
In the
United States Court of Appeals
For the Seventh Circuit

No. 09-3379

BEVERLY STAYART,

Plaintiff/Appellant,

vs.

**YAHOO!, INC., OVERTURE SERVICES,
INC., d/b/a ALTA VISTA and VARIOUS,
INC., d/b/a FRIENDFINDER.COM,**

Defendants/Appellees.

Appeal from the United States District Court for the Eastern
District of Wisconsin, Milwaukee Division
Case No. 2:09-cv-00116-RTR
Hon. **Rudolph T. Randa**, Judge Presiding

BRIEF AND APPENDIX OF APPELLANT

Gregory A. Stayart
N5577 Cobblestone Road
Elkhorn, Wisconsin 53121
Telephone: (262) 745-7395

Attorney for Appellant,
Beverly Stayart

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTEREST

Pursuant to Seventh Circuit Rule 26.1, Beverly Stayart makes the following disclosures:

1. The full name of every party or amicus the attorney represents in the case:

Beverly Stayart

2. Is said party a subsidiary or affiliate of a publicly owned corporation?

N/A

3. Identify the names of all law firms or associates who have appeared for the party or amicus in the case or who are expected to appear in this court:

Gregory A. Stayart
(counsel for appellant
Beverly Stayart)

Gregory A. Stayart

November 25, 2009

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Continental Bank, N.A. v. Meyer, 10 F. 3d 1293 (7th Cir. 1993)50

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International Profit Associates, Inc. v. Paisola, 461 F. Supp. 2d 672 (N.D. Ill. 2006).....28

James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F. 2d 266 (7th Cir. 1976).....34

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Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F. 3d 742 (3d Cir. 1995).....47

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Missouri State Life Ins. Co. v. Jones, 290 U. S. 199, 54 S. Ct. 133, 78 L. Ed. 267 (1933)49

Mor-Cor Packaging Prods., Inc. v. Innovative Packaging Corp., 328 F. 3d 331 (7th Cir. 2003)...41

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Whitney Info Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738 (11th Cir. 2000)40

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 Wis. Stats. 994(4).....48
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Other Authorities

Louis Altman and Malla Pollack, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES Sec. 22:44 (4th ed. 2008).....42

Dale A. Cendali, et al., “An Overview of Intellectual Property Issues Relating to the Internet,” 89 TRADEMARK REPORTER 485 (May - June 1989).....33

Greg Kastkova, “Google’s Law,” 73 BROOKLYN LAW REV. 1327 (2008)26

Barbara K. Kaye & Norman J. Medow, JUST A CLICK AWAY: ADVERTISING ON THE INTERNET (2001)14

F. Gregory Lastowka, “Search Engines, HTML, and Trademarks: What’s the Meta For?” 86 VA. L. REV. 825 (2000)39

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J. Thomas McCarthy, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION Sec. 23:11:50; 28:15 (4th ed. 1996).....19, 43

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant Beverly Stayart (“Stayart”) respectfully submits that oral argument would be of substantial assistance to the Court because of the multiple, complex issues present in this appeal concerning the district court’s liability rulings in favor of Defendant-Appellees Yahoo!, Inc., Overture Services, Inc. and Various, Inc. on Stayart’s false endorsement claims under Section 43(a) of the Lanham Act, 15 U.S.C. Sec. 1125.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over Stayart's false endorsement claims in Counts I, IV and VII of her Complaint (R. 1; Jt. Apx. pp. 30; 36; 40) arising under the Trademark Act of 1946 ("Lanham Act"), pursuant to 28 U.S.C. Sec. 1331. The specific portions of the Lanham Act conferring jurisdiction were Sections 39(a) and 43(a), 15 U.S.C. Secs. 1121(a) and 1125(a). The district court also exercised jurisdiction over certain claims alleging invasion of privacy under Wisconsin law in Counts II, III, V, VI, VIII and IX of her Complaint (R. 1; Jt. Apx. pp. 33-34; 37-39; 41-42) under the doctrine of supplemental jurisdiction, pursuant to 28 U.S.C. Sec. 1367(a).

