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

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

RESPONSE IN OPPOSITION TO DEFENDANT PHILLIP YBARROLAZA'S MOTION TO DISMISS PLAINTIFFS' AMENDED VERIFIED COMPLAINT

INTRODUCTION

This matter presents, in part, a case of first impression under Tennessee law. At issue is whether the webmaster of an Internet web site bears legal responsibility for scurrilous, false, and defamatory material written by Tennesseans about other Tennesseans, and published on his web site. Complaint, ¶2-5. While no Tennessee court has previously ruled on the immunity issue raised in the Defendant's Motion to Dismiss, it is altogether clear that Tennessee has a strong interest in asserting personal jurisdiction over the publisher of such infamous material, both to protect its citizens from being libeled, and to protect its citizens from being deceived by false and

defamatory information. It is also clear that Tennessee courts view the kind of defamation which is at issue in this case very seriously indeed.

Both at common law, and as a matter of black-letter law in Tennessee, a false statement which either (1) accuses its victim of a crime (*Hinson v. Pollack*, 15 S.W.2d 737 (Tenn. 1929)), or (2) imputes unchastity to a woman (*Cohen v. Pinson*, 1 (Higgins) Ct. Civ. App. (1911); see also *Burkhart v. Randles*, 1984 Tenn. App. Lexis 3194 (Tenn. Ct. App. 1984)), was among the most serious of all forms of defamation. Such vilification was considered so serious as to be defamatory on its face. Yet such is the kind of defamation which Defendant Phillip Ybarrolaza now asks this Court to allow him to perpetuate without fear of being called to account.

The Plaintiffs and the Defendants in this case are all associated with the Teamsters Union. Complaint, ¶2. It is black-letter labor law that "every member of any labor organization shall have the right ... to express any views, arguments or opinions." The Labor Bill of Rights, 29 U.S.C. § 411 (a)(2). Federal courts have widely accepted the use of harsh language in the discussion of union practices and policies (for example, on a union picket line). But it should be noted that the defamatory material in question here is not mere rough-and-tumble intra-union political criticism (*i.e.*: "political speech"). It is, rather, intensely personal as well as false and defamatory. The material includes:

> a. At least 20 statements which explicitly accuse Plaintiffs of being thieves (see, *e.g.*: "Let the **lying, thieving sonofa*****" go to jail and take that Fatass Foreleach with him." Complaint, at ¶ 6(a)(2));
>
> b. At least 10 statements which explicitly accuse Plaintiffs of lying (including lying to federal investigators)(see, *e.g.*: "All of **his lies and crooked ways** are starting to catch up with the piece of crap we have in office." Complaint, at ¶ 6(a)(1));
>
> c. At least 9 statements which explicitly accuse Plaintiffs of sexual infidelity (see,

e.g.: "Yes, Bully Stud Cullen has spent a lot of time grooming Dana [Barrett] **for the "position" on her back.**" Complaint, at ¶ 6(a)(21);

d. At least 6 statements which explicitly or implicitly accuse Plaintiffs of homosexual orientation (See, *e.g.*: ""Teamster hero Tracey aka Killer Kid Kullen (KKK) **wears daisy duke shorts** on the dock at Roadway and he looks DAMN fine in em too??? Too bad he don't like black guys like me. **He only likes the other white boys.** Damn what a shame!!!" Complaint, at ¶ 6(c)(3)); and

e. Various accusations that Plaintiffs have performed illegal or immoral acts which range from lying to federal investigators to patronizing prostitutes (see, e.g.: "You talk about keeping their pants zipped **Bully and Foreskin screw anything that walks, crawls, slithers, or leaps. They go to the titty shows.**" Complaint, at ¶ 6(a)(22).

For the purposes of this Motion to Dismiss, the facts set forth in the Complaint must be taken as true. Winchester v. Little, 996 S.W.2d 818, 821 (Tenn. Ct. App. 1998). Therefore, it is undisputed (as the Complaint asserts) that Mr. Ybarrolaza published, on his California-based web site, scurrilous and defamatory material written by residents of Davidson County and Middle Tennessee and transmitted to Ybarrolaza, who then posted it on his web site where it was read and was intended to be read by other residents of Davidson County Middle Tennessee, for the purpose of harming the reputations of victims who live and work in Davidson County, Tennessee. See Complaint, ¶¶ 3, 4, 5, 8 & 9. Although Mr. Ybarrolaza is the only person who can possibly reveal the names of the authors of this material[1], he has not yet revealed them. Indeed, he is asking this Court to assist him in keeping those names secret.

Further, in accordance with the requirements of § 29-24-103, Tenn. Code Ann., the Plaintiffs served written notice upon Mr. Ybarrolaza on August 29, 2003 of the false and defamatory statements. To this day, Ybarrolaza has refused to remove the false and defamatory

1 As Mr. Ybarrolaza states in the "Privacy Statement for TeamsterNet" page published on his web site, he is capable of monitoring and identifying visitors to his site by recording their "IP address," and by to planting "cookies" on the visitor's computer. Teamster.net, visited October 8, 2003 at 5:03:04 p.m., attached as Exhibit A.

material from his web site, nor has he published a correction, apology, or retraction of the false and defamatory statements. More than a year later, the false and defamatory statements are *still* displayed world-wide to any Teamster or any other person who visits Teamster.Net.

