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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**
12

13 CERTAIN APPROVAL PROGRAMS,
14 L.L.C.; and JACK STERNBERG,

15 Plaintiffs,

16 v.

17 XCENTRIC VENTURES, L.L.C.;
18 EDWARD MAGEDSON; and JOHN or
19 JANE DOE,

20 Defendants.

Case No: CV08-1608-PHX-NVW

MOTION FOR SUMMARY JUDGMENT

21 Pursuant to Fed. R. Civ. P. 56, Defendants Xcentric Ventures, L.L.C. and Ed
22 Magedson hereby move this Court for an Order granting summary judgment as to all
23 claims in this matter on the basis that in light of the undisputed facts, Defendants are
24 entitled to judgment as a matter of law as to the issue of immunity pursuant to the
25 Communications Decency Act, 47 U.S.C. § 230(c)(1).

26 For the Court’s information, the issue raised by this motion is intentionally narrow.
27 Specifically, the single question addressed is: whether the undisputed facts establish that
28 Defendants are “responsible, in whole or in part” for the creation of any statements which
are allegedly defamatory as to Plaintiffs?

Defendants contend the answer to this question is NO—it is undisputed that they
did not create and are not responsible for any defamatory statements about Mr. Sternberg.
As such, they are entitled to CDA immunity as a matter of law.

1 As a general rule the CDA provides immunity to the operator of an interactive
2 website as long as one key condition is present—the content at issue must have been
3 created by a third party. Based on this simple premise, cases interpreting the CDA have
4 created an extremely bright-line rule: as long as the elements of the CDA are met, liability
5 for online statements is limited to 1st party authors only.

6 Put another way, under the CDA, the author of a statement is liable for the
7 accuracy of his words, but others are not. If the author is a user of a website, then the user
8 may be liable but the website is not. By the same token, where the website itself creates
9 unlawful content, then the website is liable for the content it creates. Under either
10 scenario, the simple effect of the CDA is to limit liability to first-party authors/creators,
11 whether that creator is a user of a website or whether the creator is the website itself.

12 This simple rule is extremely “bright-line” in the sense that no case has ever denied
13 CDA immunity to a website where the statements at issue were created by a third party.¹
14 However, this is exactly what Plaintiffs seek—to blur the CDA’s bright line in a manner
15 no court has ever allowed—imputing and transferring liability from a 1st party author
16 directly to a 3rd party website for statements made solely by the 1st party author:

17 Defendants anticipate that Plaintiffs will respond by suggesting that their position
18 is *not* novel. Rather, Plaintiffs will argue that Defendants *are* first-party creators of some
19 of the statements at issue in this case, and therefore Plaintiffs are not trying to impute
20 liability to one party for statements created by a third party.

21 As explained below, this position mixes apples and oranges, and is without factual
22 support. Indeed, the facts concerning the creation of the statements at issue in this case
23 are entirely undisputed, and these facts demonstrate that as a matter of law, Defendants
24 are entitled to immunity pursuant to the Communications Decency Act.

25
26 ¹ Only one case has entertained the *possibility* that CDA immunity might not exist under these facts. In *Batzel v.*
27 *Smith*, 333 F.3d 1018 (9th Cir. 2003), a dispute arose as to whether a third party author intended his statements to be
28 published online. Recognizing that CDA immunity only extended to statements which the author intended to be
published, the Ninth Circuit remanded for further findings as to the author’s intent. *Cf. Barnes v. Yahoo!, Inc.*, ___
F.3d ___, 2009 WL 1232367 (9th Cir. May 7, 2009) (CDA does not bar breach of contract claim based on promise to
remove fake dating profile because claim does not require treatment of website as publisher of third-party content).

1 **I. BACKGROUND FACTS**

2 As the Court knows, Defendants Xcentric and Ed Magedson run the website
3 www.RipoffReport.com which allows consumers to post complaints and to review
4 complaints written by other users. *See* Defendants’ Statement of Facts (“DSOF”) ¶ 1.
5 Plaintiff Jack Sternberg is the principal of Certain Approval Programs, LLC. DSOF ¶ 2.
6 From 2005 until 2008, Mr. Sternberg created and sold a program known as “Buyer’s
7 First” which “teaches real estate investors how to develop leads of potential real estate
8 buyers before finding real estate to sell to them.” DSOF ¶ 3. Although Mr. Sternberg has
9 for the most part retired, when the Buyer’s First class was being offered from 2006–2008,
10 the cost was between \$35,000–\$60,000 for a 2–3 day seminar with some follow-up
11 tutoring.

12 This case arises from a single “report” posted on www.RipoffReport.com on
13 August 31, 2007 by an anonymous author identified as “John or Jane Doe”. The text of
14 this report is set forth in its entirety in ¶ 38 of Plaintiffs’ First Amended Complaint
15 (“FAC”). DSOF ¶ 4. Paraphrased simply, the report states that Mr. Sternberg cannot be
16 trusted, that his Buyer’s First program is illegal and does not work, and that Mr. Sternberg
17 was arrested for fraud, among other things. DSOF ¶ 5. The report contains a title with a
18 similar message. DSOF ¶ 6.

