

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(Alexandria Division)

NEMET CHEVROLET LTD., *et al.*

Plaintiffs,

v.

CONSUMERAFFAIRS.COM, INC.

Defendants.

CIVIL ACTION NO. 1:08cv254

**BRIEF IN SUPPORT OF MOTION TO DISMISS OR STRIKE AMENDED  
COMPLAINT**

**INTRODUCTION**

On March 18, 2008, Plaintiffs Nemet Chevrolet Ltd. (“**Nemet Chevrolet**”) and Thomas Nemet d/b/a Nemet Motors (“**Nemet Motors**”) filed suit against Defendant ConsumerAffairs.com, Inc. (“**ConsumerAffairs**”) alleging Virginia common law claims for defamation and tortious interference with business expectancy and unfair competition claims (alleging false designation of origin and false advertising) under the Lanham Act, 15 U.S.C. §1051, *et seq.* in connection with ConsumerAffairs’s operation of a consumer complaint website (the “**ConsumerAffairs Website**”).

In the original Complaint, Plaintiffs alleged that ConsumerAffairs operated the ConsumerAffairs Website on which third-parties are encouraged to post their experiences purchasing products and services from particular companies. (Compl. ¶¶ 12-14). Over the course of several months, third-party users of the ConsumerAffairs Website posted seven “articles” about the Plaintiffs, who were alleged to be automobile dealers in New York, which Plaintiffs alleged to be defamatory and likely to cause potential customers to avoid conducting

business with the Plaintiffs. (Compl. ¶¶ 17-34). Plaintiffs sought to hold ConsumerAffairs liable for the allegedly defamatory content of these articles, in blatant disregard of the broad federal immunity afforded to ConsumerAffairs under Section 230 of the Communications Decency Act, and sought damages for ConsumerAffairs's use of the term "consumer affairs," to which Plaintiffs have no rights whatsoever.

ConsumerAffairs filed a motion to dismiss or strike the Complaint (the "**First Motion to Dismiss**"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that: (1) Plaintiffs' defamation and tortious interference claims were barred by the federal immunity granted to website operators under Section 230 of the Communications Decency Act of 1996; (2) Plaintiffs sought punitive damages for the alleged defamation and tortious interference which far exceed Virginia's statutory cap on such damages; (3) Plaintiffs do not have a valid, protectable trademark which has been imitated by ConsumerAffairs, as is required to maintain an unfair competition claim under the Lanham Act; and (4) Plaintiffs do not have standing to assert a false advertising claim because neither is a competitor of ConsumerAffairs.

The Court granted the Motion to Dismiss. (See Memorandum Order of 6/18/2008 [hereinafter, "**Dismissal Order**"]). Plaintiffs have filed an Amended Complaint containing augmented versions of the defamation and tortious interference claims and versions of the unfair competition claims which are identical to Counts III and IV of the original Complaint. The Amended Complaint is characterized by the same fatal flaws as the original and must, accordingly, suffer the same fate – dismissal.

## ARGUMENT

### I. COUNT I OF THE COMPLAINT MUST BE DISMISSED OR STRICKEN.

#### A. The defamation claim alleged in Count I of the Amended Complaint is barred by Section 230 of the Communications Decency Act.

Section 230 (“**Section 230**”) of the Communications Decency Act of 1996 (the “**CDA**”) provides that “[n]o provider or user of an interactive computer service<sup>1</sup> shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>2</sup> 47 U.S.C. § 230(c)(1). It further provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3).

The United States Circuit Court of Appeals for the Fourth Circuit was the first appellate court to interpret Section 230 and concluded that

§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. 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.

Zeran v. America Online, Inc., 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997). Here, there can be no doubt that Section 230 bars the defamation claim alleged in Count I of the Amended Complaint.

#### 1. ConsumerAffairs is a “provider or user of an interactive computer service” under the Communications Decency Act.

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1 The CDA 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 server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2).

2 “Information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other” interactive computer service. 47 U.S.C. § 230(f)(3).

ConsumerAffairs.com benefits from the federal immunity provided by Section 230 because it is “a provider or user of an interactive computer service.” See 47 U.S.C. § 230(c)(1). Section 230 defines an “interactive computer service” (“**ICS**”) as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2). Courts construing Section 230(f) (2) have recognized that this definition is extremely broad and includes a wide range of services, including websites that function “as an intermediary by providing a forum for the exchange of information between third party users.” Doe v. MySpace, Inc., 474 F.Supp.2d 843, 849 (W.D.Tex.2007); Doe v. SexSearch.com, 502 F.Supp. 2d 719, 724 (N.D. Ohio 2007). See, e.g., Carafano v. Metrosplash.com, Inc., 207 F.Supp.2d 1055, 1065-1066 (C.D.Cal.2002), aff'd on other grounds , 339 F.3d 1119 (9th Cir.2003); Gentry v. eBay, Inc., 99 Cal.App.4th 816, 831 & n. 7, 121 Cal.Rptr.2d 703 (2002); Schneider v. Amazon.com, 108 Wash.App. 454, 31 P.3d 37, 40-41 (2001); Barrett v. Clark, 2001 WL 881259 at \*9 (Cal.Sup.Ct.2001); Schneider v. Amazon.com, 108 Wash.App. 454, 31 P.3d 37, 40-41 (Wash.App.2001).

The Amended Complaint alleges that ConsumerAffairs operates a website through which third-party consumers exchange information about their experiences buying products or services from particular companies. (Am. Compl. ¶¶ 1 & 27-106). Accordingly, ConsumerAffairs acts as a “provider . . . of an interactive computer service” and is entitled to the immunity offered by Section 230, as long as it is not also an “information content provider” (“**ICP**”) with respect to the content which forms the basis of the Plaintiffs’ defamation claim. See, e.g., Global

Royalties, Ltd. v. Xcentric Ventures, LLC, 2008 WL 565102, \*1-2 (D. Ariz. 2008); Whitney Information Network, Inc. v. Xcentric Ventures, LLC, 2008 WL 450095, 8 (M.D. Fla. 2008).

As the Court has pointed out, ConsumerAffairs is “indisputably an interactive computer service.” (Dismissal Order at 7). Therefore, the question turns to whether ConsumerAffairs “assisted in the creation and development of the content at issue so as to render it also an information content provider” as to that content. (Id.).