In his Motion to Dismiss, Defendant Ybarrolaza raises two defenses. First, he alleges that he has had insufficient contact with the State of Tennessee for this Court to assert personal jurisdiction over him. Setting aside for a moment the fact that Mr. Ybarrolaza has already submitted to the jurisdiction of the Court by making an appearance through counsel, it is clear that his contacts with Tennessee are sufficient to establish jurisdiction.

Second, Mr. Ybarrolaza asserts that he is immune from prosecution for defamation as an "interactive computer service" under the Communications Decency Act ("CDA"), 47 U.S.C. § 230. Because the defendant *is not* an "interactive computer service" within the meaning of the Act; because he *is* an "information content provider" within the meaning of the Act; and because he *reserves to himself editorial control* over the material on his web site, Mr. Ybarrolaza is simply mistaken in his contention that the CDA bars this action against him.

For these reasons, the defendant's Motion to Dismiss is not well taken, and this Court should deny the Motion.

STATEMENT OF THE LAW

The standard for a successful Rule 12.02 Motion to Dismiss is one of the highest in civil jurisprudence. Such a motion tests only the sufficiency of the complaint, not the strength of plaintiff's evidence. Doe v. Sundquist, 2 S.W.3d 919, 922 (Tenn. 1999). The motion admits the truth of all relevant and material averments in the complaint but asserts that such facts are insufficient to state a claim as a matter of law. Winchester v. Little, 996 S.W.2d 818, 821 (Tenn.

Ct. App. 1998).

In the seminal case Cook v. Spinnaker's of Rivergate, 878 S.W.2d 934 (Tenn. 1994), the Tennessee Supreme Court observed that in considering a motion to dismiss, courts must construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true. In addition, however, and amplifying on the rule of liberal construction of the complaint, the Spinnaker's opinion makes it clear that the Court must deny the motion to dismiss unless it appears that the plaintiffs can prove *no set of facts in support of their claim that would entitle them to relief.* Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994). Within this context and based upon the facts alleged in the Verified Complaint, the Court should deny Plaintiff Ybarrolaza's Motion to Dismiss.

"If ... matters outside the pleading are presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12.02, Tenn. R. Civ. P.

GLOSSARY

The Internet (sometimes referred to as the World Wide Web) is still a young and developing technology. In part because it is a high-tech field, a distinct jargon or idiom has evolved to describe the various components of the Internet – a jargon so dense and so removed from everyday English that some courts in this country have found it bewildering. For the assistance of this Court in sorting through the facts of this case, Plaintiffs present the following glossary of Internet terms which are relevant to this case:

Internet – "A computer network consisting of a worldwide network of computer networks that use the TCP/IP (Transmission Control Protocol/Internet Protocol) network protocols to facilitate data transmission and exchange." Source: *WordNet ® 2.0, © 2003 Princeton University.* The part of the Internet commonly used today is also referred to as the World Wide Web.

Web Site – "A set of interconnected web pages [on the Internet], usually including a homepage, generally located on the same server, and prepared and maintained as a collection of information by a person, group, or organization." Source: *The American Heritage® Dictionary of the English Language, Fourth Edition. Copyright © 2000 by Houghton Mifflin Company.*

Webmaster – "The operator of the individual website … Each webmaster is responsible for running the website, including creating the site's content, finding a server to host the site, and other technical details, as well as promoting the site." *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1158 (D. Cal. 2002).

Internet Service Provider (ISP) – "A company which provides other companies or individuals with access to, or presence on, the Internet. Most ISPs are also Internet Access Providers." Source: *The Free On-line Dictionary of Computing, © 1993-2004 Denis Howe.*

Interactive computer service – A term of art which is defined as follows: "The term 'interactive computer service' means 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 and such systems operated or services offered by libraries or education institutions." Source: 47 U.S.C. § 230.

Server -- A computer which provides some service for other computers connected to it via a network. Source: *The Free On-line Dictionary of Computing, © 1993-2004 Denis Howe.*

Information content provider – A term of art which is defined as follows: "Any person or entity that is responsible, in whole or in part, for the creating or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230 (f)(3).

STATEMENT OF FACTS

In his written statements on his own web page, Mr. Ybarrolaza refers to himself as the "webmaster" and "the Big Kahuna." Affidavit of Mark A. Mayhew, Exhibit B.

The webmaster creates, or causes to be created, the web site. This is done by writing a computer program in one of several specific computer codes, including, but not limited to, Hypertext Markup Language (HTML) or Java. Affidavit of Mike Kinkade, Exhibit C.

The coding of the program created by the webmaster controls the appearance of the web site as it is viewed by visitors, whether input from visitors is allowed, and how such input is processed before it is displayed. Affidavit of Mike Kinkade, Exhibit C.

On a web site in which visitors are allowed to type in text which is then displayed as part of the site content such as Teamster.Net, all of the material typed in by visitors must be processed by the program created by the webmaster. In this automated process, the typed material can be edited, reformatted, filtered, blocked, and/or displayed according to parameters which are solely within the control of the webmaster. The automated process can block or allow submissions from individual visitors, and can block or allow specific content, at the webmaster's sole discretion. Affidavit of Mike Kinkade, Exhibit C.

