE

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D.C.

BILLY CULLEN, CLAUDETTE CULLEN, TRACY CULLEN, JERRY FROELICH, DANA BARRETT, KAREN SAWYER, and MIKE GREEN,	)	
Plaintiff,	)	
v.	)	Case No. 04 C 197
PHILLIP YBARROLAZA and JOHN DOES 1-10,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT PHILLIP YBARROLAZA'S MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT

NOW COMES defendant, Phillip Ybarrolaza ("Defendant Ybarrolaza"), pursuant to Tennessee Rule of Civil Procedure 12.02 and Section 230 of the Communications Decency Act, and respectfully submits this Memorandum in Support of his Motion to Dismiss Plaintiffs' Amended Complaint ("Motion to Dismiss"). In support of his Motion to Dismiss, Defendant Ybarrolaza states as follows:

OPENING STATEMENT

The Plaintiffs' suit has no merit against Defendant Ybarrolaza. From California, Defendant Ybarrolaza operates a website accessible to anyone on the Internet. Defendant Ybarrolaza's website, Teamster.net, allows third parties to publish uncensored statements and comments on the website's bulletin board service. See Am. Comp. at ¶ 4. In this case, certain unknown third parties have posted uncensored comments on Teamster.net that arguably relate to the Plaintiffs. See Ver. Compl. at ¶ 5; Am. Comp. at ¶¶ 5-6. The Plaintiffs have filed suit

against Defendant Ybarrolaza for the publication of these third-party communications they allege to be defamatory. See Am. Comp. at ¶ 8.

Because Defendant Ybarrolaza does not have sufficient contacts with the State of Tennessee, this Court cannot exercise personal jurisdiction over Defendant Ybarrolaza. Moreover, as a provider of an interactive computer service, Defendant Ybarrolaza enjoys immunity from the Plaintiffs' claims brought against him for the uncensored communications of third-parties posted to his website. Consequently, there exist no grounds upon which the Plaintiffs may proceed against Defendant Ybarrolaza in this action. With this Motion to Dismiss, Defendant Ybarrolaza seeks to dismiss the Plaintiffs' action as to him in its entirety. Moreover, the Defendant seeks sanctions against the Plaintiffs for their oppressive and bad faith conduct in pursuing these claims against him in light of a clear lack of personal jurisdiction and statutory immunity.

BACKGROUND

Defendant Phillip Ybarrolaza operates the website known as "Teamster.net." As the Plaintiffs admit in their Amended Complaint, Defendant Ybarrolaza is a California resident. See Am. Compl. at ¶ 3. In operating Teamster.net, Defendant Ybarrolaza facilitates the availability of information of interest to Teamsters. In addition, Defendant Ybarrolaza facilitates the uncensored publication of third-party communications through a "Shout Box" and numerous forums accessible through Teamster.net. These forums are akin to electronic bulletin board systems. Defendant Ybarrolaza does not censor or moderate the communications posted through the "Shout Box" and/or forums by third parties.

In December 2003, certain unknown third parties utilized the Teamster.net forums to publish communications arguably relating to the Plaintiffs. These third-party communications

form the basis of the Plaintiffs' claims against the Defendants, including Defendant Phillip Ybarrolaza.

On January 21, 2004, the Plaintiffs filed suit against Defendant Phillip Ybarrolaza and John Does 1-10. See generally Ver. Comp. Plaintiffs have since filed an Amended Complaint. See generally Am. Compl. Defendant Phillip Ybarrolaza now files his Motion to Dismiss and this accompanying memorandum in support thereof.

ARGUMENT

Defendant Ybarrolaza seeks to dismiss Plaintiffs' Amended Complaint in its entirety. Defendant Ybarrolaza contends that the Plaintiffs' claim can be dismissed pursuant to Tennessee Rule of Civil Procedure 12.02(2) because this Court does not have personal jurisdiction over him. Alternatively, should the Court choose not to dismiss the Plaintiffs' claim on this basis alone, Defendant Ybarrolaza contends that the Plaintiffs' claim should be dismissed pursuant to Rule 12.02(6) for failure to state a claim as Section 230 of the Communications Decency Act provides immunity to providers of interactive computer services for the uncensored publications of their third-party subscribers and/or users.