**2. With respect to the allegedly defamatory statements which originated with third-party users of the ConsumerAffairs Website, ConsumerAffairs is not an ICP.**

The Amended Complaint plainly demonstrates that all of the statements which might arguably support Plaintiffs’ defamation claim originated with third-party users of the ConsumerAffairs Website. Accordingly, Section 230 bars any defamation claim against ConsumerAffairs for publishing those statements. Zeran, 129 F.3d at 331-34.

The CDA establishes a “broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of a service.” Zeran v. American Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); MCW, Inc. v. Badbusinessbureau.com, LLC, 2004 U.S. Dist. LEXIS at \*22; Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 2008 WL 450095 (M.D. Fla. 2008). However, the CDA does not immunize the provider of an ICS if it is also responsible, in whole or in part, for the creation or development of the information alleged to violate the law (that is, if it is an ICP with respect to the offending content). MCW, 2004 U.S. Dist. LEXIS at \*22. Thus, the issue to be decided here is whether ConsumerAffairs is an ICP with respect to the *specific third-party postings* which Plaintiffs allege to be defamatory; the

critical issue is whether the ICS acted as an ICP with respect to the false, negative, disparaging, or defamatory information that forms the basis of the claims alleged in the Amended Complaint. Id. at \*23-24; Carafano, 339 F.3d at 1125. ConsumerAffairs cannot be liable for content posted by third parties; it can only be liable for defamatory content that it took part in creating. See Carafano, 339 F.3d at 1125.

In the original Complaint, Plaintiffs alleged harm resulting from seven individual posts made to the ConsumerAffairs Website. In each instance, the information was created, developed, and posted by a third-party user of the ConsumerAffairs Website and the Complaint identified each of these individual ICPs. (Compl. ¶¶ 21-34). The Complaint did not allege facts sufficient to demonstrate that ConsumerAffairs played any part in creating or developing the information posted by these third-parties. In fact, the Complaint made clear that the defamation claim was based solely on the fact that ConsumerAffairs “published” these allegedly defamatory statements. (Compl. ¶¶ 17, 35-37 & 39-41). Even after the Plaintiffs raised additional allegations in their response to the Motion to Dismiss, the Court correctly ruled that Section 230 barred the Plaintiffs’ defamation claim against ConsumerAffairs. (See Dimissal Order at 6-13).

The Amended Complaint is a blatant attempt to circumvent the Court’s ruling on the Motion to Dismiss by pleading additional unsupported and unreasonable conclusions and unwarranted inferences disguised as supporting “facts.” In dismissing the original Complaint, the Court noted that

[a]s far as alleging in the Complaint that Defendant played a role in the development or creation of the content at issue, the closest Plaintiffs come is the generic statement that follows each instance of conduct, wherein Plaintiffs state that, “upon information and belief, Defendant participated in the preparation and publication of a false, defamatory, malicious, and libelous article of and

concerning Plaintiffs . . . .” Such bald allegations of Defendant’s participation are insufficient to meet the Rule 8(a) requirements.

(Dismissal Order at 7-8). In the Amended Complaint, the Plaintiffs seek to address this issue by expanding this “generic statement” and supporting it with slightly less generic but still wholly unsupported, unreasonable, and unwarranted conclusory assertions. The statement which followed each instance of alleged wrongdoing in the original Complaint has now been modified to read, “Defendant participated in the preparation of this complaint by soliciting the complaint, steering the complaint into a specific category designed to attract attention by consumer class action lawyers, contacting [the third-party author of the complaint] to ask . . . questions about [the] complaint and to help [him or her] draft or revise [the] complaint, and promising [the third-party author of the complaint] that she could obtain some financial recovery by joining a class action lawsuit.” (Am. Compl. ¶¶ 39, 42, 45, 49, 53, 56, 59, 63, 67, 71, 75, 78, 81, 85, 89, 92, 95, 99, 102 & 105). The essential elements of the Plaintiffs defamation and tortious interference claims remain unchanged; they still impermissibly seek to hold ConsumerAffairs for “publishing” allegedly defamatory statements created by third-parties. (Am. Comp. ¶¶ 1 & 108).

In the Amended Complaint, the Plaintiffs have simply pled unsupported and unreasonable conclusions which address some of the specific flaws recognized by the Court in dismissing the original Complaint. (Dismissal Order at 10 (“Nowhere in the Complaint in this matter have Plaintiffs made any claims pertaining to the creation of title and headings by Defendant, let alone any injury suffered by Plaintiffs as a result of such headings. The Court in MCW also found the defendants to be information content providers, however the active conduct alleged pertaining to the defendants in that matter are far more severe and sufficiently distinct

from the conduct alleged in the Complaint here. In MCW, the defendants were encouraging posters to take pictures to add to the website, and were actively soliciting postings. There have been no allegations as to any such active solicitation of information by Defendants in this matter.”). Plaintiffs apparently do not realize that pleading such unsupported, unreasonable, and unwarranted conclusions will not create legally-cognizable claims where no properly-pled *facts* support such a finding. See, e.g., Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1969 (2007); Tellabs, Inc. v. Mahon Issues & Rights, Ltd., 127 S.Ct. 2499, 2509 (2007); Eastern Shore Markets v. J.D. Associates Limited Partnership, 213 F.3d 175, 180 (4<sup>th</sup> Cir. 2000); Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4<sup>th</sup> Cir. 1999).

In addition to an expanded version of the generic, conclusory statement describing ConsumerAffairs’s alleged “participation” in the creation of the seven posts referenced in the original Complaint, the Amended Complaint contains similar references to thirteen additional and allegedly defamatory consumer reports posted by third-party users of the ConsumerAffairs Website. (Am. Compl. ¶¶ 60). As they did in the original Complaint, the Plaintiffs identify each ICP who posted one of the subject consumer reports. (Am. Compl. ¶¶ 61-105). As to those consumer reports attributed to a third-party that the Plaintiffs claim not to recognize, they have alleged that they “believe” that ConsumerAffairs actually authored the report, though the Amended Complaint is devoid of any factual allegations supporting such a conclusion. (Am. Compl. ¶¶ 64, 68, 72, 82, 86 & 96). As the Court has previously ruled, “[s]uch bald allegations of Defendant’s participation are insufficient to meet the Rule 8(a) requirements” and, further, fail to state a cause of action sufficient to survive a Rule 12(b)(6) motion. See, e.g., Twombly, 127 S.Ct. at 1969; Tellabs, 127 S.Ct. at 2509; Eastern Shore Markets, 213 F.3d at 180; Edwards, 178



F.3d at 244. Even if the new allegations contained in the Amended Complaint were factual allegations and not bare conclusions, they would be insufficient to state a valid cause of action which would not be barred by Section 230.