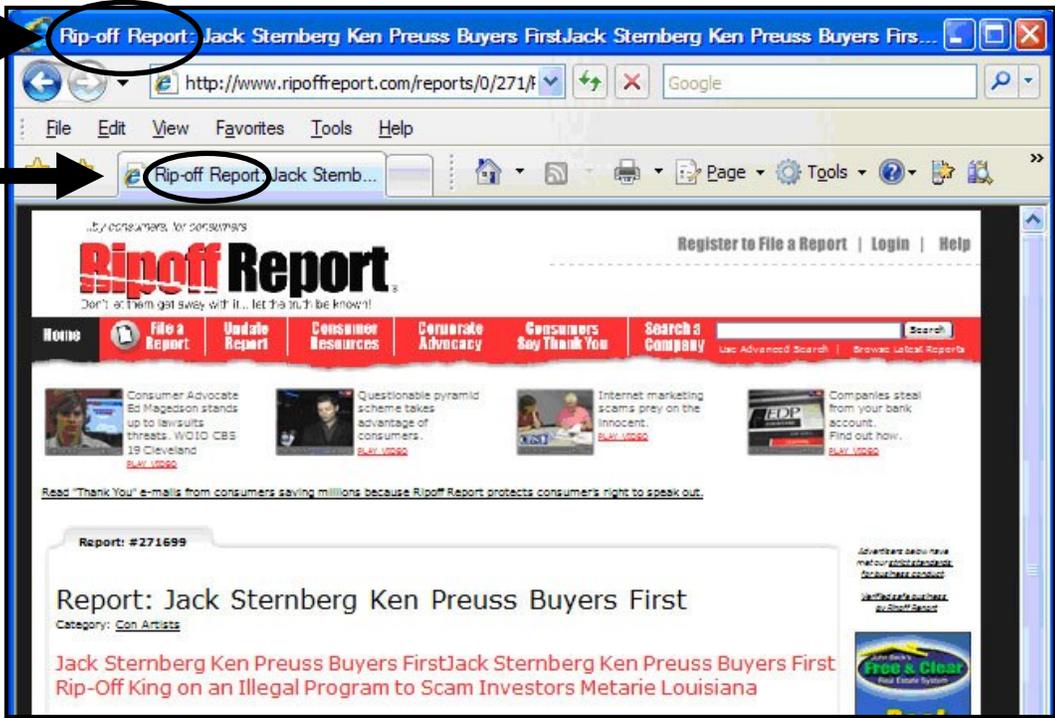
19 The Complaint does not allege that the substance of the report was created by
20 Defendants. DSOF ¶ 7. Rather, the Complaint alleges that the report was created solely
21 by John/Jane Doe without any input from Defendants. DSOF ¶ 8. Defendants agree that
22 this allegation is entirely correct; the report was created solely by a third party without any
23 input or encouragement from Defendants.

24 Likewise, the Complaint does not allege that the title of the report was created by
25 Defendants. Rather, Paragraph 39 of the FAC alleges the author John/Jane Doe created
26 the report’s title without any input or co-development by Defendants. DSOF ¶ 9. Again,
27 Defendants agree that this allegation is correct; every word in the title as quoted in FAC ¶
28 39 was created solely by a third party.

1 Thus far, it is factually undisputed that every word which forms the basis for
2 Plaintiffs' claims was created solely by John/Jane Doe without any input or
3 encouragement from Defendants. The next question is obvious: if Defendants did not
4 create the report or the title, *what defamatory information did they create?*

5 The answer is found in Paragraph 42 of the Complaint which alleges that
6 Defendants "added" the words "Rip-off Report:" to the beginning of the title of John
7 Doe's report. DSOF ¶ 10. The exact location of this "added" content is shown in the
8 circles below.

9
10
11 **Text**
12 **"Added"**
13 **By**
14 **Defendants**



15
16
17
18
19
20
21
22 Based on these facts (which Defendants agree are all undisputed), Plaintiffs seek to
23 hold Defendants responsible for *every word* of the *entire* posting, even the portions which
24 Mr. Sternberg admits were created solely by a third party. This argument is creative, but
25 it is directly contrary to well-settled law. Courts have routinely held that a website can be
26 both a creator of some content and a republisher of other content, but liability cannot be
27 imposed on the site for material which the site itself did not create. Summary judgment
28 should therefore be entered in favor of Defendants as to all claims in this case.

1 **II. ARGUMENT**

2 Before tackling specific points, the Court should note that this motion relies on a
3 crucial distinction—the distinction between text created by Defendants and text created by
4 someone else; e.g., a third party user of the Ripoff Report website. As a matter of course,
5 and with one general exception,² Defendants agree that the CDA does not apply to text
6 which they themselves created. This point is beyond dispute; “Essentially, the CDA
7 protects website operators from liability as publishers, but not from liability as authors.”
8 *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002, *3 (D.Ariz. 2007)
9 (emphasis added).