This Court has jurisdiction over Stayart's appeal under 28 U.S.C. Sec. 1291. The district court entered its judgment (R. 42; Apx.) on August 31, 2009. Stayart filed her Notice of Appeal (R. 43; Apx.) on September 24, 2009.

STATUTORY PROVISIONS INVOLVED

Section 43(a) of the Lanham Act, 15 U.S.C. Sec. 1125(a), and the Communications Decency Act of 1996, 47 U.S.C. Sec. 230, are set forth in the appendix to this brief.

STATEMENT OF THE ISSUES

Section 43(a) of the Lanham Act provides a cause of action to “any person who believes that he or she is likely to be damaged” by any misrepresentation that is likely to deceive consumers as to that person’s “affiliation, connection, or association” with any good or service.

The questions presented are:

- 1. Did the district court err in concluding that a person lacked prudential standing to sue for false endorsement under the Lanham Act where she alleged that she had a unique personal name; that she was engaged in public advocacy against the mistreatment of animals; and that her name had commercial value, in part, because of her activities?**
- 2. Did the district court err in concluding that there was no likelihood that the public would believe that a person endorsed pornographic materials, sexual dysfunction drugs, or a dating service where her name repeatedly appeared on Internet websites displaying these items?**
- 3. Did the district court err in concluding that Internet search engines enjoyed statutory immunity for false endorsement claims under the Lanham Act where the challenged content was not evidenced to originate from third parties and the search engines played a material role in the content development?**
- 4. Did the district court err in concluding that Internet search engines could not be sued for false endorsement claims under the Lanham Act because “they did not” use the claimant’s name “in connection with their own goods and services”?**

5. Did the district court err in not retaining jurisdiction over related state law claims for commercial misappropriation of a person's name where the parties possessed diversity in citizenship and it was not a legal certainty that the claimant would not recover more than \$75,000 on these claims?

STATEMENT OF THE CASE

This lawsuit stems from the misappropriation of the name "Bev Stayart" on the Internet. Her name was used without her permission in the display of pornographic videos and photos, in the advertising and sale of brand-name sexual dysfunction drugs by on-line pharmacies, and in the promotion of an online dating service.

On February 5, 2009, Stayart filed a nine-count complaint against Yahoo!, Inc., Overture Services, Inc., d/b/a Alta Vista, and Various, Inc., d/b/a FriendFinder.com (R. 1; Apx. p. 1).

Stayart asserted that Internet search engines Yahoo and Alta Vista violated Section 43(a) of the Lanham Act, the federal law governing trademarks. Section 43(a) prohibits false designation of origin, affiliation or sponsorship. Search results for "Bev Stayart" allegedly contained false summaries, called "snippets," which improperly implied her endorsement of pornography and online pharmacies, and drove additional traffic to these sites.

A third claim under Section 43(a) asserted that dating service AdultFriendFinder.com used the name "Bev Stayart" as the title in a metatag (the hidden programming code) of a website to attract potential members. Internet users, using "Bev Stayart" as a search term and seeking information about her, would instead reach the dating website, thereby implying her endorsement.

Stayart's remaining six claims alleged that each defendant also violated her statutory right of privacy and common law right of privacy under Wisconsin state law by the same misconduct (i.e., misappropriating her name for commercial purposes).

On August 28, 2009, the district court dismissed Stayart's three Lanham Act claims by a decision and order (R. 41). The court held that she lacked prudential standing to bring such false endorsement claims because her complaint did not specifically allege that she was engaged in the commercial marketing of her name or allege an intent to commercialize her name (R. 41; Apx. p. 10).¹

The district court further held that there was no "likelihood of confusion" that Internet users might conclude that Stayart endorsed the products at issue because her complaint disavowed any past "association with pornographic materials, sexual dysfunction drugs or sexually-oriented dating services" (R. 41; Apx. p. 13).

Finally, the district court held that Yahoo and Alta Vista were entitled to statutory immunity under the Communications Decency Act of 1996 (47 U.S.C. Sec. 230) for Stayart's Lanham Act claims because third-party content was challenged and these search engines "did not use Stayart's name in connection with their own goods and services" (R. 41; Apx. pp. 15-16). But the district court found that the question of Various' immunity "at the pleading stage" was "less clear" because it may have been the content provider of a banner ad on the website (R. 41; Apx. pp. 18 – 19).