As the webmaster of Teamster.Net, Mr. Ybarrolaza demands from visitors who post material to his web site:

That they agree not to "transmit any message, information, data, text, or other materials ("Content") that is unlawful, harmful, threatening, abusive, harassing, tortuous (sic), defamatory, vulgar, obscene, libelous, that may be invasive of another's privacy, hateful, racially, ethnically or otherwise objectionable;" and

That they grant to him "a worldwide, royalty-free, perpetual, non-exclusive right and license (including any moral rights or other necessary rights) to use, display, reproduce, modify, adapt, publish, distribute, perform, promote, archive, translate, and to create derivative works and compilations, in whole or in part" the material they submit to him. Affidavit of Mark A. Mayhew, Exhibit B.

Mr. Ybarrolaza further reserves in writing on his web site the right "to edit, refuse to post, or remove any content posted on Teamster Net Message Boards and to move Content to other Teamster Net Message Boards. Without limiting the foregoing, Teamster Net and its designees shall have the right to remove any Content that is in violation of the provisions hereof or otherwise objectionable." Affidavit of Mark A. Mayhew, Exhibit B.

Mr. Ybarrolaza requires persons who post material to his web site to "indemnify and hold Teamster Net harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your violation of these terms and conditions or your violation of any rights of another." Affidavit of Mark A. Mayhew, Exhibit B.

The programs which constitute Mr. Ybarrolaza's web site were, at all times relevant to this lawsuit, stored on computer equipment owned by Goodall Software Engineering, 616 Draco Drive, Petaluma, California 94954. Affidavit of Mark A. Mayhew, Exhibit B.

ARGUMENT

A. This Court has Personal Jurisdiction over Mr. Ybarrolaza

At p. 3 of his Memorandum, Mr. Ybarrolaza asserts that this action should be dismissed because "this Court lacks personal jurisdiction over him." Because Mr. Ybarrolaza has already submitted to the jurisdiction of the Court, and because he has sufficient "minimum contacts" with the State of Tennessee to justify personal jurisdiction, his motion to dismiss is not well-taken. It should be denied.

1. Defendant Ybarrolaza has already submitted to the Jurisdiction of this Court

On November 3, 2004, by and through counsel, Defendant Ybarrolaza filed a Motion for Admission *Pro Hac Vice* of his Chicago counsel, Charles Lee Mudd, Jr. After this Court denied his first *pro hac* motion, the defendant filed a second *pro hac vice* motion by and through counsel on December 6, 2004. The Defendant was scheduled to participate in a status conference in this matter on November 29, 2004; by agreement of the parties and the case management officer, the conference was rescheduled for December 6, 2004. At the conclusion of that status conference, *counsel for the Defendant* drafted and filed an agreed scheduling order which remains in force.

All of these matters occurred prior to the filing of defendant's Motion to Dismiss for lack of personal jurisdiction on December 8, 2004. By that time and by his own acts and the acts of his counsel, Mr. Ybarrolaza *had already submitted to the personal jurisdiction of this Court.*

> The filing of any pleading, **making or resisting of any motion**, filing of exceptions to a Master's report, taking of depositions to be read in a cause,

> **making of any agreement with plaintiff or his attorney relative to any proceeding in a cause, or any other act in the cause**, between the filing of the complaint and rendition of the final decree, whereby pendency of the suit is recognized, expressly or by implication, will, if there be record evidence of the fact, constitute a general and unlimited appearance, unless limited by express declaration or by necessary implication.

Patterson v. Rockwell International, 665 S.W.2d 96, 99 (Tenn., 1984)(*Superseded on other grounds*)(Emphasis added)(See also *Akers v. Gillentine*, 231 S.W.2d 372, 376 (Tenn. 1950)(But see, e.g., *Landers v. Jones*, 872 S.W.2d 674, 677 (Tenn. 1994)). Because he voluntarily, and by his own acts, submitted to this Court's jurisdiction, Mr. Ybarrolaza should not now be heard to complain that the Court lacks personal jurisdiction over him.

2. In any event, Defendant Ybarrolaza has sufficient Minimum Contact with Tennessee to establish Personal Jurisdiction

There can be no reasonable doubt that Phillip Ybarrolaza published the false and defamatory material which is the subject of this lawsuit. To begin with, the Complaint asserts, at ¶¶ 4-5, that Mr. Ybarrolaza was the publisher. This assertion must be taken as true for the purpose of this Motion to Dismiss. In addition, however, Black's Law Dictionary defines a publisher as "one who by himself or his agent makes a thing publicly known." Black's Law Dictionary, 6th Ed. (West Publishing 1991). The word "publish" is defined as "to make public, to circulate; to make known to people in general." *Id.*

In essence, by creating Teamster.Net and functioning as its webmaster, Mr. Ybarrolaza designed and built an auditorium, complete with a chalkboard which he also designed and built. Visitors to the auditorium pass their written comments about a variety of subjects to Mr. Ybarrolaza. The software Ybarrolaza designed then writes those visitor comments onto the chalkboard for all in the auditorium to see. This software can edit the visitors' messages, or it

can ignore them altogether. Visitors cannot write directly on the chalkboard themselves; it is only by the agency of Mr. Ybarrolaza and the software he created that their comments can be "published" on the world-wide chalkboard.