10 On the other hand, if defamatory text was created by a third party without
11 significant input or substantive alteration from Defendants, the CDA prohibits transferring
12 or imputing liability to Defendants for another person’s statements; “This is precisely the
13 kind of situation for which section 230 was designed to provide immunity.” *Fair Housing*
14 *Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir.
15 2008). This distinction is pivotal because, “Under the CDA, website operators are only
16 considered ‘information content providers,’ for the information at issue that the operators
17 are responsible for creating or developing.” *GW Equity*, 2009 WL 62173, * 7 (emphasis

18 ² The exception is as follows: users of the Ripoff Report website may choose to place their
19 report into a category such as “Con Artists” or something less controversial. Although the
20 actual words for each category were created by Defendants, the decision to select those
21 words for a particular report is a choice made by the author, not by Defendants. As a
22 matter of law, Defendants are still entitled to CDA protection as to user-selected category
23 choices even if the words were initially created by Defendants; “This minor and passive
24 participation in the development of content will not defeat CDA immunity, which can
25 even withstand more active participation.” *Global Royalties*, 2007 WL 2949002 at *3
26 (citing *Batzel v. Smith*, 333 F.3d 1018, 1031 note 19 (9th Cir. 2003)); *see also Whitney*
27 *Information Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095, *10 (M.D.Fla.
28 2008) (noting, “the mere fact that Xcentric provides categories from which a poster must
make a selection in order to submit a report on the ROR website is not sufficient to treat
Defendants as information content providers of the reports ... that contain the “con
artists”, “corrupt companies”, and “false TV advertisements” categories.”); *see also GW*
Equity, LLC v. Xcentric Ventures, LLC, 2009 WL 62173, *5 (N.D.Tex. 2009)
(concluding, “Defendants’ provision of a broad choice of categories did not create or
develop the alleged harmful conduct here.”)

1 added) (citing *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)).
2 Put simply, if a website creates 1% of a posting, the site is liable only as to *that* 1% it
3 created. If the other 99% was created solely by a third party, the website is not
4 responsible for that part of the text. See *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 833
5 note 11, 121 Cal.Rptr.2d 703, 717 note 11 (Cal.App.4th 2002) (explaining, “the fact
6 appellants allege eBay is an information content provider is irrelevant if eBay did not
7 itself create or develop the content for which appellants seek to hold it liable. It is not
8 inconsistent for eBay to be an interactive service provider and also an information content
9 provider; the categories are not mutually exclusive. The critical issue is whether eBay
10 acted as an information content provider with respect to the information that appellants
11 claim is false or misleading.”) (emphasis added).

12 As these cases hold, the standard for CDA immunity is very clear and very
13 simple—in order to overcome the CDA, Mr. Sternberg must show that Defendants are
14 responsible, in whole or in part, for creating false statements, and that *those statements* are
15 the ones for which Mr. Sternberg seeks to hold Defendants liable. This showing cannot
16 be made here for two simple reasons:

- 17 1.) The undisputed facts show that Defendants did not create either the report or
18 the title at issue; this information was provided solely by a third party. As
19 such, the original author may be liable to Mr. Sternberg for his/her
20 statements, but the CDA fully applies to protect Defendants from liability as
21 to these statements; and
- 22 2.) To the extent Defendants “created” any content such as the words “Rip-off
23 Report:” these words are non-defamatory as a matter of law and did not
24 change the meaning of the original author’s statements. As such, liability
25 cannot be based on these statements, and there is no basis to impute liability
26 on Defendants for the author’s own statements.

27 These two principles are based on facts which are entirely undisputed. As such,
28 summary judgment should be entered in favor of Defendants.

1 a. It Is Undisputed That Defendants Did Not Create Any Of The Text
2 Of The Posting At Issue

3 As described in Paragraph 38 of the Complaint, on August 31, 2007 a third party
4 author identified as "John or Jane Doe" logged into the Ripoff Report website and posted
5 a report about Plaintiffs. The full text of this report is quoted *verbatim* in the Complaint
6 and the body of the report is shown here:

7 ...by consumers, for consumers

8 **Ripoff Report**
Don't let them get away with it... let the truth be known!

9 Register to File a Report

10 Home File a Report Update Report Consumer Resources Corporate Advocacy Consumers Say Thank You Search a Company Use Advanced Search

11 Consumer Advocate Ed Magedson stands up to lawsuits threats. WOIO CBS 19 Cleveland [PLAY VIDEO](#)

12 Questionable pyramid scheme takes advantage of consumers. [PLAY VIDEO](#)

13 Internet marketing scams prey on the innocent. [PLAY VIDEO](#)

14 Companies from your bank account. Find out how. [PLAY VIDEO](#)

15 Read "Thank You" e-mails from consumers saving millions because Ripoff Report protects consumer's right to speak out.

16 Report: #271699

17 Report: Jack Sternberg Ken Preuss Buyers First
Category: [Con Artists](#)

18 Jack Sternberg Ken Preuss Buyers First Jack Sternberg Ken Preuss Buyers First Rip-Off King on an Illegal Program to Scam Investors Metairie Louisiana

19 Jack Sternberg Ken Preuss Buyers First
3001 19th St
Metairie, Louisiana, 70002
U.S.A. Phone: 504-833-5201 [Fax:](#)

20 Robin Universal City, Texas Submitted: 8/31/2007 5:44:39 PM Modified: 8/31/2007 5:45:00 PM

21 Do not trust the Buyers First or any other name given to the idea by Jack Sternberg. I have seen people buy his program and fail, and I too have failed using this program, and not because the people who bought into this scam didn't try it, but because it's illegal and very difficult. His idea of charging \$50,000 is an attempt to scam anyone. He [makes more money](#) from selling the program than doing one stray deal here or there.