I. LACK OF PERSONAL JURISDICTION

The Defendant Ybarrolaza seeks to dismiss the Plaintiffs' claim[1] because this Court lacks personal jurisdiction over him. Specifically, the postings at issue in the Amended Complaint do not give rise to personal jurisdiction over Defendant Ybarrolaza, a resident of California.

A. 12.02 Standard

A plaintiff bears the ultimate burden of demonstrating the existence of personal jurisdiction over a defendant. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S.Ct. 780, 785 (1936); Massachusetts School of Law at Andover, Inc. v. American Bar

Ass'n, 142 F.3d 26, 34 (1st Cir. 1998). When a defendant challenges personal jurisdiction over him by motion, a plaintiff must set out specific facts that demonstrate the existence of personal jurisdiction over the defendant. See Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.2d 846, 854-855 (Tenn. Ct. App. 2000). Although a Court must construe the pleadings and affidavits in the light most favorable to the plaintiff, CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996), it should not "struthiously . . . 'credit conclusory allegations or draw far-fetched inferences.'" See Massachusetts School of Law at Andover, Inc., 142 F.3d at 34 (quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994)); Chenault v. Walker, 36 S.W.3d 45, 55-56 (Tenn. 2001). When the Court concludes that the plaintiff has failed to state a prima facie case for jurisdiction after having collectively considered all of the specific facts alleged by the plaintiff, the Court must dismiss the defendant. See CompuServe, 89 F.3d at 1262; Manufacturers Consolidation Serv., Inc., 42 S.W.2d at 854-855.

B. Internet Postings Insufficient for Personal Jurisdiction

Under the principles of personal jurisdiction adopted in Tennessee, this Court lacks personal jurisdiction over Defendant Ybarrolaza whose lack of contacts with the State of Tennessee preclude the exercise of either general or specific personal jurisdiction.

1. Tennessee Long-Arm Statute and Personal Jurisdiction

Tennessee's Long-Arm Statute has been codified as Tennessee Code Annotated § 20-2-214 ("Tennessee Long-Arm Statute").[2] The Sixth Circuit has interpreted the jurisdictional limits

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[1] In their Amended Complaint, the Plaintiffs have reduced their claims to one count of defamation.

[2] 20-2-214. Jurisdiction of persons unavailable to personal service in state - Classes of actions to which applicable.

(a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

(1) The transaction of any business within the state;

(2) Any tortious act or omission within this state;

(3) The ownership or possession of any interest in property located within this state;

of the Tennessee Long-Arm Statute to be identical to those imposed by the Due Process Clause of the United States Constitution. See Payne v. Motorists' Mut. Ins. Cos., 4 F.3d 452, 455 (6th Cir.1993). Consequently, a court "need only determine whether the assertion of personal jurisdiction . . . violates constitutional due process." Aristech Chemical Int'l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 627 (6th Cir. 1998) (quoting Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., 91 F.3d 790, 793 (6th Cir. 1996). As such, the Court can limit its inquiry to determining whether the exercise of personal jurisdiction passes constitutional muster. See id.

2. Constitutional Determinations of Personal Jurisdiction

Personal jurisdiction may be exercised over an individual where the individual has certain minimum contacts with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Depending on the particular circumstances of a case, jurisdiction may be of a general nature or specific nature. See Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994).

a. *General Jurisdiction*

General jurisdiction arises from "continuous and systematic contacts with the forum state sufficient to justify the state's exercise of judicial power with respect to any and all claims." Aristech Chem. Int'l Ltd., 138 F.3d at 627. Because Defendant Ybarrolaza does not have

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(4) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;
(5) Entering into a contract for services to be rendered or for materials to be furnished in this state;
(6) Any basis not inconsistent with the constitution of this state or of the United States;
(7) Any action of divorce, annulment or separate maintenance where the parties lived in the marital relationship within this state, notwithstanding one party's subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or marital dissolution agreement, if the other party to the marital relationship continues to reside in this state.

(b) "Person," as used herein, includes corporations and all other entities which would be subject to service of process if present in this state.

