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ENDORSED
FILED
Superior Court of California
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MAY 02 2010

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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SAN FRANCISCO

21 SCOTT P.,

CASE NO. CGC-10-496687

22 Plaintiff,

NOTICE OF DEMURRER AND
DEMURRER OF CRAIGSLIST, INC.;
MEMORANDUM OF POINTS AND
AUTHORITIES

23 v.

24 CRAIGSLIST, INC., FOSTER DAIRY
25 FARMS, FOSTER POULTRY FARMS,
26 MICHAEL O. SIMPSON, ALBERT
27 CARRENO, and DOES 1 through 100,
28 inclusive,

Department 301
Judge: Hon. Peter Busch
Date: June 2, 2010
Time: 9:30 a.m.

Defendants.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 9:30 a.m., on June 2, 2010, or as soon thereafter as the matter may be heard in Department 301, Defendant craigslist, Inc. ("craigslist") will and hereby does demur to the First Amended Complaint ("Amended Complaint") filed by Plaintiff Scott P. This demurrer is made pursuant to Section 430.10 of the California Code of Civil Procedure on the following grounds:

NOTICE OF DEMURRER
CASE NO. CGC-10-496687

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

This is an employment discrimination and harassment case – plain, clear and simple. If the allegations of the Amended Complaint are true, the treatment of Plaintiff by Foster Dairy Farms, Foster Poultry Farms, Michael O. Simpson and Albert Carreno (collectively, the "Employer Defendants") was despicable. However, craigslist was not Plaintiff's employer, manager or supervisor. craigslist did not participate in the discrimination conducted by the Employer Defendants. craigslist was just one "tool" (Plaintiff's word) that the Employer Defendants used fleetingly in their lengthy course of harassment of Plaintiff.

Amid the Employer Defendants' course of discrimination and insult to Plaintiff, the Employer Defendants allegedly posted ads to the craigslist website fraudulently posing as Plaintiff and soliciting sex or offering free goods. The Amended Complaint alleges that offensive ads were posted to craigslist on three days over a span of five years of alleged persistent hostility and harassment by the Employer Defendants. Upon notice of the posts, the Amended Complaint alleges that craigslist acted quickly and voluntarily to remove the ads and volunteered to try to block similar posts.

At the time, Plaintiff was entirely satisfied with craigslist's prompt and supportive response. Now, however, Plaintiff alleges that it was not enough for craigslist to remove the offensive posts within *minutes* of notice, and to immediately produce the underlying data so Plaintiff, his counsel or the law enforcement agents investigating the harassment could identify the perpetrators of the fraudulent posts. Now, Plaintiff alleges that it was also not enough that craigslist (allegedly) volunteered to try to help prevent similar posts. Instead, the Amended Complaint alleges that craigslist's voluntary effort to help should be construed as a contractual guarantee to perfectly prevent publication of future posts about Plaintiff.

Plaintiff's claims against craigslist are barred by § 230 of the Communications Decency Act, 47 U.S.C. § 230, which provides protection from liability to online service providers, including craigslist, for third-party content *and* for their voluntary efforts to screen offensive third-party content. Aware of § 230's barrier to his complaint against craigslist, Plaintiff attempts to characterize his allegations to fit a recent Ninth Circuit opinion that found a potential narrow promissory estoppel

1 exception to the broad protection conferred by § 230, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir.
2 2009). However, Plaintiff's alleged facts do not and cannot evade § 230, even by pleading a
3 promissory estoppel count and citing *Barnes*. Moreover, the Amended Complaint fails to allege facts
4 sufficient even to meet the elements of a promissory estoppel claim.

5 The Amended Complaint also tries to skirt § 230 by alleging a claim of unfair business
6 practices under California Business & Professions Code § 17200 because craigslist allegedly does not
7 require users "to *accurately* identify themselves in any way prior to posting and in allowing such
8 unidentified users to post virtually anything on [c]raigslist."¹ Pursuant to this claim, Plaintiff wants to
9 command changes to craigslist's online services so he and others can more easily identify the authors
10 of content to which they object. Specifically, according to the Amended Complaint, Plaintiff's
11 frustration over anonymous speech on the Internet should dictate a new regulatory standard and
12 craigslist should be required to mandate a user identification regime on its Internet forum. Plaintiff
13 does not wield this right or power. Congress, not Plaintiff or the courts, has the power to make laws.
14 And Congress has determined that regulation of the Internet should be kept to a minimum. Moreover,
15 the First Amendment of the United States Constitution protects the right to anonymous speech on the
16 Internet. In any event, Plaintiff does not have standing to assert the purported § 17200 claim.

17 craigslist's demurrer should be sustained and the case should proceed as the obvious
18 employment discrimination and harassment action that it is.

19 **II. SUMMARY OF RELEVANT ALLEGATIONS**

20 For the strict and sole purposes of this demurrer, craigslist treats the allegations of the
21 Amended Complaint as true. *BT-I v. Equitable Life Assurance Society of the United States*, 75
22 Cal.App.4th 1406, 1409 n. 2 (4th Dist. 1999). As a matter of law, the exhibits to the Amended
23 Complaint ("Exhibits") are treated as part and parcel of the Amended Complaint, and any
24 inconsistency between the allegations of the Amended Complaint and the Exhibits must be resolved
25 according to the Exhibits. *Barnett v. Fireman's Fund Ins. Co.*, 90 Cal.App.4th 500, 505 (4th Dist.
26 2001).