Because he set up, operates, and maintains the web site where the statements were made publicly known and were circulated to the public, by either of these definitions Mr. Ybarrolaza clearly became the publisher of the false and defamatory statements when they were posted on Teamster.Net, over which he reserves complete editorial control. It remains only to decide whether Mr. Ybarrolaza can be haled into a Tennessee court to account for the statements he published.

a. Tennessee's Long-Arm Statute

Tennessee's long-arm statute permits the courts of this state to exercise jurisdiction upon, *inter alia*, "any basis not inconsistent with the constitution of this state or of the United States." Tenn. Code Ann. §§ 20-2-214(a)(6), 20-2-225(2) (1994 & Supp. 1997). When a state's long-arm statute authorizes the assertion of personal jurisdiction to the limits of federal due process, as does Tennessee's long-arm statute, the issue becomes simply whether the trial court's exercise of personal jurisdiction over the defendant meets due process requirements. *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364, 1368 (M.D. Ala. 1989), aff'd, 932 F.2d 977 (11th Cir. 1991).

Following the United States Supreme Court's lead, "the Tennessee Supreme Court has adopted the 'minimum contacts' test for determining when the courts of this state may exercise personal jurisdiction over a nonresident defendant." *Davis Kidd Booksellers, Inc. v. Day-Impex, Ltd.*, 832 S.W.2d 572, 574-75 (Tenn. Ct. App. 1992) (citing *Masada Inv. Corp. v. Allen*, 697

S.W.2d 332, 334 (Tenn. 1985)). In adopting this test, our Supreme Court explained that due process requires that a non-resident defendant be subject to a judgment *in personam* if he has minimum contacts with the forum such that "the 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, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).

a. The *International Shoe* Three-Prong Test

Notwithstanding his voluntary submission to the personal jurisdiction of this Court in this matter, it is clear that Mr. Ybarrolaza has sufficient minimum contacts with the State of Tennessee to establish personal jurisdiction. The plaintiffs in this case "need only make a *prima facie* showing of jurisdiction" in order to defeat a Motion to Dismiss based on lack of personal jurisdiction. *First Tennessee National Corporation v. Horizon National Bank*, 225 F. Supp. 2d 816, 821 (W.D. Tenn. 2002). The facts alleged in the Amended Verified Complaint handily establish such a *prima facie* case.

As defendant Ybarrolaza correctly points out, Tennessee courts have adopted a three-prong test first articulated in *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and echoed in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 86 L.Ed. 2d 528 (1985). To exercise jurisdiction over a non-resident defendant (1) the defendant must have sufficient minimum contacts with the forum state; (2) the claim asserted against the defendant must arise out of the contacts; and (3) the exercise of jurisdiction must be reasonable. "An inference arises that the third factor is satisfied if the first two factors are met." *First Tennessee National Corporation v. Horizon National Bank*, 225 F. Supp. 2d 816, 822 (W.D. Tenn. 2002).

b. Ybarrolaza has Sufficient Minimum contacts with the State of Tennessee

"In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 104 S.Ct. 1473, 79 L. Ed.2d 790 (1984)(Quoting with approval from *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) and *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)). As in the case at bar, the *Keeton* court was particularly concerned with how minimum contacts are to be interpreted in the context of a defamation case.

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tort-feasor [sic] shall be liable for damages which are the proximate result of his tort ... **False statements of fact harm both the subject of the falsehood and the readers of the statement. [A state] may rightly employ its libel laws to discourage the deception of its citizens. There is "no constitutional value in false statements of fact."**
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> ...
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> **The tort of libel is generally held to occur wherever the offending material is circulated.** The reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished.

Keeton, supra, at 776-777. (Internal citations omitted)(Emphasis added).

It hardly needs to be argued that the sting of the libel alleged in this case was at its most painful here in Middle Tennessee. Because this is where the victims of the defamation and their families live (Complaint, ¶2), it was in Tennessee where their reputations suffered the most grievous harm from the scurrilous statements published on Mr. Ybarrolaza's web site.[2] It is

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2 Indeed, as the United States Supreme Court noted in the defamation case *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), the defendants in this case are not charged with "mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed" at residents here in Tennessee. The John Doe defendants wrote and Defendant Ybarrolaza published statements "they knew would have a potentially devastating impact" on the Plaintiffs. **"And they knew that the brunt of that injury would be felt by [the**

here, near the homes and hearths of the Tennessee victims, that the false statements of fact caused the most harm on the readers of those false statements, by deceiving those Tennessee readers. Finally, it is here where the cynical authors of these false and defamatory statements reside in silent glee, their craven anonymity still preserved by Mr. Ybarrolaza. Complaint, ¶ 5.

c. Tortious Conduct arising out of the Defendant's Contact

Under the circumstances, it is eminently fair to hale Mr. Ybarrolaza into court at the locus where the greatest harm occurred, where his fellow tortfeasors (John Does 1-10) reside, and where his victims *still* suffer the harm proximately caused by his acts. It is immaterial that Mr. Ybarrolaza himself resides in another state or that his web site was created there. By analogy, it is as if Mr. Ybarrolaza had broadcast the false and defamatory statements in this case over a large and powerful radio station located outside the Tennessee border, but whose broadcast signal covers the entire state of Tennessee. Mr. Ybarrolaza's web site is a "radio station" with a "signal" which blankets the entire world, including the Volunteer State. It is simply disingenuous for him to claim that he did not direct the defamatory content into this state.