"continuous and systematic contacts" with Tennessee and the Plaintiffs' Amended Complaint does not allege such contacts, general jurisdiction is not applicable to the instant matter. See id. Moreover, because the Plaintiffs' cause of action relates to and stems from Defendant Ybarrolaza's specific alleged contacts with Tennessee, the court must determine whether specific jurisdiction exists over Defendant Ybarrolaza.[3] See id.

b. *Specific Jurisdiction*

Specific jurisdiction is suit specific. The Sixth Circuit has established three criteria that must be met before a Court may exercise specific personal jurisdiction. See Southern Mach. Co., Inc. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). First, a court must consider and determine whether the defendant has purposefully "established minimum contacts within the forum State" or "personally availed" himself of the forum State so as to invoke the benefits and protections of its laws. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174 (1985). Next, the Court must conclude that the claims in the particular suit arise from the defendant's alleged contacts with the forum State. See id.; RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997). In essence, specific personal jurisdiction is suit specific. Finally, the Court must consider whether the exercise of personal jurisdiction based upon the defendant's specific contacts comports with traditional notions of substantial justice and fair play. In other words, the court must determine whether the exercise of personal specific jurisdiction would be reasonable and fair under the circumstances. See RAR, Inc., 107 F.3d at 1276-77; Southern Mach. Co., Inc. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968).

(c) Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative.

[3] "Most courts considering the significance of internet activity for the exercise of personal jurisdiction have done so in the context of a specific, rather than general, jurisdictional analysis." Citigroup Inc. v. City Holding Co., 97 F.Supp.2d 549, 570-71 (S.D.N.Y.2000). While operation of an interactive website may support specific

"Purposeful availment" remains the crucial factor in such a determination. See Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1273 (6th Cir. 1998). To satisfy this factor, a plaintiff must demonstrate that the defendant's contacts with the forum state "proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State," and that based upon these actions the defendant "should reasonably anticipate being haled into court" in the forum State. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996) (quoting Burger King Corp., 471 U.S. at 474-75)). This requirement prevents a defendant from being haled into a jurisdiction on the basis of "random," "fortuitous," or "attenuated" contacts. Id. However, the satisfaction of the purposeful availment factor does not require a defendant's physical presence in the forum state. Id. at 1264. Consequently, in some circumstances, a foreign operator of a website could purposefully avail himself of the forum state. That being said, such circumstances do not exist here.

c. *Specific Jurisdiction and Websites*

In the Sixth Circuit, an individual or operator of a website purposely avails himself of the forum jurisdiction when "the website is interactive to a degree that reveals specifically intended interaction with residents of the state." Bird v. Parsons, 289 F.3d 865, 874 (6th Cir. 2002) (quoting NeoGen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 891 (6th Cir. 2002)). In determining the level of interactivity that amounts to purposeful availment and, thereby, personal jurisdiction, many courts have relied upon the "sliding scale" set forth in Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). See NeoGen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002); First Tennessee Nat. Corp. v. Horizon Nat. Bank, 225 F.Supp.2d 816, 820 (W.D. Tenn. 2002). The Zippo Court found:

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jurisdiction, it remains unlikely that the same operation will support general jurisdiction. See Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp 1119, 1124 (W.D.Pa.1997).

> that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

See Zippo, 952 F. Supp. at 1124 (citations omitted).

Of the few cases in the Sixth Circuit that have addressed this issue, the courts have found defendants to have purposefully availed themselves of the forum jurisdiction where their websites exhibited a commercial, interactive nature.[4] In Bird, the Court found that a defendant had purposely availed itself of the forum state with sales of approximately 4,666 domain names to residents of the forum state. See Bird, 289 F.3d at 874. Specifically, the Court held "that by maintaining a website on which Ohio residents can register domain names and by allegedly accepting the business of 4,666 Ohio residents, the Dotster defendants have satisfied the purposeful-availment requirement." Id. In Bridgeport Music, Inc. v. Still N The Water Pub., the Court found that a defendant had purposely availed itself of the forum state where it had sales of approximately 70 albums with residents of the forum state. See Bridgeport Music, Inc. v. Still N The Water Pub., 327 F.3d 472, 484 (6th Cir. 2003). In First Tennessee, the court found that the defendant, through its website, "purposefully availed itself of the privilege of acting in the forum

[4] In NeoGen, the court analyzed the defendant's website but did not reach a specific conclusion on whether the website alone would amount to purposeful availment because other factors apart from the website enable it to reach this conclusion.

state by maintaining a website that permits Tennessee residents to obtain mortgage loans, obtain expert loan advise, and receive daily commentary." First Tennessee, 225 F. Supp.2d at 821. Consistent with Zippo, the Western District of Tennessee found a wholly passive website to be insufficient to find purposeful availment. See Bailey v. Turbine Design, Inc., 86 F.Supp.2d 790, 795 (W.D. Tenn. 2000).

