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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

KEITH GOODRIDGE CONSTRUCTION,
and **KEITH GOODRIDGE,**

Case No. 6:08-CV-6313-TC

Plaintiffs,

v.

MEMORANDUM IN SUPPORT
OF WYBS'S MOTION TO DISMISS

WYBS, INC., a Delaware Corporation, doing
business as **MERCHANTCIRCLE** and
JOHN DOE 1,

Defendants.

I. INTRODUCTION

Plaintiffs Keith Goodridge Construction and Keith Goodridge seek to hold defendant WYBS, dba MerchantCircle ("MerchantCircle"), an Internet service provider, liable

for an anonymous comment that MerchantCircle did not create or encourage, but did promptly remove upon plaintiffs' request.

MerchantCircle hosts an online network of local business owners, combining social networking features with a customizable Web listing that allows local merchants to attract new customers at www.merchantcircle.com. The Web site allows business owners to upload pictures, blog, create coupons and newsletters, and to connect with other merchants, and allows third parties to freely comment on their experience with various businesses.

Plaintiffs' allegations regarding defamation are based on a comment posted on MerchantCircle's website by "Attorney" who plaintiffs name as defendant John Doe 1. Although MerchantCircle promptly removed the posting, plaintiffs allege that an Internet search via www.google.com—a Web site completely unrelated to MerchantCircle— could perhaps turn up a cached mirror image of the posting.

Because 47 USC § 230 protects interactive service providers such as MerchantCircle from publisher liability, MerchantCircle moves to dismiss plaintiffs' action under Fed R Civ P 12(b)(6).

II. STANDARD OF REVIEW

Dismissal for failure to state a claim under Fed R Civ P 12(b)(6) is appropriate when it appears beyond doubt that the plaintiff can prove no set of facts to support the claim that would entitle her to relief. *Keniston v. Roberts*, 717 F2d 1295, 1300 (9th Cir 1983) (citing *Conley v. Gibson*, 355 US 41, 45-46, 78 S Ct 99, 2 L Ed 2d 80 (1957)). Moreover, "material allegations in a complaint must be taken as true and viewed in the light most favorable to the plaintiff." *Geraci v. Homestreet Bank*, 347 F3d 749, 751 (9th Cir 2003) (citing *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F3d 1131, 1133 n.1 (9th Cir 2001)).

The question of immunity under the Communications Decency Act (the "CDA") is appropriately addressed in a motion to dismiss. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 564 F Supp2d 544, 550 (ED Va June 18, 2008) (evaluation of defendant's immunity defense in the context of a Fed R Civ P 12(b)(6) motion is proper when the necessary facts are apparent on the face of the complaint); *MCW, Inc. v. Badbusinessbureau.com*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *7 (ND Tex Apr. 19, 2004).

III. ARGUMENT/ANALYSIS

47 USC § 230(c)(1) provides: "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."

The Ninth Circuit this summer reiterated that Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties. *Fair Housing v. Roomates.com*, 521 F3d 1157, 1162 (9th Cir 2008). The "grant of immunity applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of the offending content.'" *Id.* (quoting 47 USC § 230(f)(3)).

Courts construe 47 USC § 230(f)(3) broadly to include Web sites that serve 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 (WD Tex 2007) (holding that social networking site is an interactive computer service). *See also Nemet Chevrolet*, slip op at 7 (holding that consumer ratings Web site is an interactive computer service).

MerchantCircle is without question an interactive computer service, and plaintiffs

make no suggestion that MerchantCircle was the "content provider" of the allegedly defamatory posting on its Web site.¹ In fact, plaintiffs specifically allege that an unknown person using the alias "Attorney" authored the posting.

Under the CDA, then, because plaintiffs have made no allegations that MerchantCircle itself has, at any relevant time, been anything more than an interactive service provider, MerchantCircle's motion to dismiss should be granted.

¹ Plaintiffs further make the unreasonable allegation that MerchantCircle "republished" the statement because a search via Google—an interactive service provider completely unrelated to MerchantCircle—might turn up a mirror image of the statement. Plaintiffs' reasoning for seeking to hold MerchantCircle liable for material published on Google is at best unclear.

IV. CONCLUSION

Because 47 USC § 230 provides immunity to interactive service providers such as MerchantCircle, plaintiffs' claims against MerchantCircle should be dismissed.

DATED this 16th day of October, 2008.

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I hereby certify that I served the foregoing memorandum in support of WYBS's motion to dismiss on:

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by the following indicated method or methods on the date set forth below:

- CM/ECF system transmission.**
- E-mail.** As required by Local Rule 5.2, any interrogatories, requests for production, or requests for admission were e-mailed in Word or WordPerfect format, not in PDF, unless otherwise agreed to by the parties.
- Facsimile communication device.**
- First-class mail, postage prepaid.**
- Hand-delivery.**
- Overnight courier, delivery prepaid.**

DATED this 16th day of October, 2008.

s/Bruce L. Campbell

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