In determining whether sufficient minimum contacts exist, the *Keeton* court and others have analyzed whether there is a substantial connection between the tort and the forum state. The torts alleged in this case are *directly* related to Mr. Ybarrolaza's publishing activities in Tennessee. Mr. Ybarrolaza repeatedly accepted false defamatory postings about the Tennessee Plaintiffs from John Does 1-10, who are also residents of Middle Tennessee. Complaint, ¶¶ 5-6. He repeatedly published those false and defamatory postings on his web site in such a way that

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Plaintiffs] in the State in which [they] live and work ... Under the circumstances [the defendants] must reasonably anticipate being haled into court there to answer for the truth of the statements made in their article." *Id.*, at 798-790.(Emphasis added).

he *knew or should have known* that they would be read by subscribers to his web site here in Tennessee. Complaint, ¶ 6. In so doing, he maliciously and/or negligently harmed the Plaintiffs, who are all residents of Tennessee. Complaint, ¶ 8. Because Phillip Ybarrolaza is "carrying on a 'part of [his] general business [of publishing his web page]'" in this state, "that is sufficient to support [personal] jurisdiction when the cause of action arises out of the very activity being conducted, in part," in Tennessee. *Keeton, supra*, at 779-780.[3] It can hardly be denied, then, that the tortious conduct arose directly out of Mr. Ybarrolaza's contact with Tennessee.

Because both the "minimum contacts" prong and the "arising out of those contacts" prong of the *International Shoe/Burger King* test are met in this case, our courts have held that it can and should be presumed that the third prong (reasonableness) of the test is also met. *First Tennessee, supra*, at 822. Even if such a presumption were not available, however, it is clearly reasonable that Mr. Ybarrolaza should be called to account in Tennessee for the damage he has done here to people who live and work here by making his web site containing the false and defamatory statements available here. The defendant's motion to dismiss this case based on lack of personal jurisdiction should therefore be denied.

B. The Communications Decency Act

The second basis for Mr. Ybarrolaza's Motion to Dismiss is his claim that he is immune

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3 Mr. Ybarrolaza relies on *First Tennessee National Corporation v. Horizon National Bank*, 225 F. Supp. 2d 816 (W.D. Tenn. 1986) for the proposition that his web site does not constitute sufficient minimum contact with Tennessee to establish personal jurisdiction. It should the noted that the court in *First Tennessee* determined that **the interactive web site in that case was, in fact, sufficient to establish personal jurisdiction in Tennessee**, even though there was no proof in that case that any of the content on the web site originated in Tennessee (unlike the case at bar). "[The defendant] may find it burdensome to defend a lawsuit in Tennessee. This burden, however, is outweighed by Tennessee's legitimate interest in protecting the interests of its residents and businesses." *Id.*, at 822.In the case at bar, where the offending material was posted to the web site from Tennessee, it is obvious that the publication of this material on the Teamster.net web site is sufficient contact with this state to establish personal jurisdiction over webmaster Ybarrolaza.

from prosecution for defamation under the Communications Decency Act, § 47 U.S.C. 230. While this contention may at first glance appear sound, it does not hold up under scrutiny.

Mr. Ybarrolaza's argument depends upon a profound misreading of 47 U.S.C. 230(f)(2), which defines the term "interactive computer service." This section states, in its entirety:

> Interactive computer service. The term "interactive computer service" means 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 and such systems operated or services offered by libraries or education institutions.

This definition is critical because of an earlier section of the CDA, § 230(c)(1), which establishes the immunity Mr. Ybarrolaza seeks. It states 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." To adjudicate Mr. Ybarrolaza's Motion, then, this Court must first determine whether Mr. Ybarrolaza is an "interactive computer service" within the meaning of § 230(f)(2). Because Mr.Ybarrolaza's immunity defense fails at this first step in the process, the defense is meritless, and his motion to dismiss must be denied.

1. The Historical Basis of Immunity

To understand the philosophical underpinning of Section 230 immunity, one must travel back into communications history, to the early days of the nation's telephone network. See, *e.g.*: legal scholar Jay M. Zitter, *Liability of Internet Service Provider for Internet or E-Mail Defamation*, 84 A.L.R. 5th 169, September 2003. Serious questions were raised about whether the infant telephone companies should be held liable as "an instrumentality of publication" for false and defamatory material transmitted over their facilities.[4] Faced with this huge potential

4 This Court may certainly take judicial notice of the amount of false and defamatory gossip which is transmitted over the nation's telephone lines each and every day.

threat to a communications infrastructure whose growth it was trying to encourage, lawmakers reasoned that telephone networks were "common carriers," who had no way to control the content, but served only to move the traffic from one point to another. The Supreme Court has defined a common carrier as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *Howard v. America Online, Inc.*, 208 F.3d 741, 752 (9th Cir., 2000).[5] As it did decades later in the case of the Internet with the CDA, Congress wished to "promote the continued development" and "encourage the development" of such technologies. 47 U.S.C. 230(b).

With this historical context, it can clearly be seen that it is no accident that the vast bulk of Section 230 litigation has been brought against today's Internet analog of the common carrier – the Internet service providers[6] ("ISPs"). Defendants in these cases have ranged from Compuserve (an ISP) and America Online (an ISP), to GTE, Inc. (an ISP) and Comcast (an ISP). Like the "common carriers" of the early telephone days, and *unlike* the defendant in the instant case, these companies simply provide users (1) a gateway (either by a telephonic dial-up connection or an "always-on" cable, DSL, or wireless connection) to the Internet, (2) a path of two-way transmission from point to point, and (3) a storage facility (the computer server) for electronic files. For the purposes of this Motion, the Court must accept as true the contention in

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5 It is not suggested here that internet service providers are legally classified as common carriers (they are not), but that the Congressional rationale for exempting ISPs from publisher liability is closely analogous to the historical rationale for exempting the telephone company from responsibility for slanderous telephone conversations.