22 I've seen people at the program that would never do a deal and he sold them damaged goods. The program requires bait and switch [advertising](#) (which is illegal), it requires advertising property you don't have or own (which is illegal), and it requires selling someone something which neither benefits the buyer or the seller. It's a leach equity program that benefits no one, including the investors Jack Sternberg ropes in and steals their money.

23 What Jack won't disclose is that he was arrested for fraud back in the 90's for [real-estate investing](#) and owes a few million for his petty games. He's not a person you can trust. An article published in Louisiana about his illegal scheming and arrest show his true nature.

24 What anyone should do if they do not believe me is to ask Jack Sternberg or Ken Preuss to show you their books or 1099 and show you how much money they make and ask them to give them 5 references of people who are making so much money. These people don't mind hurting anyone. I put more than enough money and time to make the program work and frankly it's stealing. I lost my money already, this is for you, the consumers sake.

25 Robin Universal City, Texas U.S.A.

26 America's #1 Gold Buyer CASH4GOLD
27 Sell Your Gold!
28 1. Request Your Free Kit

29 Ripoff Report Verified Safe

30 Thank you!!

31 Read how Ripoff Report saves consumers millions.

32 Rebuttal Box Respond to this report!

33 Are you an owner, employee or ex-employee with either negative or positive information about the company or individual, or can you provide "insider information" on this company?

34 File a Rebuttal

35 Victim of this person/company?

36 Are you also a victim of the same company or individual? Want Justice? File a Rip-off Report, help other consumers to be educated and don't let them get away with it!

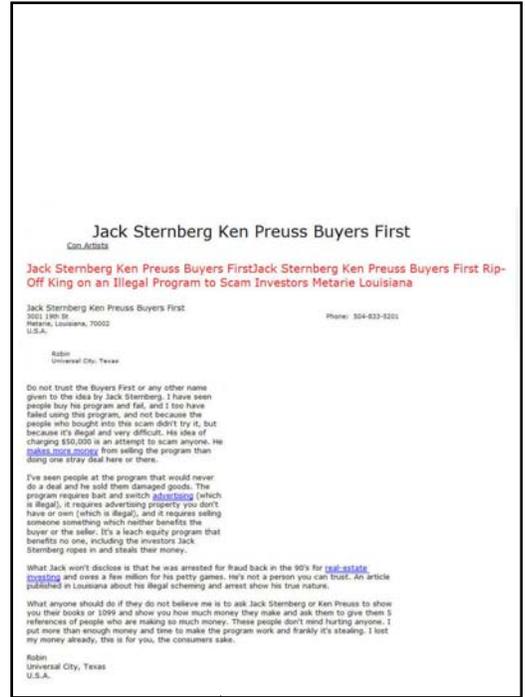
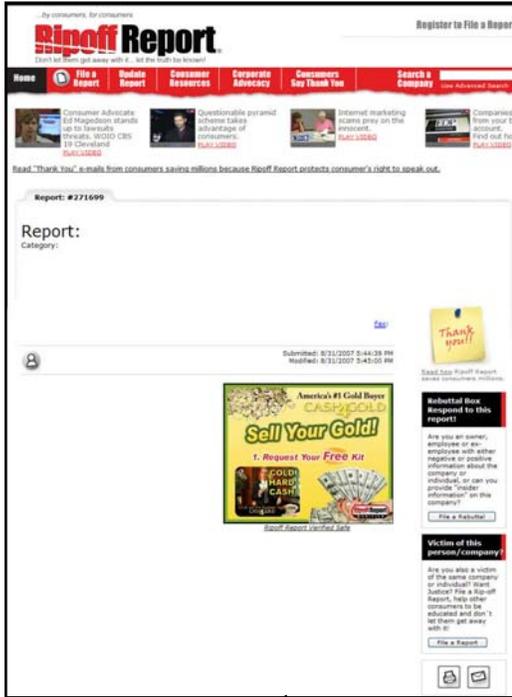
37 File a Report