27 To resolve this demurrer, the salient allegations from the Amended Complaint are as follows.

28 ¹ Amended Complaint ¶ 91 (emphasis in original).

1 **A. THE NATURE AND PURPOSE OF THE LAWSUIT**

2 The Amended Complaint states: "This lawsuit aims to stop the *anonymous* internet attacks
3 and *impersonations* that have become commonplace on [c]raigslist by implementing accountability in
4 the way [c]raigslist does business consistent with Federal and State criminal laws prohibiting identity
5 theft and impersonation, compelling [c]raigslist to require users to *accurately identify themselves*
6 before they are allowed to post ads on the website." (Am. Cmplt. ¶ 13 (emphasis in original))²
7 Specifically, the Amended Complaint alleges that craigslist allowed the Employer Defendants to post
8 fraudulent ads targeting Plaintiff because craigslist lacks "user-screening or identification
9 requirements of any kind." (*Id.* ¶ 51)³

10 **B. DISCRIMINATION AGAINST AND HARASSMENT OF THE PLAINTIFF**

11 The Amended Complaint alleges:

- 12 • The discrimination against and harassment of Plaintiff by the Employer Defendants began in
13 2004 and continued into 2009 – approximately five years. (Am. Cmplt. ¶¶ 16, 29-35)
- 14 • Employer Defendant Simpson posted fraudulent ads regarding Plaintiff to craigslist on three
15 dates: March 16 and 18, 2009, and April 18, 2009. (*Id.* ¶¶ 12, 16, 51-53, Exs. 10, 12, 16, 23)
- 16 • craigslist was a "tool" that the Employer Defendants (Defendant Simpson specifically) used
17 to harass Plaintiff on the Internet. (*Id.* ¶ 8; *see also Id.* ¶ 13 ("weapon"))

18 **C. THE ALLEGATIONS AGAINST CRAIGSLIST**

19 **1. The March 16 Post and Related Communications**

20 The Amended Complaint alleges:

- 21 • Defendant Simpson first posted a fraudulent ad regarding Plaintiff to craigslist on March 16,
22 2009. (*Id.* ¶ 53)
- 23 • Plaintiff contacted craigslist on March 18, 2009, and asked that the post be removed. (*Id.*
24 ¶ 56) The post was voluntarily removed by craigslist within seven minutes. (*Id.* ¶ 78; *see also*
25 *id.* Exs. 10, 14).
- 26 • On March 18, Plaintiff asked craigslist for identifying information regarding the individual
27 responsible for the post. (*Id.* ¶ 57, Ex. 10) craigslist responded promptly and voluntarily
28 provided the requested data within minutes. (*Id.* ¶ 57, Exs. 10, 14).
- Before Plaintiff emailed craigslist, Plaintiff called craigslist and informed an unknown
 representative of the fraudulent post. (*Id.* ¶¶ 56-57) During this telephone conversation,
 Plaintiff, among other things, requested that the post be removed and asked that posts
 identifying him by name, numbers or address not be allowed on the craigslist website without

² See also *id.* ¶¶ 10, 11, 41, 42, 43, 48, 49, 89, 90, 91, 93.

³ See also *id.* ¶¶ 12, 13, 35, 38, 39, 41, 42, 43, 48, 49, 58, 89.

1 his express consent, to which an unidentified craigslist representative allegedly responded that
2 they would "take care of it." (*Id.* ¶ 56)

- 3
- 4 • Plaintiff followed up the telephone call with email communications with craigslist. (*Id.* ¶¶ 56-
5 57, Exs. 10, 14) None of the emails from Plaintiff included any request for craigslist to
6 prevent future posts and none of the email responses from craigslist contain any promise to
7 prevent future posts. (*Id.*) craigslist's email informed Plaintiff that, while craigslist did not
8 possess the name, telephone number or address of the poster, the data provided by craigslist
9 could be used by law enforcement authorities to trace and identify the poster. (*Id.* Ex. 14)
 - 10 • Plaintiff's March 18 email communication to craigslist stated "We have contacted the local
11 law enforcement as well as reported this information to the proper government agencies for
12 child pornography and abuse." (*Id.* Ex. 10)

13 2. The March 18 Post and Related Communications

14 The Amended Complaint further alleges:

- 15 • Defendant Simpson next posted a fraudulent ad as Plaintiff on March 18, 2009. (*Id.* ¶ 59)
- 16 • Plaintiff called and emailed craigslist in the early morning on March 20, 2009, requesting that
17 the post be removed.⁴ (*Id.* ¶ 56, Exs. 12, 13) The post was voluntarily removed by craigslist
18 less than fifteen minutes after the start of the business day. (*Id.* Ex. 12)
- 19 • In two telephone calls from Plaintiff to craigslist on March 20 and 21, Plaintiff asked
20 craigslist not to allow further posts about him, his name, his telephone number or his address
21 in any way. (*Id.* ¶ 62) In both conversations, unidentified craigslist representatives allegedly
22 responded with the same words, volunteering that they would "'take care of it.'" (*Id.* ¶ 63)