6 Dictionary.com defines an internet service provider as: "A company which provides other companies or individuals with access to, or presence on, the Internet. Most ISPs are also Internet Access Providers; extra services include help with design, creation and administration of World Wide Web sites, training, and administration of intranets." Source: *The Free On-line Dictionary of Computing, © 1993-2004 Denis Howe.*

the Amended Complaint that PhillipYbarrolaza is *not* an internet service provider. Complaint, § 3. As Plaintiffs will demonstrate in the following section, neither Mr. Ybarrolaza nor his web site are "interactive computer services" within the meaning of the statute.[7]

2. Defendant Ybarrolaza is not an "Interactive Computer Service"

One achieves the status as an "interactive computer service" by leaping two statutory hurdles. First, one must be an information service, system, or access software provider. 47 U.S.C. § 230 (f)(2). Mr. Ybarrolaza and his web site, Teamster.net, may, indeed, meet this first half of the definition. In addition, however, an "interactive computer service" must *provide or enable computer access by multiple users to a computer server*. 47 U.S.C. § 230 (f)(2)(emphasis added).[8] Mr. Ybarrolaza does not meet the second criteria. He does not own, maintain, or operate the computer server on which his web site resides. Affidavit of Mark A. Mayhew, Exhibit B. He simply rents space on the server where his web site program is stored from an Internet web hosting service: Goodall Software Engineering (GSE), 616 Draco Drive, Petaluma, California 94954. See Exhibit B, attached hereto. Visitors who browse the Internet to the GSE server where Ybarrolaza's web site is stored are not "enabled" to do so by any service of Mr. Ybarrolaza. Instead, each net surfer who goes to Teamster.Net gains access the Internet through connection provided by his own individual Internet Service Provider. A visitor may type in the

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7 Mr. Ybarrolaza can best be described, not as an "interactive service provider," but as a "webmaster." The term "webmaster" has been defined by one court as " the operato[r] of the individual websit[e] ... Each webmaster is responsible for running the website, including creating the site's content, finding a server to host the site and other technical details, as well as promoting the site. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1158 (D. Cal., 2002).

8 The statute lists two specific examples of entities which meet the second criteria: (a) a service or system that provides access to the Internet; and (b) such systems operated by libraries or educational institutions. *Id.* In other words, the only specific examples listed in the statute are entities which provide the user access to the Internet itself – **i.e.: Internet service providers**. As has already been pointed out, both this brief and the Amended Verified

name of Mr. Ybarrolaza's site, or he may locate the site using an Internet search engine like Yahoo or Google. But Mr. Ybarrolaza plays no part in "enabl[ing] computer access to the [GSE] server." In short, Mr. Ybarrolaza cannot provide "access ... to a computer server" to even a *single* individual, much less to "multiple users," as Section 230(f)(2) of the statute requires in plain English. Because the defendant does not meet this threshold criterion of the statute, he and Teamster.net cannot be considered an "interactive computer service." If he and his web site are not an "interactive computer service," they are not entitled to the immunity Mr. Ybarrolaza seeks under 47 U.S.C. § 230(c)(1).

Plaintiffs in the case at bar are not alone in asserting that an individual web site like Mr. Ybarrolaza's Teamster.Net is *not* entitled to immunity as an "interactive computer service" under the CDA. In his analysis in American Law Reports, legal scholar Jay M. Zitter agrees that the federal statute was intended to protect internet service providers, not individual web sites. He writes:

> Web sites may be able to limit their liability for defamatory materials posted by third parties through disclaimers in visitor agreements. To provide sufficient protection against user-supplied content, the disclaimer should (1) disclaim responsibility for content in chat rooms, bulletin boards, and similar areas that may not be regularly monitored or could be offensive, controversial, or both; (2) warn users not to post statement that are defamatory or otherwise unlawful; and (3) reserve the right of the web site to remove any user-supplied content at its discretion.

Jay M. Zitter, *Liability of Internet Service Provider for Internet or E-Mail Defamation*, 84 A.L.R. 5th 169, September 2003. Zitter also urges web masters to take advantage of the "protection from defamation liability [which] is afforded in many jurisdictions through retraction or correction statutes." *Id.* Clearly there would be no need for disclaimers, retractions, or corrections if the

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Complaint establish that Mr. Ybarrolaza is a webmaster, not an internet service provider.

web site and its web master were immune from defamation claims pursuant to Section 230 of the CDA. It is interesting to note that in the case at bar, Mr. Ybarrolaza's web site includes disclaimers of liability which comply with *every one* of Zitter's suggestions (see Affidavit of Mark A. Mayhew, Exhibit B), but that Mr. Ybarrolaza ignored the Plaintiffs' demand for a retraction or correction of the defamatory material.

The Court's "duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature." See *Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000). Such "intent is to be ascertained whenever possible from the **natural and ordinary meaning of the language used**, without forced or subtle construction that would limit or extend the meaning of the language." *Id.*, (quoting *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997)(Emphasis added). "When the statutory language is clear and unambiguous, [courts] must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." *Carson Creek Vacation Resorts, Inc. v. State Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). For this Court to apply the statutory label "interactive computer service" to Defendant Ybarrolaza, the Court would be required to twist the words of § 230(f)(2) completely out of shape in order to "expand the statute's application." While this is exactly what Mr. Ybarrolaza demands, the Court cannot properly ignore the plain meaning of the statute's words.