In the Amended Complaint, Plaintiffs claim that ConsumerAffairs is an ICP with respect to the allegedly defamatory content attributed to certain third-party users of the ConsumerAffairs Website because it: (1) “advises visitors to the website on how to craft their complaint to better support a lawsuit [and] advises readers that complaints need to be organized into categories similar to other complaints if they want to join a class action lawsuit,” (Am. Compl. ¶¶ 30, 34); (2) categorizes consumer reports posted by third-party users of the ConsumerAffairs Website, (Am. Compl. ¶¶ 31-34, 36, 39, 42, 45, 49, 53, 56, 59, 63, 67, 71, 75, 78, 81, 85, 89, 92, 95, 99, 102 & 105); (3) otherwise “participated in the preparation of” certain consumer reports posted by third-party users of the website (Id.); and (4) is believed by the Plaintiffs (with no evidence or factual basis whatsoever) to be the author of certain other posts attributed to third-party users of the website, (Am. Compl. ¶¶ 64, 68, 72, 82, 86 & 96). The new allegations contained in the Amended Complaint consist largely of unsupported and unreasonable conclusions and unwarranted inferences; the few additional well plead *factual* allegations contained in the Amended Complaint are insufficient to alter the Court’s conclusion that ConsumerAffairs is entitled to the immunity afforded by Section 230.

First, Plaintiffs’ conclusion that ConsumerAffairs “actually advises” visitors to the ConsumerAffairs Website “on how to craft their complaint to better support a lawsuit” is unsupported by the facts alleged in the Amended Complaint. On the ConsumerAffairs Website, the discussion of the creation and posting of third-party consumer reports is fairly neutral.

Contrary to the conclusory allegations of the Plaintiffs, the purpose of the ConsumerAffairs Website is not to encourage readers to post negative or false comments about any business or to encourage class action lawsuits. As alleged in the Amended Complaint, the purpose of the ConsumerAffairs Website is “to expose consumer fraud, inform and educate consumers, publish safety alerts and recall data, and publish any other information to assist consumers.” (Am. Compl. ¶ 22 & Ex. H at ¶ 2). In fact, ConsumerAffairs makes every effort to prevent defamatory material from being posted on its site and even attempts to omit consumer reports that “seem to stem from isolated incidents, rather than a pattern of behavior.” (Am. Compl. ¶ 22 & Ex. H at ¶ 6). The ConsumerAffairs Website solicits both positive and negative comments from consumers, (Am. Compl. ¶ 30 & Exs. I & J), and notes that attorneys who review the posts will only be interested in complaints that have legal merit. (Exs. I & J). Far from encouraging class action suits, ConsumerAffairs points out how difficult such cases are to certify and prove. (Am. Compl. Exs. I & J). Such conduct is clearly insufficient to make ConsumerAffairs an ICP with respect to the complaints attributed to third-party users of the ConsumerAffairs Website.

Second, Plaintiffs’ allegation that ConsumerAffairs categorizes reports about the Plaintiffs does not affect ConsumerAffairs’s Section 230 immunity. In support of their position, Plaintiffs will no doubt cite to Fair Housing Council of San Fernando Valley v. Roommates.com LLC, 521 F.3d 1157 (9<sup>th</sup> Cir. 2007), MCW, Inc. v. Badbusinessbureau.com, LLC, 2004 U.S. Dist. LEXIS 6678 (N.D. Tex. 2004), and Hy Cite Corp. v. Badbusinessbureau.com, LLC, 418 F.Supp.2d 1142 (D. Ariz. 2005).<sup>3</sup> As the Plaintiffs should know from briefing and arguing the First Motion to Dismiss, each of these cases is distinguishable from the case at bar and none of

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<sup>3</sup> Plaintiffs have previously cited to these three cases in support of their position.

them adequately support the Plaintiffs' position in this action.

In Roommates.com, the Ninth Circuit Court of Appeals addressed three specific aspects of the Roommates.com website (billed as the "Web's Most Popular Roommate Matching Service") that were alleged to violate the Fair Housing Act and California fair housing laws: (1) the questions posed by Roommates.com to prospective subscribers during the website registration process, which were written solely by Roommates.com; (2) allegedly discriminatory statements displayed in the "Additional Comments" section of user's profile pages; and (3) Roommates.com's alleged development and display of subscribers' discriminatory preferences. The court concluded that Section 230 did not apply to the first and third aspects of the website but did immunize Roommates.com against liability for the second aspect.

As part of the website registration process, Roommates.com required users to disclose their sex, family status, and sexual orientation. Merely *asking* such questions constitutes a violation of the Fair Housing Act, which prohibits housing discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin. As the Court noted, "a real estate broker may not inquire as to the race of a prospective buyer." Roommates.com, 521 F.3d at 1164.

Since Roommates.com "*created* the questions and choice of answers, and designed its website registration process around them," the Ninth Circuit concluded that Roommates.com was the "information content provider" as to the *questions* and could claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services." Roommates.com, 521 F.3d at 1164 (emphasis added). The court held that Section 230 did not protect Roommates.com from liability resulting from the publication of questions and

answers *actually authored* by the website operator.