23 While not stated in the Amended Complaint, the Exhibits show the following additional facts:

- 24 • On March 20, Plaintiff also asked craigslist for identifying information of the individual
25 responsible for the second post, which craigslist promptly and voluntarily provided. (*Id.*
26 Ex. 11)
- 27 • Plaintiff's email on March 20 asked craigslist to stop any posts from being made under his
28 name or with his telephone numbers "without verbal consent from [him] first," but craigslist
did not assent or make any representations in response that it would or could implement such
an individualized screening, authentication and authorization procedure. (*Id.*)
- In his March 20 communications, Plaintiff notified craigslist: "I have contacted the District
Attorneys office who is already researching the information from the previous post and I
would like the information of the individual who posted the most recent post on March 18,
2009 at 10:08pm . . . ," and "I am requesting the complete records in your system for this
particular post so that I may give them to the District Attorney as well as my lawyer and
would appreciate your immediate response." (*Id.*)

3. The April 18 Posts and Related Communications

The allegations of the Amended Complaint and the Exhibits also establish:

⁴ Plaintiff's email message to craigslist also acknowledged removal of the initial fraudulent post,
and thanked craigslist for doing so. (*Id.* Ex. 12 ("On March 18, 2009 I submitted a request for you
to remove a fraudulent posting by ID# 10785447498, which you did, and I would like to say
thank you!"))

- 1 • There were no further fraudulent ads posted on craigslist until April 18, 2009, when Defendant Simpson posted six ads for items available for sale or for free by Plaintiff. (*Id.* ¶¶ 63-64, Exs. 16, 23)
- 2 • Plaintiff notified craigslist by email, and craigslist voluntarily and promptly removed the posts and provided Plaintiff with identifying data for each of the posts. (*Id.* Exs. 16, 23)
- 3 • craigslist also notified Plaintiff that craigslist had voluntarily taken additional steps "that may help prevent this issue from happening again." (*Id.* ¶¶ 71, 77, Exs. 16, 23)
- 4 • Plaintiff's email to craigslist confirmed that he had an open case with law enforcement to investigate the person responsible for the prior fraudulent posts and that he intended to contact law enforcement about the new posts. (*Id.* Exs. 16, 23)

7 No further fraudulent posts related to Plaintiff are alleged to have been posted on craigslist.

8 (*Id.*, *passim*)

9 **D. PLAINTIFF'S ACTIONS TO INVESTIGATE AND STOP FRAUDULENT POSTS**

10 The Amended Complaint alleges that, other than contacting craigslist, Plaintiff took no action
 11 to investigate or stop fraudulent craigslist posts. (*Id.* ¶¶ 63, 79) However, the Exhibits provide
 12 different facts, and the facts demonstrated by the Exhibits control. *See Barnett*, 90 Cal. App. 4th at
 13 505. The Exhibits demonstrate that, following his communications with craigslist, Plaintiff continued
 14 to take numerous actions to investigate and stop the fraudulent posts. Specifically:

- 15 • On March 22, 2009, Plaintiff provided the identification information for the posts received
 16 from craigslist, as well as a list of telephone numbers of callers responding to the posts, to an
 individual named "Uncle Troy" to investigate and try to identify the poster. (*Id.* Ex. 11)
- 17 • On March 23, 2009, Plaintiff stated that he was turning all of the evidence regarding the posts
 18 over to his attorney that day. (*Id.*)
- 19 • Law enforcement agents investigated and traced the fraudulent craigslist posts to the
 20 Defendant Simpson, Plaintiff's supervisor with the Employer Defendants. (*Id.* ¶¶ 3, 9, 74)
 This investigation could only have occurred after Plaintiff's communication with craigslist,
 because craigslist provided the data to trace the posts. (*Id.* Exs. 11, 14, 16, 23)
- 21 • As a result of the data provided by craigslist and the law enforcement investigation, on or
 22 about July 31, 2009, Defendant Simpson was arrested on criminal charges related to the
 fraudulent posts. (*Id.* ¶ 75, Ex 25)
- 23 • On or about October 29, 2009, Defendant Simpson pled guilty to two criminal counts related
 24 to the fraudulent posts. (*Id.*)

25 The above allegations and evidence from the Amended Complaint and the Exhibits irrefutably
 26 establish that craigslist's demurrer must be sustained and the claims against craigslist must be
 27 dismissed with prejudice.