38

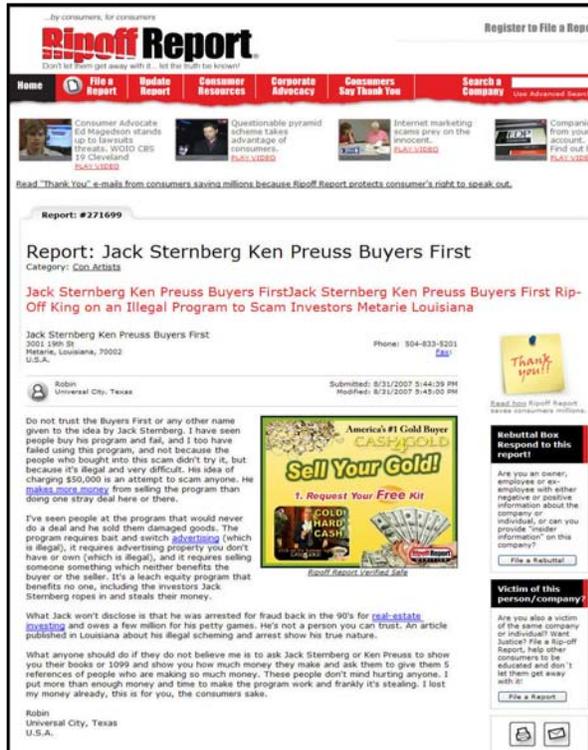
1 Not surprisingly, the report includes some content from the author and some
2 generic content created by Defendants. SOF ¶ 11. When the user submitted his/her
3 posting to the site, the author's content was combined with the generic material to create
4 the final standardized page common to every report on the website. SOF ¶ 12.

5 Generic Website Content

Content from 3rd Party Author



Final Combined Posting



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1 Of course, as noted above, the fact that the posting at issue contains a combination
2 of some text from the third party author and some text from Defendants does not make
3 Defendants jointly liable for every word in the posting. This is not how the CDA works.
4 Rather, “Under the CDA, website operators are only considered ‘information content
5 providers,’ for the information at issue that the operators are responsible for creating or
6 developing.” *GW Equity*, 2009 WL 62173, * 7 (emphasis added)

7 Here, the undisputed facts establish all three elements of CDA immunity as to the
8 text comprising the body of the posting identified in Paragraph of the Complaint. *See*
9 *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash.App. 2001) (observing CDA’s three
10 elements are: “[1] the defendant must be a provider or user of an interactive computer
11 service; [2] the asserted claims must treat the defendant as a publisher or speaker of
12 information; and [3] the information must be provided by another information content
13 provider.”)

14 First, it is undisputed that Defendants are the providers of an interactive computer
15 service; to wit, www.RipoffReport.com. *See Global Royalties, Ltd. v. Xcentric Ventures,*
16 *LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008) (finding Defendants entitled to CDA immunity as
17 providers/operators of an interactive computer service).

18 Second, it is undisputed that all claims in the First Amended Complaint treat
19 Defendants as publishers or speakers of information. *See* SOF ¶ 13.

20 Third, it is undisputed that Defendants did not create the text identified in ¶ 38 of
21 the Complaint. This information was provided solely by another information content
22 provider—John/Jane Doe. Mr. Sternberg does not allege that Defendants played any role
23 in the creation of this content.

24 Because all three CDA elements are present with respect to the body of the report
25 at issue, Defendants are entitled to immunity as to that material and summary judgment is
26 therefore proper to that extent, excusing Defendants from having to defend the accuracy
27 of this material which they did not create; “Without reviewing every essay, [website
28 operators] would have no way to distinguish unlawful discriminatory preferences from

1 perfectly legitimate statements. ... This is precisely the kind of situation for which section
2 230 was designed to provide immunity.” *Roommates.com*, 521 F.3d at 1174.

3 Based on these undisputed facts, Defendants are entitled to summary judgment in
4 their favor as to any/all statements contained in the body of the posting at issue and the
5 title as described in Paragraph 39 of the Complaint. There is no dispute that Defendants
6 did not create this information, and as such, the CDA precludes Plaintiffs from imposing
7 liability upon Defendants for the accuracy of these statements.

8 **b. None of Defendants’ Editorial Actions Abrogate CDA Immunity**

9 As explained above, it is undisputed that Defendants did *not* write the report and
10 did *not* write the title. Despite this, it is expected that Plaintiffs will argue that liability
11 may pass from the author to Defendants by virtue of editorial contributions which make
12 Defendants liable as joint creators of the posting at issue.

13 Given the uncontested facts shown above, the dispositive question is purely a legal
14 one—are any of Defendants’ actions sufficient to treat Defendants as “responsible, in
15 whole or in part” for the creation of material which defames Plaintiffs? As explained
16 below, the answer is simple: NO, none of Defendants actions fall outside the permissible
17 editorial actions allowed by the CDA.

18 **1. Including “Rip-off Report:” In A Title Of A Posting On 19 www.RipoffReport.com Does Not Materially Alter The 20 Meaning Of The 3rd Party-Generated Text**

21 Over the past several months, Plaintiffs’ theory of this case has become very
22 apparent. The theory works like this. Knowing that they cannot prove Defendants wrote
23 any of the substantive text of the report or the report’s title (because they did not),
24 Plaintiffs contend that the CDA does not apply because Defendants added the words “Rip-
25 off Report:” to one version of the report title (as shown above) thereby effectively
26 “contributing to” the third-party author’s text, causing Defendants to become jointly
27 responsible for the entire posting, even as to 3rd party material which was not altered or
28 modified by Defendants in any way.