The court also concluded that Section 230 did not protect Roommates.com from liability resulting from its publication of users' sex, family status, and sexual orientation and use of this information to "channel subscribers away from listings where the individual offering housing has expressed preferences that are incompatible with the subscriber's answers." Roommates.com, 521 F.3d at 1165. Here, the Court determined that

the part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws – the information about sex family status and sexual orientation – is provided by subscribers in response to Roommate's questions, which they *cannot refuse to answer* if they want to use defendant's services. By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of prepopulated answers, [Roommates.com] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. . . . Unlawful questions solicit (a.k.a. "develop") unlawful answers. Not only does Roommate ask these questions, Roommate makes answering the discriminatory questions a condition of doing business . . . . When a business enterprise extracts such information from potential customers as a condition of accepting them as clients, it is no stretch to say that the enterprise is responsible, at least in part, for developing that information.

Roommates.com, 521 F.3d at 1166 (emphasis added).

The Fair Housing Council also argued that Roommates.com should be held liable for discriminatory statements displayed in the "Additional Comments" section of users' profile pages. However, the Court noted that, despite the fact that it required users to provide certain information upon which discriminatory preferences may be based, Roommates.com does not "urge subscribers to input discriminatory preferences." Roommates.com, 521 F.3d at 1174. Therefore, Roommates.com "is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by [the website]." Accordingly, Section 230 immunity did apply to these comments and Roommates.com could not

be held liable for publishing them.

The Ninth Circuit’s decision is narrowly limited to conduct by website operators that is alleged to violate laws prohibiting discriminatory practices, in which it is not the content itself (e.g. “I am Caucasian, straight, and Christian.”) which results in liability but the type of content (e.g., the race, sexual orientation, or religion of a potential home purchaser) which is solicited, developed, and then published. Here, Roommates.com was alleged to have *required* subscribers to provide and publish certain information in a context in which that type of information may not legally be used – thus, the website “developed, in whole or in part” the content.

This is not at all similar to a website soliciting comments or posts about a particular subject (e.g., positive and negative consuming experiences) but is much closer to a website asking its users to provide specific and unlawful comments (e.g., false complaints about specific companies). In fact, the Court distinguished the case before it from many others in which Section 230 protection did apply by noting that in those cases the website operator “did not design its system around the dissemination of unlawful content.” Roommates.com, 521 F.3d at 1172.

Here, ConsumerAffairs’s system is not designed around the dissemination of unlawful content. In fact, ConsumerAffairs’s system is designed to publish accurate reports written by third-parties regarding their consuming experiences, both positive and negative. (Am. Compl. ¶ 30 & Exs. I & J). The dissemination of such information is perfectly legal, unlike the discriminatory and illegal content published by Roommates.com. Unlike Roommates.com, ConsumerAffairs does not require users to create and display illegal content in order to use the ConsumerAffairs Website. Thus, the holding of Roommates.com is inapplicable to the case at bar.

As for MCW and Hy Cite, the defendant in both cases (Xcentric Ventures d/b/a Bad Business Bureau, badbusinessbureau.com, and ripoffreport.com) was found to have immunity under the CDA in later cases under nearly identical facts. See Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 2008 WL 450095 (M.D. Fla. 2008); Global Royalties, Ltd v. Xcentric Ventures, LLC, 2008 WL 565102 (D. Ariz. 2008).

In MCW, the United States District Court for the Northern District of Texas held that the defendants were not entitled to CDA immunity because:

- (1) Defendant created the titles “con artists,” “scam,” and “ripoff,” and organized the reports under such headings. The Court found that such titles and headings were “clearly part of the web page content.”
- (2) Defendants personally created a number of messages such as “we will not rest until [plaintiffs] either change their fraudulent business practices or are run out of business. In the meantime, we will do our best to help their victims get their money back...” and “The comments by the victim above are typical to Rip-off Report of [the plaintiff]...Rip-off Report has relentlessly pursued this corrupt company...”
- (3) Defendants, in an email, encouraged a consumer to take photos of himself, his car, him handing out Rip-off Reports in front of the plaintiff’s office, and the plaintiff’s sign in the background with the Rip-off Reports in hand, so that the defendants could include the photos on its website. The court found that actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes beyond the traditional publisher’s editorial

role and that the defendants were doing more than making minor alterations to a consumer's message; they were participating in the process of developing information.

MCW, 2004 U.S. Dist. LEXIS 6678 at \*33-36.

MCW is distinguishable from the instant case in that ConsumerAffairs does not actively encourage consumers to take certain pictures or ask certain questions to “develop” information about Plaintiffs.<sup>4</sup> It merely provides a place for consumers to post accounts of their consuming experiences. Additionally, the comments allegedly written by ConsumerAffairs do not independently accuse Plaintiffs of using fraudulent business practices or of being a corrupt company. Those statements merely assert that consumers have complained about Plaintiffs and are obviously true.

In Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 2008 WL 450095 (M.D. Fla. 2008), the United States District Court for the Middle District of Florida distinguished MCW, even though that case involved the same defendant, the owner and operator of the ripoffreport.com consumer complaint website. In granting defendant's motion for summary judgment, the Whitney Court rejected the plaintiff's argument that the defendants were responsible for the creation and development of the allegedly defamatory postings about the plaintiff because they created the “Con Artist,” “Corrupt Companies,” and “False TV Advertisements” categories that were used on some of the postings about the plaintiff. Id. at

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<sup>4</sup> Though Plaintiffs allege that ConsumerAffairs contacted some of the third-parties responsible for posting consumer reports about the Plaintiffs “to ask [them] questions about [their] complaint[s] and to help [them] draft or revise [their] complaints,” (Compl. ¶¶ 36, 39, 42, 45, 49, 53, 56, 59, 63, 67, 71, 75, 78, 81, 85, 89, 92, 95, 99, 102 & 105), these allegations amount to nothing more than unsupported conclusions and unwarranted inferences which the Court need not accept as true. Eastern Shore Markets, 213 F.3d at 180 (4<sup>th</sup> Cir. 2000); Edwards; 178 F.3d at 244 (4<sup>th</sup> Cir. 1999).