3. Ybarrolaza's attempts to limit his liability are inconsistent with a Claim of Immunity

Mr. Ybarrolaza explicitly attempts to limit his liability for defamatory content at several places on his web site. For example, Ybarrolaza demands that visitors to his site agree not to "transmit any message, information, data, text, or other materials ... that is unlawful ...tortuous

[sic], defamatory, vulgar, obscene, [or] libelous." Affidavit of Mark A. Mayhew, Exhibit B. Ybarrolaza also requires persons who post material on his site to "indemnify and hold Teamster Net harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your violation of these terms and conditions or your violation of any rights of another." Affidavit of Mark A. Mayhew, Exhibit B.

It is difficult to understand why Mr. Ybarrolaza would need to limit his liability for defamatory content if he were, indeed, entitled to immunity under the Communications Decency Act. The solution to this dilemma is plain: Mr. Ybarrolaza is *not* entitled to "interactive computer service" immunity under the CDA, and he knows it. That is why he seeks to limit his liability by other means.

4. The Cases cited by the Defendant provide no help in Resolving this Matter

Although the defendant argues at some length (beginning at p. 15 of his brief) that he and his site are an interactive computer service, he cites no Tennessee authority in support of his position. Further, the cases on which Ybarrolaza relies are so factually divergent from the case at bar as to hold limited precedential value for this Court. A quick review of the parties involved in defendant's cited cases will show just how easily distinguished they are.

The most revealing case of all those cited by the Defendant's brief is *Schneider v. Amazon.com*, 31 P3d 37 (Wash. App. 2001). In *Schneider*, the Washington Court of Appeals baldly acknowledged that "we find no case addressing application of the statute to interactive web site operators" such as the defendant in that case and in the case at bar. *Id,* at 461. With no justification for, or explanation of, its opinion, the *Schneider* panel simply declared that Amazon.com (an on-line bookseller) was an "interactive computer service" simply because

America Online (an ISP) had already been declared an interactive computer service. The Washington court found that Amazon.com (the online bookstore web site) was "indistinguishable" from America Online (the Internet service provider without explaining *how* an internet service provider resembled the online bookstore. *Id.* With all due respect to the Washington Court of Appeals, this is nonsensical. Fifteen minutes spent on the Internet will clearly reveal to the most casual observer the multitude of distinctions between Amazon.com and AOL.

While Amazon.com, the web site, may be visited by an internet surfer who accesses the Internet through America Online, the Internet service provider, the distinction is plain: one of them, Amazon, is a web site, which, like Teamster.Net, *provides access to servers to no one*; the other, AOL, is an ISP, which provides access to hundreds of servers across the World Wide Web to millions of people every month for a fee. While America Online clearly *is* an interactive computer service within the meaning of Section 230, Amazon.com clearly is not. Like the defendant in this lawsuit, Amazon.com was not entitled to Section 230 immunity. The Washington Court of Appeals, perhaps confused by the terminology or the technology, was simply in error on this point.

Defendant cites *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003), for the proposition that the term "interactive computer service" must be given an "expansive definition." The defendant seems to read the phrase "expansive definition" to mean that anyone who wishes to claim Section 230 immunity is entitled to get it, whether they qualify under the plain meaning of the statute or not. Setting aside the fact that *Carafano* comes from the oft-reversed 9th Circuit Court of Appeals, it is worth noting that the defendant in *Carafano* was a commercial Internet

dating service,[9] Matchmaker.com, whose online business involved a much higher degree of "interactivity" than the case at bar – members posted their own personal profiles and photos, and completed an online multiple-choice questionnaire in order to be "matched" with other members. These facts bear little resemblance to the "news, links to local unions, and election information pertinent to Teamster activities across North America" and the "internet bulletin board" service which is alleged in the Amended Verified Complaint at ¶ 4. Although the 9th Circuit ultimately concluded that Matchmaker.com was an interactive computer service, it did not explain how its determination was justified by the plain language of the statutory definition. The 9th Circuit relied instead upon the "expansive interpretation" theory which the defendant urges on this Court to substitute for the plain meaning of 47 U.S.C. § 230(f)(2).

Defendant also draws this Court's attention to *Ramey v. Darkside Productions, Inc*, 2004 U.S. Dist. Lexis 10107 (2004), an unreported case from the United States District Court for the District of Columbia. Once again, the facts of the *Ramey* case are so different from the case at bar as to seriously diminish its precedential value in the case at bar. In *Ramey*, a nude dancer sued an on-line paid advertising guide for legal adult entertainment services for publishing an intimate but authentic picture of her. This bears almost no resemblance to the allegations in the case at bar in which the defendant published and *continues to this day to display on the World Wide Web* false and defamatory statements about the Plaintiffs, as alleged in the Amended Verified Complaint. Although the D.C. Circuit Court held that Darkside Productions was an interactive computer service, it did not explain how the advertising guide qualified under the statutory definition. Without such an explanation of the principle involved, this Court can draw

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9 Along with the dating service's parent company, a true Internet Service Provider – Lycos, Inc.

little precedential benefit from *Ramey*. As our Supreme Court has recently observed, Tennessee courts are not bound by opinions from foreign jurisdictions which fail to explain their own basis, especially when those opinions "suffer from fatal imprecision concerning matters central to their holding." *Doe ex rel. Doe v. Roman Catholic Diocese of Nashville*, p. 12-13, M2001-01780-SC-R11-CV (January 18, 2005).