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III. LEGAL ARGUMENT

A. THE STANDARD ON DEMURRER

In response to a complaint, a party may object by demurrer to the pleading. Cal. Civ. Proc. Code § 430.10(e). A demurrer tests the sufficiency of the allegations in the complaint. *See, e.g., McKell v. Washington Mut. Inc.*, 142 Cal.App.4th 1457, 1469 (2d Dist. 2006). Under the same standard as a motion to dismiss, the complaint must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

B. THE COMMUNICATIONS DECENCY ACT, SECTION 230

In 1996, Congress enacted § 230 of the Communications Decency Act, 47 U.S.C. § 230, to protect operators of interactive computer services from lawsuits seeking to treat them as "publishers or speakers" of online content originated by third parties and seeking to impose liability when they take steps to prevent or remove offensive or harmful material. Since the enactment of § 230, courts across the country, including this Court, have upheld, enforced and bolstered the protection of interactive computer service providers, including craigslist under § 230. *See Barrett*, 40 Cal.4th at 63; *Delfino v. Agilent Technologies, Inc.*, 145 Cal.App.4th 790, 803-08 (2006) (amassing § 230 opinions); *Chicago Lawyers' Comm. v. craigslist, Inc.*, 461 F.Supp.2d 681 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008) (craigslist protected under § 230); *Gibson v. craigslist, Inc.*, No. 08-7735, 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (same); *Dart v. craigslist, Inc.*, 665 F.Supp.2d 961 (N. D. Ill. 2009) (same). Congress has expressly confirmed that "[t]he courts have correctly interpreted section 230(c)." H.R. Rep. No. 107-449, at 13 (2002). Plaintiff's effort to escape this weighty authority by relying on the very narrow Ninth Circuit *Barnes v. Yahoo!* decision is misplaced.

It is axiomatic that the plain meaning of a statute controls its interpretation, *Imperial Merchant Servs. v. Hunt*, 47 Cal.4th 381, 388 (2009), and § 230(c) states:

(c) Protection for "good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c). Section 230(e)(3) adds:

No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Id. § 230(e)(3).

"Section 230 has been interpreted literally." *Barrett v. Rosenthal*, 40 Cal.4th 33, 63 (2006).

Section 230(c) prohibits claims that treat online service providers as publishers of third-party content and that would hold online service providers liable for voluntarily endeavoring to remove or prevent objectionable content. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Goddard v. Google, Inc.*, No. 08-2738, 2008 WL 5245490 at *6 (N.D. Cal. Dec. 17, 2008). Thus, § 230 serves the dual purposes "to protect online freedom of expression and to encourage self-regulation, as Congress intended." *Barrett*, 40 Cal.4th at 63.

(statement of Rep. Cox) (emphasis added).

C. SECTION 230 BARS PLAINTIFF'S PROMISSORY ESTOPPEL CLAIM

Parsing through the chaff, Plaintiff's breach of contract-promissory estoppel claim is based on the allegation that, in various telephone calls from Plaintiff to craigslist on March 18, 20 and 21, Plaintiff, among other things, asked craigslist to prevent future posts related to him, by name, telephone number or address, without his advance consent, and unidentified craigslist representatives said they would "take care of it," but posts related to Plaintiff subsequently appeared on the craigslist website on April 18.⁵ (Am. Cmplt. ¶¶ 56-57, 61-64, 69-71, 77-82) craigslist is protected from this claim by both § 230(c)(1) and § 230(c)(2).

⁵ The allegations of a promise to remove the objectionable posts mentioned in the Amended Complaint cannot be the basis for Plaintiff's purported promissory estoppel claim because the Amended Complaint states and the Exhibits show that the posts *were* removed. (Am. Cmplt. ¶ 78, Exs. 10, 12, 14, 16, 23) Plaintiff's April 18 communications with craigslist also cannot be the

1 **1. Section 230(c)(1) Bars Plaintiff's Promissory Estoppel Claim**

2 Three elements are necessary for § 230(c)(1)'s protection: (1) the defendant is a "provider or
3 user of an interactive computer service"; (2) the content was "provided by another information
4 content provider"; and (3) the claim seeks to treat the defendant as the "publisher or speaker" of the
5 objectionable content. *Delfino*, 145 Cal.App.4th at 804-08. Here, there is no issue that craigslist is an
6 "interactive computer service" provider. (Am. Cmplt. ¶ 37); *see Dart*, 655 F.Supp.2d at 965-66.
7 There is also no issue that the content—the alleged fraudulent posts—were provided by another
8 information content provider, *i.e.*, Defendant Simpson. (Am. Cmplt. ¶¶ 9, 12, 74-75, 58-59, 65-66,
9 68); *see also Id.* ¶¶ 89-93 (users provide the ads posted to craigslist).

10 The only question is whether Plaintiff's purported promissory estoppel claim "treats" craigslist
11 as the "publisher or speaker" of the alleged fraudulent posts. Plaintiff will say that it does not because
12 his claim treats craigslist as a promisor, not a publisher. In support, he will point the Court to the
13 Ninth Circuit opinion in *Barnes v. Yahoo!, Inc.*, which held that, "insofar as [the plaintiff] alleges a
14 breach of contract claim under a theory of promissory estoppel, section 230(c)(1) of the Act does not
15 preclude her cause of action." 590 F.2d at 1109. However, the fact that Plaintiff has labeled his claim
16 "promissory estoppel" is not enough to circumvent § 230.