d. Teamster.net Does Not Give Rise to Specific Jurisdiction Over Defendant Ybarrolaza

Here, Defendant Ybarrolaza operates a website from California. The website does not sell any products, and the Plaintiffs have not alleged that it does. The website is not of a commercial nature, and the Plaintiffs have not alleged that it is. Rather, the website "offers news, links to local unions, and election information pertinent to Teamster activities across North America." See Am. Compl. at ¶ 4. Indeed, the website is predominantly passive. Although the website does have a limited interactive feature where individuals can post their own content and messages on the website's internet bulletin board system, this communication does not result in any further action from the website or Defendant Ybarrolaza. Moreover, Defendant Ybarrolaza and the website's interactive message board do not target individuals in any particular jurisdiction. Specifically, they do not target residents of Tennessee. The Plaintiffs have not alleged anything to the contrary. Consequently, Defendant Ybarrolaza and his website Teamster.net can be distinguished from those in Bird, Bridgeport Music, and First Tennessee. Indeed, interactive message boards alone do not give rise to purposeful availment and long-arm jurisdiction. See Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002) (no jurisdiction in Texas over New York defendant that maintained website where purportedly defamatory article was published because there was no evidence that the website targeted Texas internet users); Barrett v. Catacombs Press, 44 F.Supp.2d 717, 729 (E.D. Pa. 1999) (no jurisdiction in Pennsylvania over

a nonresident defendant for posting allegedly libelous information on an interactive website message board because plaintiff failed to allege that defendant's comments specifically targeted Pennsylvania users); Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc., 989 F. Supp. 265, 272-273 (D. D.C. 1998) (no jurisdiction over nonresident defendant that purportedly posted defamatory material on an AOL bulletin board where the material was not sent to or from the District of Columbia and the subject of the message was unrelated to the District of Columbia). Thus, the Teamster.net website is insufficiently interactive to find that Defendant Ybarrolaza purposely availed himself of Tennessee. See id.

3. Defendant Ybarrolaza Did Not Purposely Avail Himself of Tennessee

The Plaintiffs admit that Defendant Ybarrolaza is a California resident. See Am. Compl. at ¶ 3. The Plaintiffs acknowledge that Defendant Ybarrolaza's website, Teamster.net, "offers news, links to local unions, and election information pertinent to Teamster activities across North America." See Am. Compl. at ¶ 4. Further, the Plaintiffs acknowledge that Teamster.net hosts an "internet bulletin board service" that, by definition, is accessible to anyone on the Internet. See generally id. Beyond the publication of the statements written by Defendants John Does 1-10, the Plaintiffs allege no further interaction with the State of Tennessee by Defendant Ybarrolaza. See generally Am. Compl. The Plaintiffs do not allege that Teamster.net or Defendant Ybarrolaza specifically target residents of Tennessee. See id. Further, the Plaintiffs do not allege that Teamster.net's "internet bulletin board service" specifically targets residents of Tennessee. See id. Finally, the Plaintiffs do not allege that the statements at issue were targeted solely for residents of Tennessee. See id. The website Teamster.net is noncommercial. Moreover, the predominant passive nature of the website and the interactive message board, without more, do not give rise to purposeful availment and personal jurisdiction. See Bailey, 86

F.Supp.2d at 795; Revell, 317 F.3d at 471; Barrett, 44 F.Supp.2d at 729; Mallinckrodt Medical, Inc., 989 F. Supp. at 272-273. Consequently, the Plaintiffs have failed to allege that Defendant Ybarrolaza has purposely availed himself of the privileges of Tennessee. See id.

4. Conclusion

Because Defendant Ybarrolaza's alleged conduct does not give rise to purposeful availment, the Plaintiff has failed to allege any further basis demonstrating that Defendant Ybarrolaza has purposefully availed himself of Tennessee, and Defendant Ybarrolaza has not purposefully availed himself of Tennessee, the Court should dismiss Defendant Ybarrolaza from the Amended Complaint with prejudice. See CompuServe, 89 F.3d at 1262; Manufacturers Consolidation Serv., Inc., 42 S.W.2d at 854-855.