The district court then declined to retain supplemental jurisdiction over Stayart's remaining six state law claims, dismissing those claims without prejudice to replead in state

¹ Prudential standing consists of "several judicially self-imposed limits on the exercise of federal jurisdiction." Allen v. Wright, 468 U. S. 737, 751 (1984)

court (R. 41; Apx. pp. 19-23). See, Stayart v. Yahoo! Inc., et al., 2009 WL 2840478 (E.D. Wis., August 28, 2009).

STATEMENT OF THE FACTS

I. Stayart's Background and Interests

Stayart resides in Elkhorn, Wisconsin (R. 1; Jt. Apx. p.1). She has worked for several major financial institutions in Chicago, Illinois, eventually attaining the rank of Vice President (R. 1; Jt. Apx. p. 3). She holds a Bachelor's Degree from the University of Iowa, as well as a Master's Degree in Business Administration from the University of Chicago (R. 1; Jt. Apx. p.3).

For many years and continuing to the present day, she has been active in animal protection programs throughout the world, as well as genealogy research (R. 1; Jt. Apx. p.3). She has participated in public advocacy to save the baby seal population in eastern Canada; to save the wild horse population in the United States; and to prohibit the aerial shooting of wolves in the United States (R. 1; Jt. Apx. p. 3).

Stayart regularly uses the Internet in connection with both her animal protection efforts and genealogy research (R. 1; Jt. Apx. p. 4).

Stayart contributes to an online discussion forum for research and genealogy data concerning the Siouan people (Saponi) at www.saponitown.com. This third-party website contains her photo and other personal information. Her periodic, scholarly posts on this forum have generated almost 17,000 "hits" (online visitors) within the last three years (R. 1; Jt. Apx. p.4).

Two poems written by Stayart appear on two Danish websites supporting the preservation of the baby seal population in eastern Canada (Id.). See, www.bentbay.dk/seal_kils.htm (page 1) and www.bentbay.dk/REDAK.HTM (pp. 13-14).

She has a truly unique personal name. She is the only “Beverly Stayart” and/or “Bev Stayart” on the Internet. She uses both names in her endeavors (Id.). She is a professional woman, with important and valuable friends and business contacts throughout the world (Id.).

She has never given anyone the permission, authority or license to use her name “Bev Stayart” or “Beverly Stayart” for the promotion of any goods or services on the Internet, or in any other media (R. 1; Jt. Apx. p. 5).

Stayart has never engaged in a promiscuous lifestyle, or other overt sexual activities (R. 1; Jt. Apx. p. 4). The name “Bev Stayart” has commercial value because of her humanitarian efforts, positive and wholesome image, and the popularity of her scholarly posts on the Internet (R. 1; Jt. Apx. p. 4).

II. How Commercial Search Engines Operate

In the fall of 2008, Stayart used two affiliated commercial search engines (www.yahoo.com and www.altavista.com) to view information about her on the Internet (R. 1; Jt. Apx. p. 12, 20). Commercial search engines allow the public to find websites on the Internet containing information, including products and services. Many companies have websites or web pages offering product information or to sell products and services online (R. 1; Jt. Apx. p. 6).

A search engine reviews search terms against its data base to produce a search result list (Id.). This list, which may contain multiple pages, usually contains three types of information

for each search result: (1) the page title; (2) a URL (Universal Resource Locator), a numerical address identifying the resource on the Internet; and (3) a summary or “snippet” of the result, with a “link” (an embedded electronic address) to the website on the Internet on which the “snippet” language will be found. To view a particular search result from the listed search results, the user merely has to “click” the link given by the search engine to access the result (R. 1; Jt. Apx. pp. 6-7).

Yahoo is the second largest search engine on the Internet, with over 500 million users worldwide (R. 1; Jt. Apx. p. 5). Yahoo and its affiliate, Overture, encourage consumers to use their websites to find other websites offering particular products and services (R. 1; Jt. Apx. p. 6).

On information and belief, Yahoo provides most of its online content for free. Yahoo and its affiliates profit primarily through the sale of ads that appear alongside its search results (R. 1; Jt. Apx. p. 6). Internet ads generated \$16.8 million in revenue in 2006, an increase of 34% from the prior year (R. 1; Jt. Apx. p. 6 n. 1).