1 As noted above, no court has ever accepted such a radical theory. As a general
2 rule, merely adding or subtracting words to/from user-generated text will not result in a
3 loss of CDA immunity; “A website operator who edits user-created content-such as by
4 correcting spelling, removing obscenity or trimming for length-retains his immunity for
5 any illegality in the user-created content, provided that the edits are unrelated to the
6 illegality.” *Roommates.com*, 521 F.3d at 1169; *Global Royalties*, 544 F.Supp.2d at 932
7 (“the CDA is a complete bar to suit against a website operator for its ‘exercise of a
8 publisher’s traditional editorial functions-such as deciding whether to publish, withdraw,
9 postpone or alter content.’”) (emphasis added) (quoting *Batzel*, 333 F.3d at 1035). In
10 other words, merely editing third-party content will not destroy a website’s immunity.

11 By the same token, CDA immunity will always be lost if the website operator edits
12 or alters third-party text in a manner that materially changes the *meaning* of the original
13 author’s message:

14 [A] website operator who edits in a manner that contributes to the alleged
15 illegality—such as by removing the word “not” from a user’s message
16 reading “[Name] did *not* steal the artwork” in order to transform an
17 innocent message into a libelous one—is directly involved in the alleged
18 illegality and thus not immune.

19 *Roommates.com*, 521 F.3d at 1169 (brackets and emphasis in original). Clearly, removing
20 the word “not” from a sentence drastically alters the meaning of the message and exposes
21 the editor to liability as the developer of the statement. Defendants do not dispute that
22 rule. But this rule cannot be extended to impose liability here based on the inclusion of
23 the words “Rip-off Report:” in part of a report’s title for at least two reasons.

24 First, Plaintiffs do not dispute that the anonymous author wrote every word of the
25 following title: “Jack Sternberg Ken Preuss Buyers FirstJack Sternberg Ken Preuss Buyers
26 First Rip-Off King on an Illegal Program to Scam Investors Metarie Louisiana”. As the
27 Court can see, the words “Rip-Off” were part of the text submitted by the original author.
28 As such, adding the trademarked phrase “Rip-off Report” to the front of the title did not
change its meaning in any way because the term “Rip-Off” was already there.

1 But even if the words “rip-off” were not included by the original author, this
2 editorial act of simply identifying the name of the website where the posting is located
3 does not materially alter any part of the original title’s message or meaning. In other
4 words, if the words “Rip-off Report:” were *removed*, the message of the original title and
5 report would remain the same. Mr. Sternberg conceded this point in his deposition:

6 Q: [W]ould you be satisfied in our case if those words were removed from this
7 report "Rip-Off Report:" those words are taken out, would that eliminate
8 any concerns that you have about this posting?

9 A. No.

10 Q. Why not?

11 A. Because it is, there is all kinds of stuff, there is all kinds of stuff wrong with
12 it. There is [sic] all kinds of stuff.

13 SOF ¶ 14. Here, it is obvious that the words “Rip-off Report:” do not alter the meaning of
14 the original author’s words because the original, unedited title already contained the
15 words “Rip-Off”. In addition, the term “Rip-off Report” is simply an accurate reflection
16 of the location of the report; it is, in fact, posted on www.RipoffReport.com. The
17 presence of this text does not change the meaning of the author’s words.

18 As the Court is aware, three other federal courts have considered cases involving
19 the Ripoff Report website and all three reached the same conclusion—Defendants’
20 operation of the website is fully protected by the CDA. *See GW Equity, LLC v. Xcentric*
21 *Ventures, LLC*, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (granting summary judgment in
22 favor of Xcentric under the CDA); *Whitney Information Network, Inc. v. Xcentric*
23 *Ventures, LLC*, 2008 WL 450095 (M.D.Fla. 2008) (granting summary judgment in favor
24 of Xcentric under the CDA); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544
25 F.Supp.2d 929 (D.Ariz. 2008) (granting Rule 12(b)(6) dismissal in favor of Xcentric
26 under the CDA). Given that each of these cases involved the exact same website and
27 reports which (as here) also included “Rip-off Report:” in the same locations as in this
28 case, there is simply no basis to reach a different result here.

1 Speaking pragmatically, if this case presented a “close call” (which it does not),
2 Defendants note that the Ninth Circuit has explained that difficult cases should be
3 resolved in favor of immunity under the CDA:

4 We must keep firmly in mind that this is an immunity statute we are
5 expounding, a provision enacted to protect websites against the evil of
6 liability for failure to remove offensive content. Websites are complicated
7 enterprises, and there will always be close cases where a clever lawyer
8 could argue that something the website operator did encouraged the
9 illegality. Such close cases, we believe, must be resolved in favor of
10 immunity, lest we cut the heart out of section 230 by forcing websites to
11 face death by ten thousand duck-bites, fighting off claims that they
12 promoted or encouraged-or at least tacitly assented to-the illegality of third
13 parties. Where it is very clear that the website directly participates in
14 developing the alleged illegality-as it is clear here with respect to
Roommate's questions, answers and the resulting profile pages-immunity
will be lost. But in cases of enhancement by implication or development by
inference-such as with respect to the “Additional Comments” here-section
230 must be interpreted to protect websites not merely from ultimate
liability, but from having to fight costly and protracted legal battles.