\*10. The Court held that the defendant could not be considered an ICP for the reports that included these categories because the defendant did not participate in any way in the *selection* of the categories. Id. at \*10. The defendant simply supplied a list of categories and the consumers / posters, as part of the submission process, selected the particular phrases used to categorize their reports. Id. The mere fact that the defendant supplied a list of categories from which a poster had to make a selection was not sufficient to treat defendant as an ICP; the authors of the postings made the decision to select the categories describing the plaintiff. Id. at \*10. Additionally, the defendant did not offer posters only categories that were negative or defamatory in nature (other categories included “seminar programs”, “multi-level marketing”, and “financial services”), so posters could have chosen other categories to describe their reports about the plaintiff. Id. See Global Royalties, Ltd v. Xcentric Ventures, LLC, 2008 WL 565102 (D. Ariz. 2008); Carafano, 339 F.3d at 1124. The court also held that, though the defendant provided guidance as to what makes a good report and what to include in a report, there was no evidence that the defendant played any role in creating or developing the postings that were the subject of the plaintiff’s complaint. Id.

Third, Plaintiffs’ unsupported, unreasonable, and conclusory allegations that ConsumerAffairs otherwise “participated in the preparation of, and so is responsible, in whole or in part, for the creation or development of” the allegedly defamatory statements posted by certain third-party users of the ConsumerAffairs Website are insufficient to demonstrate that ConsumerAffairs is not to be granted the broad immunity provided by Section 230.

In addition to the “advising” and “categorizing” previously addressed, the other allegations pertaining to ConsumerAffairs’s “participation” in the creation of the allegedly



offending content are nothing more than unwarranted inferences. Plaintiffs allege that “upon information and belief” ConsumerAffairs contacted each of the third-parties responsible for the subject consumer reports but clearly have no facts to support that conclusion. No facts supporting such a conclusion have been pled and the discovery propounded by Plaintiffs evidence an urgent need to obtain such information directly from Consumer Affairs. Ironically, even if ConsumerAffairs had contacted one or more of the third-parties responsible for the subject consumer reports, that conduct would not make ConsumerAffairs an ICP with regard to those consumer reports. Such activities (the selection and editing of content) are among the traditional functions of a publisher; Section 230 was specifically designed to protect service providers, like ConsumerAffairs, from liability associated with exercising these functions. Zeran, 129 F.3d at 330.

Fourth, the Plaintiffs’ allegation that they “*believe*” that ConsumerAffairs *may* be the author of certain posts attributed to third-parties that are allegedly defamatory, (Am. Compl. ¶¶ 64, 68, 72, 82, 86 & 96), is wholly insufficient to place ConsumerAffairs outside of the statutory protection afforded it by the CDA. It is clear from the Amended Complaint that Plaintiffs have absolutely no basis to make this allegation; where they are unable to positively identify the author of a specific post, the Plaintiffs simply conclude that ConsumerAffairs wrote the post, without any evidence or factual support. (Id.). Plaintiffs’ allegation that ConsumerAffairs wrote some of the subject posts attributed to third-parties is an unsupported and unreasonable conclusion or unwarranted inference which the Court need not accept as true. E.g., Eastern Shore Markets, 213 F.3d at 180.

3. **With respect to those statements alleged to have been actually authored by ConsumerAffairs, the Amended Complaint fails to state a valid claim for defamation.**
  - a. **The statements alleged to have been authored by ConsumerAffairs are protected by the First Amendment to the United States Constitution.**

The United States Supreme Court has “recognized constitutional limits on the type of speech which may be the subject of state defamation actions.” Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 110 S.Ct. 2695, 2704 (1990) (citations omitted). While defamation actions “have their basis in state common law,” they are still “subject to principles of freedom of speech arising under the First Amendment to the United States Constitution . . . .” Yeagle v. Collegiate Times, 255 Va. 293, 295 (1998).

To support an action for defamation, statements made by a “media defendant” (such as ConsumerAffairs) on matters of “public interest” (such as those described on the ConsumerAffairs Website) must first be “provable as false.” Milkovich, 497 U.S. at 19-20, 110 S.Ct. at 2706 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986)); Biospherics, Inc. v. Forbers, Inc., 151 F.3d 180, 183 (4<sup>th</sup> Cir. 1998); Yeagle, 255 at id. Such a statement must also be “reasonably interpreted as stating actual facts about an individual.” Milkovich, 497 U.S. at 20, 110 S.Ct. at 2706 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 879 (1988); Biospherics, 151 F.3d at id.; Yeagle, at id. In determining whether a statement could be reasonably interpreted as stating actual facts about an individual, a court should consider the language used and whether it was “loose, figurative, or hyperbolic language which would negate the impression that the writer’ was stating an actual fact. Milkovich, 497 U.S. at 21, 110 S.Ct. at 2707. The court must also consider the context and

“general tenor of the article.” Biospherics, at id. (quoting Milkovich, 497 at 21). Speech that is “insulting, offensive, or otherwise inappropriate, but constitutes no more than ‘rhetorical hyperbole,’” does not constitute actionable defamation. Yeagle, 255 Va. at 295-96.

Plaintiffs allege that ConsumerAffairs authored three separate defamatory statements about them: (1) “some of Nemet’s customers aren’t so impressed as the complaints in this section indicate,” (Am. Comp. ¶ 33); (2) “The Nemet complaints pretty well cover the territory – everything from prices engraved in sand to advertising that overlooks certain crucial elements. It’s also interesting to see how Nemet responds when consumers take the trouble to drag them into court,” (Am. Compl. ¶ 34); and (3) “if a dealer advertisers [sic] a car at a certain price, it is obligated to honor that price unless it has clearly disclosed that the price applies only under certain conditions. Does Nemet know this?”

Given the figurative language used, the context, and the general tenor of the material in which these statements were made, they should be considered protected speech under the First Amendment. Moreover, to the extent that any of these statements is a statement of fact, each is true and cannot, therefore, be the basis of a defamation claim.

**b. The statements alleged to have been authored by ConsumerAffairs are true.**

Truth is an absolute defense to a defamation claim. Alexandria Gazette Corp. v. West, 198 Va. 154, 159, 93 S.E.2d 274, 279 (1956) (citing Rosenberg v. Mason, 157 Va. 215, 160 S.E. 190; Guide Publishing Co. v. Futrell, 175 Va. 77, 7 S.E.2d 133; Massey v. Jones, 182 Va. 200, 208, 28 S.E.2d 623). As demonstrated by the allegations contained in the Amended Complaint, the three statements alleged to have been made by ConsumerAffairs are true; accordingly, they cannot be the basis of a claim for defamation.