II. FAILURE TO STATE A CLAIM - COMMUNICATIONS DECENCY ACT

Should the Court conclude that it does have jurisdiction over Defendant Ybarrolaza, the Court should dismiss the Amended Complaint as to Defendant Ybarrolaza pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure because § 230 of the Communications Decency Act provides immunity to Defendant Ybarrolaza and supersedes any contrary state law, particularly § 29-24-101, et seq., Tenn. Code Ann. As such, the Amended Complaint fails to state a claim upon which relief can be granted against Defendant Ybarrolaza. Rule 12.02(6) is based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Dyer v. Intera Corporation, et al., 870 F.2d 1063, 1066 (6th Cir. 1989). In deciding a motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a Court will accept all well-pleaded facts as true and will draw all reasonable inferences in favor of the Plaintiff. See Hernandez v. City of Goshen, 324 F.3d 535, 537 (7th Cir. 2003). However, a Court must dismiss any claim where it appears beyond all doubt that the Plaintiff can prove no set of facts that would entitle him to relief. See id.

A. Introduction to Section 230

The Plaintiffs claim that Defendant Ybarrolaza should be liable for defamation solely because he published the statements written by John Does 1-10. See Am. Compl., ¶ 8 ("Defendant Ybarrolaza, by publishing written false statements on the internet bulletin board which were intended to impeach Plaintiffs' honesty, integrity, virtue, chastity, marital fidelity, or reputation, defamed Plaintiffs."). As such, the Plaintiffs seek to treat Defendant Ybarrolaza as the publisher of "information provided by another information content provider." See 47 U.S.C. § 230(c)(1); see also Green v. America Online, 318 F.3d 465, 470 (3d Cir.2003) (holding that chat room messages written by an AOL member are information "provided by another information content provider"). Section 230 of the Communications Decency Act prohibits this. Indeed, Section 230 states 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)(l). Because Defendant Ybarrolaza is a provider of an interactive computer service and did not author, create or provide for publication the content at issue, this Court must conclude that Section 230 precludes any finding of liability with respect to Defendant Ybarrolaza on this basis. See 47 U.S.C. § 230(c)(l).

B. Section 230 and Immunity for Interactive Computer Services

Section 230 of the Communications Decency Act, codified as 47 U.S.C. § 230, "creates a federal immunity to any cause of action that would make service providers liable for information originating from a third-party user of the service." Section 230 states: "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." 47 U.S.C. § 230(c)(l). Section 230 further 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). This statute has consistently been held to preclude liability for interactive computer services that make available or publish third-party content.[5] "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."[6] Zeran v. America Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997), cert., denied, 524 U.S. 937 (1998).

In Zeran v. America Online, Inc., the plaintiff brought suit against America Online, Inc. ("AOL") alleging "that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter, including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home." Zeran, 129 F.3d at 328. The district court dismissed Zeran's claims against AOL as precluded by Section 230. Zeran appealed and argued, among other grounds, that Section 230 allows for liability against interactive computer services that possess notice of defamatory materials posted through their services. See id. The Fourth Circuit disagreed and affirmed the lower court. In its opinion, the Fourth Circuit reviewed the history and purpose of Section 230. It concluded that:

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[5] The statute provides for only four exceptions: claims involving federal criminal statutes; any laws pertaining to intellectual property; any State law that is consistent with this provision; and the Electronic Communications Privacy Act. See 47 U.S.C. § 230(e)(1)-(4). These categories remain exclusive and do not include common law torts such as negligence and defamation. See Noah v. AOL Time Warner, Inc., 261 F. Supp.2d 532, 539 (E.D. Va. 2003).

[6] Most courts have concluded that, in the online context Section 230 sought to protect, the statute provides immunity to interactive computer services that could be considered distributors of the content. Although contrary to common law defamation principles, Section 230 insulates both distributors and publishers from liability in the online context. See PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp.2d 1069, 1071 (D. S.D. 2001); but see Grace v. eBay, Inc., 16 Cal.Rptr.3d 192, (Cal. App. 2004) (disagreeing with Zeran and its progeny and holding that a distinction between publisher and distributor as well as distributor liability remains).

> [i]t 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.

Id. at 330-31. The Zeran Court also noted an additional purpose behind Section 230 to encourage self-regulation among service providers. For this, Section 230 "forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."[7] See id. In essence, the Zeran Court affirmed Section 230's broad immunity for interactive service providers who publish content from third parties on the Internet. See id. at 334. Moreover, the Zeran Court made clear that Section 230 preempts contrary state and common law. See id.; see also 47 U.S.C. § 230(e)(3) ("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").