17 **a. The "Promissory Estoppel" Claim Treats craigslist as a Publisher**

18 As carefully explained by the Ninth Circuit in *Barnes*, "what matters is not the name of the
19 cause of action- . . . —what matters is whether the cause of action inherently requires the court to treat
20 the defendant as the 'publisher or speaker' of content provided by another." 570 F.3d at 1101-02.
21 Even artful pleading cannot evade § 230's protection. *See Doe v. MySpace, Inc.*, 474 F.Supp.2d 843,
22 849 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008). Courts therefore will – and must –
23 examine the nature, essence and intent of a complaint's claims and allegations to determine whether
24 they treat the defendant as a "publisher or speaker" of third-party content regardless of what causes of
25 action the complaint purports to allege. Here, the Amended Complaint labels Plaintiff's grievance
26 against craigslist as promissory estoppel, but, from beginning to end, the Amended Complaint, its

27
28 basis for his purported promissory estoppel claim because there are no allegations that fraudulent
posts appeared on the craigslist website after April 18, 2009. (*Id.* ¶ 69; *see also id., passim*)

1 allegations, and its demands for relief treat craigslist as a publisher, not promisor, responsible for
2 third-party content posted to its website.

3 First and foremost, the Amended Complaint itself declares the nature and purpose of
4 Plaintiff's claims against craigslist: "This lawsuit aims to stop the *anonymous* internet attacks and
5 *impersonations* that have become commonplace on [c]raigslist by ...compelling [c]raigslist to require
6 users to *accurately identify themselves* before they are allowed to post ads on the website." (*Id.* ¶ 13
7 (emphasis in original)). "Whether to publish" content is a "publisher's traditional editorial function[]"
8 *Zeran*, 129 F.3d at 333. Thus, by its own admission, whatever the label given its claims, the
9 Amended Complaint seeks to regulate craigslist's activities as a publisher of online content.

10 Second, the allegations throughout the Amended Complaint support this stated directive. The
11 Amended Complaint spends thirteen paragraphs describing craigslist's services, craigslist's purported
12 lack of screening and identification procedures, and the ills (unrelated to Plaintiff) that Plaintiff
13 attributes to craigslist's purported lack of screening and identification procedures. (*Id.* ¶¶ 36-49; *see*
14 *also id.* ¶¶ 8, 10, 11, 12, 13, 35, 51, 58, 89, 90, 91, 93) For example, Plaintiff alleges: "Defendant
15 CRAIGSLIST's complete lack of identification or screening policies and practices of any kind have
16 actually caused a veritable free-for-all where impersonating and harassing online posts regularly
17 appear along with online ads regarding highly offensive, openly sexual and often criminal behavior."
18 (*Id.* ¶ 43)

19 Third, in recitation of the allegations specific to Plaintiff's grievance against craigslist, the
20 Amended Complaint explains that because "CRAIGSLIST does not implement the user-
21 authentication, screening and identification procedures utilized by other competing internet
22 providers," "Defendant SIMPSON was able to easily access Defendant CRAIGSLIST and
23 impersonate the Plaintiff for purposes of harassing him." (Am. Cmplt. ¶¶ 11-12; *see id.* ¶¶ 51, 58
24 (same)).

25 Setting aside labels, the Amended Complaint addresses whether and how craigslist can
26 identify and block posters and content on its website, and, in doing so, is plainly based on craigslist's
27 publisher role and not on any ostensible promise. As such, it is barred by § 230(c)(1).
28

1 **b. Plaintiff's Claim Is Not Saved By *Barnes v. Yahoo!***

2 Nonetheless, the Amended Complaint attempts to maintain a viable claim against craigslist by
3 crafting allegations intended to fit within the holding by the Ninth Circuit in *Barnes v. Yahoo!, Inc.* In
4 *Barnes*, the Director of Communications at Yahoo! (the defendant), Ms. Osako, placed an affirmative
5 telephone call to the plaintiff (Barnes), after Yahoo! had for months repeatedly ignored written
6 requests from Barnes to remove fraudulent sexually-explicit profiles of her on Yahoo!'s service. 570
7 F.3d at 1098-99. In that call, the Communications Director specifically committed to "personally
8 walk" the written requests to the division responsible for profile removals and "they would take care
9 of it"; yet, the profiles remained online. *Id.* The call from the Communications Director occurred the
10 day before a local news program was scheduled to broadcast a report about the incident. *Id.* The
11 Ninth Circuit concluded that, to the extent Barnes may have alleged a promissory estoppel cause of
12 action, § 230(c)(1) did not preclude her claim. *Id.* at 1099, 1109. The court remanded the case to
13 determine whether the complaint alleged a viable promissory estoppel cause of action. *Id.* at 1109.

14 The *Barnes* court did *not* hold that all alleged claims of promissory estoppel survive
15 § 230(c)(1) or that promissory estoppel claims based on the phrase "they would take care of it"
16 universally survive § 230(c)(1). Rather, As explained by the Ninth Circuit, "courts must ask whether
17 the duty that Plaintiff alleges the defendant violated derives from the defendant's status or conduct as
18 a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." 570 F.3d at 1102. The Ninth
19 Circuit did just this. The court assessed whether Barnes' claims—whatever their label—treated Yahoo!
20 as a publisher or whether the allegations demonstrated some other duty. *Id., passim.* On this basis, the
21 court denied Barnes' claim of "negligent undertaking." *Id.* at 1102-03.