The Amended Complaint plainly demonstrates that “some of Nemet’s customers aren’t so impressed” with the Plaintiffs. Some of Nemet’s customers have complained about the Plaintiffs to the New York City Department of Consumer Affairs, the state agency alleged by the Plaintiffs to be “responsible for addressing legitimate consumer complaints.” (Am. Compl. ¶¶ 12-13 & 18). The Plaintiffs admit that some of the complaints made by these customers to the New York City Department of Consumer Affairs remain unresolved. (Am. Compl. ¶ 18 (“Plaintiffs have been able to resolve virtually every [but not every] consumer complaint filed with the Department”). The Plaintiffs further admit that at least some of the complaints lodged by their customers are true. (Id. (“[V]irtually all [but not all] consumer complaints filed against the Plaintiffs have proved to be false”). Clearly, ConsumerAffairs has received numerous complaints from the Plaintiffs’ customers who are clearly “not impressed” with the Plaintiffs. (Am. Compl. ¶¶ 22, 36-106, Ex. H at ¶ 8 (stating that ConsumerAffairs began receiving complaints about the Plaintiffs in January 2000) & Exs. K-L (detailing more than 40 complaints posted to the ConsumerAffairs Website by third-party customers of the Plaintiffs)).<sup>5</sup> It would be incredible to claim that the statement “some of Nemet’s customers aren’t so impressed” is false or defamatory.

Similarly, the statement “Nemet complaints pretty well cover the territory” is also clearly true as evidenced by the sheer volume of customer complaints recited in the Amended

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<sup>5</sup> Though not relevant to the question presented herein, it should be noted that the New York City Department of Consumer Affairs and ConsumerAffairs are not the only organizations fielding complaints about the Plaintiffs. Together, the Plaintiffs have been sued nearly *60 times* and have, over the last three years, been the subject of *dozens* of complaints to the Better Business Bureau.

Complaint. (Am. Compl. ¶¶ 22, 36-106, Ex. H at ¶ 8 & Exs. K-L). The Plaintiffs' assertion that this statement is "false, malicious and libelous"<sup>6</sup> is disingenuous, at best.

The statement "if a dealer advertisers [sic] a car at a certain price, it is obligated to honor that price unless it has clearly disclosed that the price applies only under certain conditions. Does Nemet know this?" also fails to describe a potentially defamatory statement. The first sentence in the statement is clearly a statement of opinion as to the law; if it is a statement of fact, it is certainly true. The question contained in the statement is not a statement that can be either true or false, and thus cannot form the basis of a defamation claim. (Moreover, the statement was clearly published no later than 2003, (Am. Compl. Ex. M (providing the date of the content as March 25, 2003)), and any defamation claim based on the statement is barred by the relevant statute of limitations. See Va. Code Ann. §8.01-247.1.)

**B. Count I of the Amended Complaint seeks punitive damages in excess of the applicable statutory cap on such relief.**

Count I of the Amended Complaint purports to set forth a cause of action for defamation under the common law of Virginia. This Count seeks, *inter alia*, punitive damages in the amount of \$1,500,000 (Compl. at 12-13).

Since Plaintiffs may only bring the state law claim alleged in Count I of the Amended Complaint under the laws of the Commonwealth of Virginia, Virginia's statutory cap for punitive damages applies to their recovery. See, e.g., PBM Products, Inc. v. Mead Johnson & Co., 204 F.R.D. 71, 74 (E.D.Va. 2001). At present, Virginia caps punitive damages at \$350,000. Va. Code Ann. § 8.01-38.1 (Michie 2007 Repl. Vol.). The Plaintiff's seek punitive damages of nearly four times the statutory limit; accordingly, their claim for punitive damages under Count I

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<sup>6</sup> Am. Compl. ¶ 34.

of the Amended Complaint must be stricken. See, e.g., Vaile v. Willick, 2008 WL 204477, \*6 (W.D. Va. 2008) (striking punitive damages claim in excess of the statutory cap); Worley v. Kia Motors American, Inc., 2001 WL 1517158, \*1 (W.D. Va. 2001) (holding that “the better practice is to strike any claim for more than the amount of an applicable statutory cap”).<sup>7</sup>

## **II. COUNT II OF THE COMPLAINT MUST BE DISMISSED OR STRICKEN.**

### **A. The tortious interference with business expectancy claim alleged in Count II of the Amended Complaint is barred by Section 230 of the Communications Decency Act.**

The federal immunity offered by Section 230 also bars the tortious interference with business expectancy claim asserted in Count II of the Amended Complaint. Like the defamation claim in Count I, the Plaintiffs’ tortious interference claim is wholly based upon the publication of allegedly defamatory statements by ConsumerAffairs. (Am Compl. ¶¶ 111-114). Like the defamation claim, Plaintiff’s tortious interference claim is also barred by Section 230. Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090, 1117-18 (W.D. Wash. 2004). See also Argument, § I(A), supra.

### **B. Count II of the Amended Complaint seeks punitive damages in excess of the applicable statutory cap on such relief.**

Like Count I, Count II of the Amended Complaint seeks punitive damages in the amount of \$1,500,000.00 (Compl. at 13-14). Since the claims set forth in Count II are brought under Virginia law, Virginia’s statutory cap of \$350,000 on punitive damages applies. Va. Code Ann. § 8.01-38.1. Accordingly, the claim for punitive damages under Count II of the Amended Complaint is futile. See, Argument, §I(B), supra.

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<sup>7</sup> ConsumerAffairs recognizes the split of authority noted by the Court in dismissing the original Complaint. (Dismissal Order at 13). However, under the particular circumstances of this case, it appears that the most prudent

**III. COUNTS III AND IV OF THE AMENDED COMPLAINT FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

The Amended Complaint contains a *verbatim* recitation of Counts III and IV of the original Complaint, as they were dismissed by the Court. Plaintiffs admit that the “Amended Complaint does not offer any new facts related to these two counts.” (Memorandum in Support of Plaintiffs’ Motion to File Amended Complaint at 4). Accordingly, Counts III and IV must be dismissed on the same grounds that required their dismissal from the original Complaint. (See Brief in Support of Motion to Dismiss or Strike Complaint, Argument, § III & Reply Brief in Support of Motion to Dismiss or Strike Complaint, Argument, §§ IV & V, which are expressly incorporated as if fully set forth herein).