Since Zeran, courts have consistently adopted and applied this approach to Section 230's immunity provision. See e.g. Doe v. GTE Corp., 347 F.3d 655, 656 (7th Cir. 2003) (voyeur videos of college athletes available on website hosted by ISP server); Green v. America Online, Inc., 318 F.3d 465, 469 (3rd Cir. 2003) (allegations of sexual orientation and delivery of "punter" program); Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003); Ben Ezra, Weinstein and Co., Inc. v. America Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000), cert. denied, 531 U.S. 824 (2000) (stock information made available on AOL's "Quotes & Portfolios" service); Morrison v. America Online, Inc., 153 F. Supp. 2d 930, 933-34 (N.D. Ind. 2001) (threats directed at physician, distributed by e-mail); PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001) (statements about patent service made in chat room by user of defendant's computers); Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C. 1998) (allegation of

wife-beating in on-line magazine); Doe v. America Online, Inc., 783 So.2d 1010, 1017 (Fla.), cert, denied. 122 S. Ct. 208 (2001) (use of chat rooms to market obscene photos); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 832, 121 Cal. Rptr. 2d 703 (2002) (offers to sell counterfeit sports memorabilia on Internet auction site); Schneider v. Amazon.com, Inc., 31 P.3d 37, 41-42 (Wash. Ct. App. 2001) (allegation in reader book review that author was a felon). This same approach is applicable here.

C. Section 230's Immunity Extends to Defendant Ybarrolaza and Teamster.net

To determine whether Section 230's immunity provisions extend to Defendant Ybarrolaza and Teamster.net, the Court must determine whether Defendant Ybarrolaza and Teamster.net constitute an interactive computer service and whether third parties published the statements at issue.[8]

1. Defendant Ybarrolaza and Teamster.net Constitute Interactive Computer Service

This Court must treat Defendant Ybarrolaza and Teamster.net as an Interactive Computer Service. Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet . . . ." 47 U.S.C. § 230(f)(2). This term has received an expansive interpretation by those courts reviewing its scope. See Carafano v. Metroplash.com, 339 F.3d 1119, 1122-1123 (9th Cir. 2003); see also Ramey v. Darkside Productions, Inc., 2004 U.S. Dist. LEXIS 10107 (D.D.C. May 17, 2004) (holding publisher of website immune under § 230); Gentry v. eBay, Inc., 99 Cal.App.4th 816, 831 & n. 7, 121 Cal.Rptr.2d 703 (Cal. App. 2002) (on-line auction

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[7] The Court clearly rejected Zeran's attempted distinction between publisher and distributor. See Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997), cert, denied, 524 U.S. 937 (1998).

[8] As courts have generally held that Section 230 does not make a distinction between publisher and distributor, this distinction need not be discussed further here.

website is an "interactive computer service"); Schneider v. Amazon.com, 108 Wash.App. 454, 31 P.3d 37, 40-41 (Wash. App. 2001) (on-line bookstore Amazon.com is an "interactive computer service"); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (AOL is an "interactive computer service").

Here, Defendant Ybarrolaza operates a website, www.Teamster.net. He provides access to this website to anyone through the Internet. Consequently, he provides access to multiple users. Moreover, he allows individuals to post messages on the website in various forums chosen by the individual user or poster. In this manner, Defendant Ybarrolaza provides services much like a bulletin board service or chat room. See Carafano, 339 F.3d at 1123; Ramey, 2004 U.S. Dist. LEXIS 10107, *19-20. As such, Defendant Ybarrolaza's interactive computer service provided to multiple users through the Internet falls within the definition of "interactive computer service" in § 230(f)(2). See 47 U.S.C. § 230(f)(2); Carafano, 339 F.3d at 1123 (provider of bulletin board like services is provider of interactive computer service); Ramey, 2004 U.S. Dist. LEXIS 10107, *19-20 (publisher of interactive website is provider of interactive computer service); Green, 318 F.3d at 470 (3d. Cir. 2003) (provider of chat room services is provider of interactive computer service). Thus, Section 230 provides immunity to Defendant Ybarrolaza so long as he did not author or publish the statements at issue. See id.