22 As to Barnes' alleged claim of promissory estoppel, the Ninth Circuit observed that, to find a
23 contractual duty, there must be "a legally significant event . . . that generates a legal duty distinct
24 from the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle." *Id.*
25 at 1107. The Ninth Circuit found that the telephone call initiated by Yahoo!'s Communications
26 Director to Barnes with a commitment to personally attend to and ensure the still posted fraudulent
27 profiles were removed, placed on the eve of broadcast of a news segment about the incident, was
28 such a legally significant event as to generate a duty distinct from Yahoo!'s publisher role, and

1 therefore was outside § 230(c)(1). *Id.* at 1107 ("Contract liability here would come not from Yahoo's
2 publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something
3 which happens to be removal of materials from publication.").

4 There is no such legally significant event here. At best, Plaintiff alleges telephone calls to
5 craigslist in which, among other things, he asked craigslist to remove the fraudulent posts, to provide
6 him with information to identify the poster, and to prevent future posts related to Plaintiff, by name,
7 telephone number or address, without his consent, and in which one or more unidentified craigslist
8 representatives allegedly said they would "take care of it." (Am. Cmplt. ¶¶ 56, 57, 62, 63) The
9 allegations of the Amended Complaint themselves show that the response they would "take care of it"
10 was not a specific commitment to universally prevent all potential future Plaintiff-related posts absent
11 his advance consent, but was a general response to Plaintiff's various requests and grievances. (*See id.*
12 ¶ 63 ("Defendant Craigslist promised Plaintiff that they would remove the posts, and take steps to
13 stop the harassing Craigslist posts and 'take care of it,'" and "[a]lthough abrupt, Defendant
14 CRAIGSLIST again promised Plaintiff that they had removed the posts, and had taken steps to
15 prevent more posts from the same harassing source and that they would 'take care of it.'"). As the
16 Ninth Circuit explained, such an "attempt to help a particular person[] on the part of an interactive
17 computer service" by craigslist is not sufficient for contract liability. *Id.* at 1108. This conclusion is
18 consistent with Horn Book law.

19 Promissory estoppel is a contract claim, and no contract can exist without a meeting of the
20 minds. *Id.* at 1108. Indeed, as described in *Barnes*, "[i]t is no small thing for courts to enforce private
21 bargains. The law justifies such intervention only because the parties manifest, ex ante, their mutual
22 desire that each be able to call upon a judicial remedy." *Id.* at 1106. Consequently, to empower the
23 words "take care of it" with the ability to unilaterally convert allegations into an enforceable
24 contractual promise, as Plaintiff apparently seeks to do, would contradict the most fundamental
25 principles of contract law.

26 Plaintiff's allegations here are materially distinct and inapposite from the facts in *Barnes*, and
27 whatever words the Amended Complaint uses to describe Plaintiff's claims do not change their nature
28

1 or their bar by § 230.⁶ The only duty alleged by Plaintiff purportedly not met by craigslist was the
2 decision whether to publish or prevent certain content. (*See supra* Part III.C. introductory paragraph,
3 n.4, and 1.b.) This is publishing conduct that § 230(c)(1) protects from liability. *Fair Housing*
4 *Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008)
5 (en banc) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third
6 parties seek to post online is perforce immune under section 230."). As such, this cause of action
7 must be dismissed with prejudice as barred by § 230(c)(1).

8 **2. Section 230(c)(2) Also Bars Plaintiff's Promissory Estoppel Claim**

9 All of that said, Plaintiff's purported promissory estoppel claim against craigslist is barred by
10 § 230(c)(2), regardless of § 230(c)(1) and *Barnes*, because it endeavors to hold craigslist liable for
11 voluntarily, but unsuccessfully, endeavoring to prevent future posts about Plaintiff. Indeed, in its
12 conclusion in *Barnes*, the Ninth Circuit implicitly invited Yahoo! to assert § 230(c)(2) as an
13 additional defense on remand. *Id.* at 1109 ("Because we have only reviewed the affirmative defense
14 that Yahoo raised in this appeal, we do not reach the question whether Barnes has a viable contract
15 claim or whether Yahoo has an affirmative defense under subsection 230 (c)(2) of the Act.").

16 The elements necessary for § 230(c)(2)'s protection are: (1) the defendant is a "provider or
17 user of an interactive computer service"; (2) that acted voluntarily and in good faith; (3) to restrict
18 access to or availability of material that the provider or user considers to be obscene, lewd, lascivious,
19 filthy, excessively violent, harassing, or otherwise objectionable (whether or not such material is
20 constitutionally protected). 47 U.S.C. § 230(c)(2). As noted above, craigslist is an "interactive
21 computer service" provider under § 230. *Supra* Part III.C.1. The Amended Complaint and the
22 Exhibits acknowledge that craigslist responded voluntarily and in good faith to Plaintiff's notice of
23 the fraudulent posts, including promptly removing the identified posts, promptly providing Plaintiff
24 with information to identify the poster and guidance that law enforcement could likely trace the
25 poster with the information, and helping to prevent similar posts – which effort was apparently

26
27 ⁶ Furthermore, as explained below (*infra* Part III.D.), the Amended Complaint – on its face – fails
28 to state a claim for promissory estoppel. Consequently, the obligations argued by Plaintiff cannot
be contractual. Plaintiff's claim cannot therefore fit within the narrow exemption to § 230 under
Barnes.