Counts III and IV of the Complaint purport to allege unfair competition claims (for false designation of origin and false advertising, respectively) under Section 43(a)(1) of the Lanham Act (15 U.S.C. § 1125(a)(1)) but Plaintiffs fail to state a cause of action in either count. Section 43(a)(1) of the Lanham Act protects a company from having its trademark, symbols, or names used in false advertising or deceptive product promotion, and prevents the use of a mark to create the impression of an affiliating connection or association between the mark's owner and the goods or services of another. Perini Corp. v. Perini Construction, Inc., 915 F.2d 121, 124 (4th Cir. 1990); Scotts Co. v. United Industries Corp., 315 F.3d 264 (4th Cir. 2002). The Act “provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” Advanced Resources Internat’l, Inc. v. Tri-Star Petroleum Co., 4 F.3d 327, 333 (4th

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procedure to follow would be that described in Vaile and Worley.

Cir. 1993) (quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 198, 105 S.Ct. 658, 663 (1985)).

The typical Section 43(a) claim is brought by a plaintiff who is in competition with the defendant, and charges the defendant with using a mark, a brand name, a word, a slogan, a symbol, a combination of words and symbols, an ornamental feature, a distinctive shape, or something else intended to remind the consumer of the brand so similar to that of the plaintiff that the public may be confused as to the source of the good or service. Advanced Resources, 4 F.3d at 334. Some courts have expanded the scope of the Lanham Act by permitting claims by plaintiffs who are not in commercial competition with the defendant and giving a broad interpretation to the concept of a “mark.” Id. Even where the scope of the Lanham Act has been expanded in this way, courts require that a plaintiff bringing a claim under Section 43(a) be a commercial entity<sup>8</sup> who can “demonstrate that it has a valid, protectable trademark and that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers.” Lone Star Steakhouse & Saloon v. Alpha of Virginia, 43 F.3d 922 (4th Cir.1995).

Here, Plaintiffs have no interest that is protectable under the Lanham Act and have no standing to assert the claims alleged. Knowing that their defamation and tortious interference claims are barred by Section 230, Plaintiffs have made a meritless attempt to plead some form of intellectual property claim which might not be barred. In doing so, they have merely mislabeled claims that are based upon allegedly defamatory publication by a website operator. Though Plaintiffs have attempted to bypass Section 230 immunity, the instant case does not give rise to any valid causes of action under the Lanham Act.



**A. Plaintiffs have not, and cannot, plead that they have a “mark” and that ConsumerAffairs’s “use of a colorable imitation of the [mark] is likely to cause confusion among consumers,” as is required to state a claim under Section 43(a) of the Lanham Act.**

To recover under Section 43(a) of the Lanham Act, a plaintiff must demonstrate that: (1) it has a valid, protectable trademark; and (2) the defendant’s “use of a colorable imitation of the trademark is likely to cause confusion among consumers.” Id.; Cardservice International, Inc. v. McGee, 950 F.Supp. 737, 740 (E.D. Va. 1997). Here, Plaintiffs have failed to plead either of these elements and the Complaint demonstrates that, as a matter of law, Plaintiffs cannot state a claim upon which relief may be granted under Counts III or IV of the Complaint.

Counts III and IV are based solely upon ConsumerAffairs’s use of the term “consumer affairs” in conjunction with the ConsumerAffairs Website. (Am. Compl. ¶¶ 116-117 & 121-122). Plaintiffs do not allege that this term is a “mark” and further do not, and cannot, allege that the term is a mark owned by the Plaintiffs. Plaintiffs do not allege that consumers associate the term “consumer affairs” with the Plaintiffs but instead affirmatively allege that consumers associate the term with a vaguely described group of third-parties consisting of “State, Federal, or other organization[s].” (Am. Compl. ¶ 117). Thus, it is clear that Plaintiffs have no valid, protectable trademark of which any “colorable imitation” has been used by ConsumerAffairs; Plaintiffs cannot, therefore, maintain any cause of action under Section 43(a) and Counts III and IV of the Complaint must be dismissed.

**B. Plaintiffs do not have standing to assert the claims alleged in Counts III and IV.**

Standing has both constitutional and prudential components. Bennett v. Spear, 520 U.S.

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8 Consumers do not have standing to sue under Section 43(a) of the Lanham Act. E.g. Made in the USA Foundation

154, 117 S.Ct. 1154 (1997). As the Court noted in dismissing the original Complaint, “Standing jurisprudence contains two strands: Article III standing, which enforces the Constitution’s case-or-controversy requirements . . . and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction.” Elk Grove United Such. Dist. v. Newdow, 542 U.S.1, 11 (2004) (quoted in Dismissal Order at 14). As the parties do not contest Article III standing, the Court’s standing determination will, once again, center on the prudential standing analysis and the analytical split among the Circuits who have addressed the issue

**1. Plaintiffs lack standing under the categorical approach to prudential standing.**

In the context of the Lanham Act, the Seventh, Ninth, and Tenth Circuits “have held, categorically, that false advertising claims not involving misuse of a trademark are actionable only ‘when brought by competitors of the wrongdoer.’” American Ass’n of Orthodontists v. Yellow Book USA, Inc., 434 F.3d 1100, 1103-4 (8<sup>th</sup> Cir. 2006) (quoting Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1109 (9<sup>th</sup> Cir. 1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1047, 122 Led.2d 355 (1993)); accord Telecom Intern. America, Ltd. v. AT&T Corp., 280 F.3d 175, 197 (2d Cir. 2001); Stanfield v. Osborne Indus., Inc., 52 F.3d 867, 873 (10<sup>th</sup> Cir.), cert. denied, 516 U.S. 920, 116 S.Ct. 314, 133 Led.2d 217 (1995); L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc., 9 F.3d 561, 575 (7<sup>th</sup> Cir. 1993). Plaintiffs clearly lack standing under this “categorical approach” because the parties are not competitors.