2. Third Parties Authored the Statements at Issue

Because Defendant Ybarrolaza did not author the statements at issue, he is immune pursuant to § 230. Interactive computer services enjoy immunity under Section 230 when their involvement remains limited to a mere editorial function and not conduct that can be construed as making them contributory publishers. See Carafano, 339 F.3d at 1123 ("Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the

interactive service provider receives full immunity regardless of the specific editing or selection process"). This principle has been consistent across jurisdictions. See id. at 1124 ("the fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a 'developer' of the 'underlying misinformation'"); see also Ramey, 2004 U.S. Dist. LEXIS 10107, *19-20 (holding publisher of website immune for publication of advertisement on website despite minor alterations of company name on advertisements, watermark on photos, and categorization of same); Gentry, 99 Cal.Reptr.2d at 717-18 ("simply compiling false and/or misleading content created by the individual defendants and other coconspirators" did not transform "eBay into an information content provider with respect to the representations targeted by appellants as it did not create or develop the underlying misinformation"); Green v. America Online, et al., 318 F.3d 465, 470 (3rd Cir. 2002) (no dispute that America Online was information service provider because another party created content at issue; negligence claim against America Online not viable in light of § 230) ; Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) (holding that America Online did not work so closely with third party content provider to be liable under §230 where published erroneous stock information supplied by third party, informing third party of erroneous nature of information, and attempting to correct and remove erroneous information). Even where the interactive computer service exercises limited editorial control, the courts still have found immunity. See Optinrealbig.com, LLC v. Ironport Systems, Inc., 323 F. Supp.2d 1037, 1044-1045 (N.D. Cal 2004) (comparing Blumenthal v. Drudge, 992 F. Supp. at 50 (finding AOL had not contributed to content despite soliciting article, retaining editorial control (though not exercised) and heavily advertised report to use as basis for increasing subscriptions) and Batzel v. Smith, 333 F.3d at 1030 (finding defendant operator of

listserv had not contributed to content despite minor edits to e-mail he received and submitting e-mail to listserve) to MCW, Inc. v. Badbusinessbureau.com, 2004 WL 833595, *9-10, fn 10 (N.D. Tex. April 19, 2004) (finding defendant had contributed to content by organizing comments by companies and geographic locations, as well as solicit photographs from one contributor)).

Here, as to Defendant Ybarrolaza, the Plaintiffs make clear in the Amended Complaint that third parties authored the statements at issue. Indeed, the Plaintiffs allege only that he published the statements authored by the third parties. Specifically, "Defendant Ybarrolaza publishes comments from persons such as John Does 1-10, about Plaintiffs and others without identifying the source of those comments." See Am Compl. at ¶ 4. The Plaintiffs further allege that "Defendants John Does 1-10 wrote and submitted for publication, and Defendant Ybarrolaza published . . . ." See id. at ¶ 5. Clearly, the Plaintiffs recognize that Defendant Ybarrolaza did not author the statements at issue. See id. at ¶¶ 4-5. Therefore, pursuant to § 230, Defendant Ybarrolaza enjoys immunity as a publisher of an interactive computer service. See Ramey, 2004 U.S. Dist. LEXIS 10107, *19-20; Carafano, 339 F.3d at 1123.

D. Section 230 Conclusion

Section 230 provides immunity to Defendant Ybarrolaza for the publication of content and statements authored, created and submitted for publication by third parties. See id. As the publication of third party content forms the only theory of liability against Defendant Ybarrolaza alleged by the Plaintiffs, the Court must dismiss this action against Defendant Ybarrolaza entirely for under no set of facts can Defendant Ybarrolaza be found liable for the online availability of statements written by third parties.[9] See id. Therefore, the Court should dismiss Plaintiffs' Amended Complaint in its entirety.

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[9] Although the Plaintiffs arguably suggest that Defendant Ybarrolaza has somehow exposed himself to liability by failing to respond to their requests provided by § 29-24-103, Tenn. Code Ann., Section 230 preempts any

III. CONCLUSION

For the foregoing reasons, Defendant Ybarrolaza respectfully moves this Court to dismiss Plaintiffs' Amended Complaint in its entirety as to him.

Respectfully submitted,

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inconsistent state law. Should § 29-24-103 be construed to expose Defendant Ybarrolaza to liability, Section 230 preempts § 29-24-103 and specifically grants him immunity. Consequently, any arguments with respect to § 29-24-103 become moot.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished, via United States Mail, first-class postage prepaid, on this the 8th day of December, 2004, to:

James G. Stranch III, Esq.
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