15 *Roommates.com*, 521 F.3d at 1174–74. Judge Kosinki’s cautionary remarks are especially
16 apropos here. Plaintiffs’ clever arguments notwithstanding, the statements criticizing Mr.
17 Sternberg were not created by Defendants. These words were created by a third party and
18 were posted without modification. As such, Defendants are protected under the CDA.

19 **2. Including “Rip-Off Report” In A Title Is Not Defamatory**

20 Although the Court need not even reach the issue, Defendants note that to the
21 extent the words “Rip-off Report” appear in any part of the posting about Mr. Sternberg,
22 the CDA may not apply *as to those words* (because Defendants created them), but this
23 does not mean Mr. Sternberg’s defamation claim will survive summary judgment for at
24 least two reasons.

25 First, as a matter of law, as long as the underlying facts are disclosed, the phrase
26 “rip-off” is a non-actionable expression of opinion which cannot support a defamation
27 claim. See Robert D. Sack, *Sack on Defamation*, § 4.3.5 at 4–54, 4–56 (2008 ed.) (citing
28 *Phantom Touring, Inc. v. Affiliated Pub.*, 953 F.2d 724 (1st Cir. 1992) for premise that

1 article referring to an obscure production of *Phantom of the Opera* as a “fake”, “rip-off”
2 and a “fraud” was non-actionable opinion).

3 An excellent example of this principle is found in *Beilenson v. Superior Court*, 44
4 Cal.App.4th 944, 52 Cal.Rptr.2d 357 (Cal.App.2nd Dist. 1996). *Beilenson* involved a
5 heated political rivalry in which a candidate for U.S. Congress (Anthony Beilenson)
6 published a campaign flyer attacking his opponent with the following statement: “Rich
7 Sybert Ripped Off California Taxpayers”. *Beilenson*, 44 Cal.App.4th at 947 (emphasis
8 added).

9 After Beilenson won the election, Sybert sued, claiming the use of the term
10 “Ripped Off” was defamatory. The California Court of Appeals disagreed, “This colorful
11 epithet [rip-off], when taken in context with the other information contained in the mailer,
12 was rhetorical hyperbole that is common in political debate. As such, the term ‘rip-off’
13 was not defamatory.” *Beilenson*, 44 Cal.App.4th at 951–52 (emphasis added) (citing
14 *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14, 26 L.Ed.2d 6, 15, 90 S.Ct. 1537 (1970)).

15 Another court reached the same result in *Jaillette v. Georgia Television Co.*, 238
16 Ga.App. 885, 520 S.E.2d 721 (Ga.App. 1999). *Jaillette* involved a local television news
17 broadcast about an air conditioning repairman who tried to charge customers \$1,200 for
18 the unnecessary replacement of a broken air conditioning unit. The news story included
19 statements from both the reporter and the unhappy customers concluding that the
20 repairman was attempting to “rip off” his customers. *See Jaillette*, 238 Ga.App. at 887,
21 520 S.E.2d at 724.

22 The repairman sued for defamation and the defendants moved for summary
23 judgment on various grounds, including on the basis that the use of the term “ripoff” was
24 “a mere statement of opinion or rhetorical hyperbole, and thus cannot form the basis for a
25 defamation claim.” *Id.* at 890, 520 S.E.2d at 725. The trial court agreed and granted
26 summary judgment in favor of the defendants.

27 On appeal, the Georgia Court of Appeals affirmed, finding that the term “ripoff”
28 was not defamatory as long as the facts underlying that opinion were disclosed. *See*

1 *Jaillette*, 238 Ga.App. at 891, 520 S.E.2d at 726. Numerous courts have reached the exact
2 same result in various types of disputes. *See Rizzuto v. Nexxus Products Co.*, 641 F.Supp.
3 473, 481 (S.D.N.Y. 1986) (claim in advertisement that competing seller of haircare
4 products was “trying to RIP YOU OFF” was non-defamatory expression of opinion); *Piro*
5 *v. Senior Action in a Gay Environment, Inc.*, 2006 WL 2611789, *1 (N.Y.Sup. 2006)
6 (granting summary judgment in favor of defendant based on finding that, “the statement
7 that plaintiff had ‘ripped someone off’ is also nonactionable opinion.”); *Telephone*
8 *Systems Int’l, Inc. v. Cecil*, 2003 WL 22232908 (S.D.N.Y. 2003) (“The defamatory
9 statements, as alleged, are that Bayat said that Bentham and/or Cecil were ‘ripping him
10 off.’ These statements are figurative and hyperbolic, and are not capable of being
11 disproved. Consequently, these statements are merely expressions of opinion. The
12 movants’ motion to dismiss the defamation counterclaim is therefore granted.”) (emphasis
13 added).