Ybarrolaza further cites to *Gentry v. eBay, Inc.*, 99 Cal. App.4th 816 (Cal. App. 2002) in which the buyers of forged sports memorabilia sued the on-line auction service. In addition to the fact that this case in entirely inapposite factually from the case at bar, the defendant failed to point out that the plaintiffs in *Gentry* **conceded**, at p. 831 of the opinion, that eBay is an interactive computer service within the meaning of Section 230. This fact alone means that *Gentry* is of no precedential value in this case, as Plaintiffs here concede nothing of the sort.

Finally, the defendant cites to *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), in which the District of Columbia appellate court determined that America Online was an interactive computer service. Since America Online is an internet service provider, the *Blumenthal* court was undoubtedly correct in its assessment. Since Phillip Ybarrolaza is not an internet service provider, the *Blumenthal* case has very little application to the case at bar.

In summary, although the defendant provides a plethora of citations in an effort to convince this court that Phillip Ybarrolaza and Teamster.net are entitled to immunity as an "interactive computer service," they fail to cite a single case which articulates any principle that the Court can apply to the case at bar. In any event, the cases defendant cites are so factually distinguishable from this case as to provide this Court with little assistance.

5. Mr. Ybarrolaza is an "information content provider"

At page 3 of the "Terms and Conditions" document posted on Mr. Ybarrolaza's web site as of October 8, 2003, Mr. Ybarrolaza states as follows:

> Teamster Net and its designees **shall have the right in their sole discretion to edit, refuse to post, or remove any Content** posted on Teamster Net.
>
> Without limiting the foregoing, Teamster Net and its designees **shall have the right to remove any Content** that is in violation of the provisions hereof or otherwise objectionable. You agree to indemnify and hold Teamster Net harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your violation of these terms and conditions or your violation of any rights of another.

Affidavit of Mark A. Mayhew, Exhibit B. (Emphasis added). By this language, Ybarrolaza explicitly reserves editorial control over the content of the web site to himself and his designees. In addition, Ybarrolaza requires posters to his site to grant to him "a worldwide, royalty-free, perpetual, non-exclusive right and license ... to use, display, reproduce, **modify, adapt, publish**, distribute, perform, promote, archive, translate, and to create derivative works and compilations, in whole or in part" the material they submit to him. Affidavit of Mark A. Mayhew, Exhibit B. (Emphasis added).

Such editorial control over the content of this web site is entirely inconsistent with Mr. Ybarrolaza's claim to be merely an "interactive computer service." Indeed, editorial control casts Defendant Ybarrolaza in the role of an "information content provider," which is defined at 47 U.S.C. § 230 (f)(3) as "any person or entity that is responsible, in whole or in part, for the creating or development of information provided through the Internet or any other interactive computer service." The significance of this classification is simple: information content providers are *not immune from liability* under Section 230(c)(1).

It is interesting to note that although Mr. Ybarrolaza specifically reserved to himself the ability to edit, alter, or remove offensive content from his web site, he has not chosen to remove the complained-of material since the filing of this lawsuit. Indeed, additional scurrilous material continues to be published on Teamster.net by writers whom Mr. Ybarrolaza continues to refuse to identify.

CONCLUSION

Of the two bases cited by the defendant in support of his Motion to Dismiss, neither ultimately holds up under scrutiny. It is clear based on the facts stated in the Amended Verified Complaint that Phillip Ybarrolaza has sufficient contacts with the State of Tennessee to justify the assertion of personal jurisdiction. It is even clearer that the State has an interest in preventing its citizens from being defamed, without regard to where the offending web site is physically located. The false and defamatory statements in question were carefully targeted for Tennessee, and it is here where the pain and damage from those statements occurred. Mr. Ybarrolaza has already submitted to the jurisdiction of this Court, and he should remain here.

It is equally clear that despite his arguments, Mr. Ybarrolaza is not entitled to immunity from these claims. He and his web site are not an interactive computer service; they provide access to a server to no one. Even the most cursory glance at the statutory language reveals that Teamster.net is not the sort of entity which Section 230 was meant to protect. Even if Section 230 should be given an "expansive definition," it does not follow that the act was meant to immunize every scandalous act merely because it was perpetrated electronically instead of on paper. Perhaps because this is such a new area of the law, the foreign-jurisdiction cases Mr. Ybarrolaza cites are of little assistance to the Court. This Court, however, is fully capable of

reading and applying the language of the statute in question.

Mr. Ybarrolaza has not demonstrated that the Plaintiffs have failed to state a claim upon which relief can be granted, or that this Court lacks personal jurisdiction over him. He has further failed to demonstrate that he is entitled to immunity under Section 230 from responsibility for his own actions. The Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response in Opposition to Defendant Phillip Ybarrolaza's Motion to Dismiss Plaintiffs' Amended Verified Complaint was served upon the following by placing the same in the United States Mail, First Class postage prepaid, upon this the 21th day of January, 2005:

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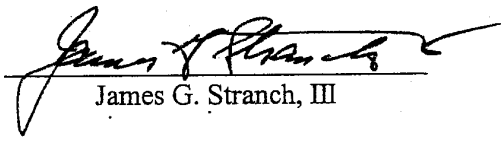

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