**2. Plaintiffs lack standing under the reasonable interest test.**

The “First and Second Circuits have adopted the reasonable interest test, wherein the plaintiff must have a reasonable interest to be protected *against the type of harm that the Lanham*

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v. Phillips Food, Inc., 365 F.3d 278, 281 (4th Cir. 2004).

*Act is intended to prevent.*” (Order at 17 (emphasis in original) (citing Ortho. Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 694 (2d Cir. 1994); Camel Hair & Cashmere Inst. Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11 (1<sup>st</sup> Cir. 1986)). Plaintiffs clearly lack standing under the reasonable interest test because, as the Court pointed out in dismissing the original Complaint, “Plaintiffs have not alleged any threat to *their own trademark*, and this case has nothing to do with *competing products* and the ability of consumers to distinguish between them.” (Dismissal Order at 17-18 (emphasis in original)).

### **3. Plaintiffs lack standing under the five-factor test.**

The Third, Fifth, and Eleventh Circuits have adopted a five-factor test “based on the Supreme Court’s test for antitrust standing, that focuses judicial enforcement of the Lanham Act on the protection of commercial interests and the prevention of competitive harm.” *Id.* (citing Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233-35 (3d Cir. 1998); Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 562-64 (5<sup>th</sup> Cir.), cert. denied, 534 U.S. 945, 122 S.Ct. 329, 151 L.Ed.2d 243 (2001)). Under this approach, the following five factors must be considered: (1) the nature of the plaintiff’s alleged injury and whether it is of a type that Congress sought to redress in the Lanham Act; (2) the directness or indirectness of the asserted injury; (3) the proximity of the plaintiff to the alleged injurious conduct; (4) the speculativeness of the damages claim; and (5) the risk of duplicative damages or complexity in apportioning damages. Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 563 (5th Cir. 2001); Conte Bros., 165 F.3d at 233. Plaintiffs clearly lack standing under this five-factor test. (See Brief in Support of Motion to Dismiss or Strike Complaint, Argument, §III; Reply Brief in Support of Motion to Dismiss or Strike Complaint, Argument, §§ IV & V; Dimissal Order at 15-16).

**C. Count IV fails to state a claim for false advertising.**

The unfair competition section of the Lanham Act is intended to prevent confusion, mistake, or deception regarding the source of goods or services. MCW, 2004 U.S. Dist. LEXIS at \*36. Thus, “[t]he touchstone of a section 1125(a) unfair competition claim is whether the defendant[s] actions are ‘likely to cause confusion.’” McCoy v. Mitsubishi Cutlery, Inc., 67 F.3d 917, 923 (Fed.Cir.1995) (quoting Matrix Essentials Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587, 592 (5th Cir.1993)), cert. denied, 516 U.S. 1174 (1996). See Perini Corp. v. Perini Construction, Inc., 915 F.2d 121, 127 (4th Cir. 1990) (stating that the ultimate question, for purposes of determining liability under the Lanham Act, is whether there exists a “likelihood that an appreciable number of ordinarily prudent purchasers will be misled, or indeed simply confused, as to the source of the goods [or services] in question”); Lamparello v. Falwell, 420 F.3d 309, 314 (4th Cir. 2005) (stating that the “hallmark” of Lanham Act claims is a likelihood of confusion).

In determining whether a likelihood of confusion exists, most courts evaluate the following factors: (1) the type of mark allegedly infringed, (2) the similarity between the two marks (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant's intent, and (7) any evidence of actual confusion. MCW, 2004 U.S. Dist. LEXIS 6678 at \*50; Lamparello, 420 F.3d at 314; Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984).

The court in MCW noted that the likelihood of confusion is generally regarded as a question of fact which should not be decided in a Rule 12(b)(6) motion to dismiss or in a motion for summary judgment. MCW, 2004 U.S. Dist. LEXIS 6678 at \*53. It also noted that courts

have also found that plaintiffs are not required to prove the likelihood of confusion at the pleading stage. There are, however, exceptions to the general rule:

First, where the record in the case at bar is devoid of any facts which would permit a reasonable jury to find that consumers were likely to be deceived, and there is no evidence showing how the plaintiff could have been injured by the alleged misattribution, courts conclude that summary judgment is an appropriate means by which to dismiss a Lanham Act likelihood of confusion claim. Second, where the goods between two parties are unrelated as a matter of law, dismissal of a likelihood of confusion claim pursuant to a Rule 12(b)(6) motion is appropriate.

*Id.* at \* 53. The MCW court found that not only were the plaintiff's and the defendants' goods unrelated as a matter of law, but neither party was a direct competitor of the other because the plaintiff assisted individuals with career counseling, while the defendants operated a for-profit consumer complaint forum. *Id.* at \*54. It held that under those circumstances, a Rule 12(b)(6) motion was a proper vehicle for deciding whether the plaintiff had stated a Lanham Act unfair competition claim. *Id.*

Similar to the facts of the MCW case, ConsumerAffairs's Website does not sell any goods or services similar to what Plaintiffs sell and does not compete, directly or indirectly, with Plaintiffs. Furthermore, the website has never used any of Plaintiffs' marks in its domain name. Most importantly, no reasonable viewer of ConsumerAffairs.com would believe that the disparaging comments regarding Plaintiffs' business are endorsed by Plaintiffs. Those accessing ConsumerAffairs's website would immediately recognize that the web pages do not belong to Plaintiffs. For these reasons, there is absolutely no evidence of a likelihood of confusion between Plaintiffs' goods and services and ConsumerAffairs's goods and services. Accordingly, Nemet's complaint does not properly state a claim for unfair competition. See also Bihari v.

Gross, 119 F. Supp. 2d 309 (S.D.N.Y. 2000).

### **CONCLUSION**

In consideration of the foregoing, Defendant ConsumerAffairs.com, Inc. respectfully moves this Court to dismiss or strike the Amended Complaint and grant it such other and further relief as the Court deems just and appropriate.

Respectfully Submitted,

CONSUMERAFFAIRS.COM, INC.  
By counsel

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4<sup>th</sup> day of August, 2008, I will hand-deliver the foregoing, and electronically file the foregoing with the Clerk of Court using the CM/ECF system which will then send a notification of such filing (NEF), to the following::

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#978120v1 Brief in Support of Motion to Dismiss or Strike Amended Complaint 47929/00004