1 successful for more than a month (Am. Cmplt. ¶¶ 57, 78, Exs. 10, 11, 12, 14, 16, 23) craigslist's
2 efforts to remove posts, help identify the poster, and help prevent similar posts were all efforts to
3 restrict access to and the availability of material regarding Plaintiff that craigslist agreed appeared to
4 be fraudulent. (*See id.* Exs. 11, 12, 14, 16, 23). Under § 230(c)(2), even if imperfect, craigslist cannot
5 be liable for these efforts. *Goddard* 2008 WL 5245490 at * 6 (§ 230(c)(2) encourages efforts by
6 Internet service providers to eliminate [objectionable] material by immunizing them from liability
7 where those efforts failed"). *See also Barrett*, 40 Cal. 4th at 53 ("the immunity conferred by section
8 230 applies even when self-regulation is unsuccessful"). Plaintiff's purported claim for promissory
9 estoppel must therefore be denied as barred by § 230(c)(2) as well.⁷

10 **D. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF**
11 **CONTRACT-PROMISSORY ESTOPPEL**

12 In addition, the Amended Complaint – on its face – fails to state claim for promissory
13 estoppel. Promissory estoppel, a form of breach of contract, requires: (1) an enforceable promise; (2)
14 reliance by the party to whom the promise is made; (3) the reliance is reasonable and foreseeable; and
15 (4) injury occurred as a result of the reliance. *Garcia v. World Sav., FSB*, No. VC049643, 2010 WL
16 1408927, *at 3 (2d Dist. Apr. 9, 2010). An enforceable promise and reliance are plainly lacking here.

17 First, the Amended Complaint does not plead an enforceable promise. To support promissory
18 estoppel, a promise must be "clear and unambiguous in its terms." *Laks v. Coast Federal Savings &*
19 *Loan Ass'n*, 60 Cal.App.3d 885, 890 (2d Dist. 1976).⁸ Here, the allegations of a promise in the
20 Amended Complaint are murky, muddled and ambiguous.

21 In the allegations specific to the promissory estoppel count, the Amended Complaint seems to
22 state that promises to remove posts and to prevent future posts regarding Plaintiff absent his consent
23 are the foundation for his promissory estoppel claim. (Am. Cmplt. ¶¶ 76-86) However, the Amended
24 Complaint and Exhibits establish that the alleged fraudulent posts were immediately removed by

25 ⁷ The Court also should not ignore a "practical implication" of Plaintiff's effort to open a truck-
26 size loophole in § 230's protection. "Adopting a rule of liability under section 230 that diverges
27 from the rule announced in *Zeran* and followed in all other jurisdictions would be an open
28 invitation to forum shopping by defamation plaintiffs. (Cf. *Webb v. Superior Court* (225
Cal.App.3d 990, 1000, 275 Cal. Rptr.581)." *Barrett*, 40 Cal.4th at 58.

⁸ A party seeking to establish promissory estoppel cannot rely on extrinsic evidence to explain an
ambiguous statement. *Lange v. TIG Ins. Co.*, 68 Cal.App.4th 1179, 1186 (2d Dist. 1998).

1 craigslist. (*Id.* Exs. 11, 12, 14, 16, 23); *see supra* Part II.C. Consequently, whether or not there was a
2 promise to remove posts, there was no violation of this promise or duty and, hence, no injury and no
3 claim.

4 As to the purported promise to prevent future posts related to Plaintiff absent his consent,
5 there are multiple overlapping allegations, but no clear and unambiguous promise. Plaintiff alleges
6 that somewhere within four different telephone conversations with unidentified craigslist
7 representatives, and within his notice and explanation of the fraudulent posts, their ramifications,
8 requests for their removal, requests for information as to identity of the poster, and whatever else was
9 discussed, Plaintiff also asked that craigslist prevent future posts related to him, by name, telephone
10 number or address, without his advance consent, and, somewhere within that conversation, one or
11 more unidentified craigslist representatives said they would "take care of it." (*Id.* ¶¶ 56, 63, 77, Ex.
12 11) On these alleged facts, there is no clarity as to what the craigslist representatives purportedly
13 agreed to "take care of" or what "take care of" meant or required. *See supra* Part II.C., III.C.a. and b.
14 Against such an immeasurable standard, there can be no meeting of the minds, no enforceable
15 promise and no promissory estoppel. *See* discussion of *Barnes*, *supra* Part III.C.1.b.