14 The same logic applies here. The term “rip-off” is a common epithet conveying
15 the speaker’s subjective opinion which cannot be conclusively proven true or false. For
16 instance, in 2004 the price of gasoline exceeded \$2/gallon for the first time, causing
17 widespread public outrage over that egregious “rip-off”.³ Now, five years later,
18 consumers are rejoicing at paying the same price. Obviously, whether or not \$2/gal.
19 gasoline is a “rip-off” is a matter of personal opinion which cannot be proven true or false.

20 For the same reason, the use of the phrase “rip-off” or “Ripoff Report” is not an
21 expression of any fact which can be proven true or false. Indeed, viewed in context, no
22 reasonable reader could conclude that the use of the term “Ripoff” implies the existence of
23 other undisclosed facts beyond the fact that a report has been posted on the website
24 www.RipoffReport.com. This is particularly true given that the front page of the website
25 clearly explains that the term “ripoff” refers to a consumer’s opinion which should NOT
26 be relied upon as fact:

27
28 ³ http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=104x1575143

1 Consumers, just because a company or individual is reported on Rip-off
2 Report does not necessarily mean you should not do business with them. In
3 many cases, it's just the opposite. Just because a company is posted on
4 Rip-off Report does not mean they are "bad". At some point in time,
5 everyone has felt like they've been ripped off, when that may not have been
6 the case. Not everything published on the Internet, or local newspapers, or
7 local TV news is always true. Many stories, no matter where you see them,
8 may have a bias slant. Being short on space or only having less than 2
9 minutes to do a story where important facts are left out can change the
10 entire story. Rip-off Report feels consumers reading the unedited
11 experiences of other consumers, without editorial involvement, are getting
12 the best consumer opinion/news available. Our detractors would like to tell
13 you differently. Savvy consumers need to take in all the information they
14 can find and use it as an advantage. Consumers who investigate and obtain
15 information about a company from a number of sources will be able to
16 make more educated decisions, because they know what to watch for. By
17 reading Rip-off Report, or any other publication containing information
18 about businesses, you, the consumer, now know more about that business
19 than its competitors. More than likely the competitor has the same issues.
20 Let the reported business know you've read complaints about them, that
21 you would like to do business with them, and get affirmation from the
22 company that if you do business with them, they will do right by you. Let
23 them know that if they treat you right, you will log on to Rip-off Report and
24 tell the world what a great experience you've had. All companies make
25 mistakes. It is the ones that learn from their mistakes that will benefit the
26 consumers the most. *"An educated consumer is our best reader"*

18 SOF ¶ 19 (emphasis added).

19 Under these circumstances, no reasonable reader would believe that the application
20 of the term "Ripoff Report" implies the existence of any facts beyond those contained in
21 the specific report(s) appearing on the site. Ripoff Report clearly discloses to readers that
22 reports on the site are the opinions of the author, are *not* verified for accuracy, and should
23 *not* discourage the reader from patronizing the reported business. As such, whether it may
24 have a negative connotation, the term "ripoff" is simply an epithet and an expression of
25 opinion which is not actionable as a matter of law.

26 c. The Corporate Advocacy Program Is Irrelevant

27 In a final effort to inflame and distract the Court, it is expected that Mr. Sternberg
28 will argue that Defendants' Corporate Advocacy Program somehow results in a loss of

1 CDA protection. This position is factually groundless because Mr. Sternberg was never,
2 at any time, solicited by Defendants to become a member of the program. SOF ¶ 17. Mr.
3 Sternberg was never asked to pay any money to Defendants, nor has he done so. SOF ¶
4 18. In fact, when *Mr. Sternberg* approached Defendants and inquired about joining the
5 Corporate Advocacy Program, Defendants declined, and explained that he could post a
6 rebuttal free of charge. SOF ¶ 19. To be blunt—the Corporate Advocacy Program has
7 nothing whatsoever to do with this case.

8 However, even if it did, this is legally irrelevant to the issue of whether the CDA
9 protects Defendants. That exact issue was considered and rejected by Judge Martone in
10 *Global Royalties*, 544 F.Supp.2d at 932–33 (finding “there is no authority for the
11 proposition that [the Corporate Advocacy Program] makes the website operator
12 responsible, in whole or in part, for the “creation or development” of every post on the
13 site.”); *see also GW Equity*, 2009 WL 62173, *13 (finding, “Like other courts to consider
14 this issue, this Court does not find the ‘Corporate Advocacy Program’ prohibits
15 Defendants from immunity under the CDA.”); *see also Whitney Info. Network Inc. v.*
16 *Xcentric Ventures, LLC*, 2008 WL 450095 at *6-12 (M.D.Fla. Feb.15, 2008) (finding
17 CDA immunity even though Court was aware of the Corporate Advocacy Program).

18 III. CONCLUSION

19 For the above reasons, Defendants move the Court for an order granting them
20 summary judgment as to all causes of action pursuant to Fed. R. Civ. P. 56.

21 DATED May 20, 2009.

22
23 **JABURG & WILK, P.C.**

24 /s/ David S. Gingras
25 Maria Crimi Speth
26 David S. Gingras
27 Laura Rogal
28 Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2009 I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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s/Debra Gower

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