16 Second, the Exhibits prove no reliance. Although the Amended Complaint alleges that, based
17 on craigslist's purported promises, Plaintiff refrained from actions to identify the poster and prevent
18 further posts (Am. Cmplt. ¶¶ 78, 79, 81), the Exhibits unambiguously show that, following his email
19 and telephone communications with craigslist, Plaintiff continued his own investigation to identify
20 the poster (including through his "Uncle Troy"); he provided the craigslist evidence to his attorney;
21 and he contacted and worked with law enforcement to identify, charge and prosecute the poster,
22 Defendant Simpson. (*Id.* ¶¶ 9, 74, 75, Exs. 10, 11, 16, 25) The Amended Complaint's bald allegations
23 of Plaintiff's reliance do not overcome the hard evidence provided in its Exhibits. Absent reliance by
24 Plaintiff, there is and can be no promissory estoppel.

25 **E. SECTION 230 BARS PLAINTIFF'S § 17200 CLAIM**

26 The Amended Complaint purports to assert a claim for unfair competition pursuant to
27 California Business & Professions Code § 17200 on the grounds that craigslist allegedly lacks user
28 screening and identity-verification procedures used by its competitors. (Am. Cmplt. ¶¶ 89-92); *see*

1 also *supra* Part II.A. This claim is blocked by § 230(c)(1) because it treats craigslist as the publisher
2 of third-party content.

3 As noted above, craigslist meets the first two prongs required for § 230(c)(1) protection. *See*
4 *supra* Part III.C.1. The only question is whether Plaintiff's § 230(c)(1) claims treats craigslist as a
5 "publisher or speaker." It does. This claim endeavors to regulate craigslist's decision-making as to
6 whether to post third-party content. (Am. Cmplt. at 61 ¶ 1⁹; *see also id.* ¶¶ 89-93). This is
7 indisputably a traditional publisher function. *Roommates*, 521 F.3d at 1170-71. Plaintiff's § 17200
8 claim is barred by § 230(c)(1). Indeed, Plaintiff's effort to impose specific regulations for craigslist's
9 publication of third-party content on the Internet runs directly contrary to stated United States policy
10 "to preserve the vibrant and competitive free market that presently exists for the Internet and other
11 interactive computer services, *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2)
12 (emphasis added). Plaintiff's demand that craigslist implement user identification, authentication and
13 screening procedures also conflicts directly with the well-established right to anonymous speech on
14 the Internet under the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342,
15 115 S.Ct. 1511 (1995); *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329 (1997).

16 The Amended Complaint's § 17200 claim is barred by § 230(c)(1) and by fundamental
17 Constitutional principles and United States policies, and should be denied with prejudice.

18 **F. PLAINTIFF'S § 17200 CLAIM ALSO FAILS FOR LACK OF STANDING**

19 Plaintiff can only sue craigslist for violation of the UCL if he "has suffered injury in fact and
20 has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. *See*
21 *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583, 1590 (4th Dist. 2008) ("A private plaintiff
22 must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or
23 property as a result of the unfair competition."). This twofold showing is required regardless of the
24

25
26 ⁹ The prayer for relief under § 17200 includes enjoining craigslist from allowing users to post
27 content without first identifying themselves and mandating that craigslist implement measures
28 that require all users to identify themselves in detail – including full name, valid telephone
number, valid residential or mailing address, valid identification card number (*e.g.*, driver's
license or credit card number), and valid email address connected to the same user – before they
can post any material to the craigslist website).

1 remedy plaintiff seeks. *See Buckland v. Threshold Enters. Ltd.*, 155 Cal.App.4th 798, 817(2d Dist.
2 2007).

3 Plaintiff alleges that craigslist does not use the "sign-up screening and identification
4 procedures utilized by its competitors" (Am. Cmplt. ¶ 89(a)) and that this policy decision "caused
5 Defendant Simpson to impersonate the Plaintiff on the Craigslist [sic] website and post harassing,
6 fraudulent, and harmful internet ads specifically targeting the Plaintiff." (*Id.* ¶ 89(b)) Plaintiff alleges
7 that craigslist "received and continues to receive unprecedented internet posts and internet traffic,
8 with resulting income" as a result of its screening policies (*Id.* ¶ 94); however, Plaintiff nowhere
9 alleges that he personally lost *money or property* as a result of craigslist's actions. Plaintiff therefore
10 lacks standing to sue and craigslist's demurrer to the second cause of action must be sustained.

11 **IV. CONCLUSION**

12 WHEREFORE, craigslist respectfully requests that this Court sustain its demur and dismiss
13 plaintiff's Amended Complaint as to craigslist with prejudice¹⁰ pursuant to Cal. Civ. Proc. Code §
14 430.10(e) and provide such other relief as is just.

15
16 DATED: May 3, 2010

PERKINS COIE LLP

17
18 By: 

19 LiLing Poh

20 Attorneys for Defendant
21 craigslist, Inc.

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25
26
27 ¹⁰ The Amended Complaint should be dismissed with prejudice as to craigslist because there is no
28 reasonable probability that Plaintiff can amend to surmount the obstacles to his claims. *Schnall v.*
The Hertz Corp., 78 Cal.App.4th 1144, 1152 (1st Dist. 2000).