Individuals and companies are advised by Yahoo that its search results provide the “best” search experience on the worldwide web by directing users to “high quality” and “relevant” web content in response to a query (R. 1; Jt. Apx. p. 9).

Yahoo’s written search content quality guidelines, published on the Internet, state that it desires metadata, including titles and descriptions, that “accurately describe the contents of a web page” (R. 1; Jt. Apx., Ex. A to Complaint). Yahoo will not tolerate web pages in its data base which deliberately trick it into offering viewers “inappropriate . . . or poor quality search results”; including “pages that harm accuracy . . . or relevancy of search results”; “pages with . . . irrelevant keywords”; “misuse or inaccurate use of competitor or brand names”; and “pages

that seem deceptive, fraudulent, or provide a poor user experience” (R. 1; Jt. Apx. pp. 9-10; Jt. Apx., Ex. A to Complaint).

III. Stayart’s Search Experience on Yahoo and Overture

On September 9, 2008, Stayart searched for “bev stayart” on Yahoo’s search engine. She obtained a result titled “Pm 10kb Loading Cialis – Online Pharmacy” (R. 1; Jt. Apx. 13; Jt. Apx., Ex. C to Complaint). Below this title, a summary or “snippet” purportedly containing words found on the associated website appeared, and a URL. The URL was <http://chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn>, while the words “bev stayart” appeared in Yahoo’s summary (Id.).

The full text (R. 1; Jt. Apx., Ex. C to Complaint) of Yahoo’s search result was:

Pm 10kb Loading Cialis – Online Pharmacy
Pm 10kb loading cialis January th, at: pm hi friends i met you
in the tim horton s on bloor st a few sundays ago I . . . on February
bev stayart on march th . . .
chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn

Cialis® is a brand name for a nationally advertised oral treatment for sexual dysfunction (R. 1; Jt. Apx. p. 19). When Stayart “clicked” Yahoo’s search result “Pm 10kb Loading Cialis – Online Pharmacy,” the name “Bev Stayart” immediately appeared on a website, centered at the top of a darkened movie screen (R. 1; Jt. Apx. p. 13).

Upon entering this website, www.mysharedvideo.com, the screen flashed “Connecting!”, while the words “Watch Free Movie!” appeared in the upper left-hand corner (R. 1; Jt. Apx. p. 13; Jt. Apx., Ex. D to Complaint). Software needed to watch the movie was not installed

Stayart's computer. This movie, on information and belief, showed a naked woman, wearing only fishnet stockings, massaging her breasts. (R. 1; Jt. Apx. p. 14).

A security system on the computer warned Stayart of spyware, designed to illegally obtain a user's computer password and other personal financial information (R. 1; Jt. Apx. pp. 13-14).

Stayart then accessed the source code for this website.² She found "Bev Stayart" as the title of the document (R. 1; Jt. Apx. p. 14; Apx., Ex. E to Complaint). The source code is the HTML (Hyper Text Mark-Up Language) code that underlies a web page (R. 1; Jt. Apx. p. 14, n.3). None of the other "snippet" language displayed by Yahoo in its search result appeared on this source code (R. 1; Jt. Apx. p. 14; Jt. Apx., Ex. E to Complaint).

On September 10, 2008, Stayart did another search for her name on Yahoo (R. 1; Apx. pp. 14-15). She found the same "Pm10kb Loading Cialis – Online Pharmacy" search result obtained on September 9, 2009, but this time the website she entered was www.gothotvidtosee.com. "Bev Stayart" was centered at the top of a darkened movie screen, but the movie couldn't be played because her computer lacked appropriate software. But another link said: "Free Streaming Porn HOTTEST DAILY PORN" and 27 hard-core photos of naked, masturbating women were displayed. None of these women were Stayart (R. 1; Jt. Apx. 14; Jt. Apx., Ex. F to Complaint).

Between September 11, 2008 and October 28, 2008, Stayart repeatedly used the search term "Bev Stayart" on Yahoo's search engine. Yahoo's "Pm 10kb Loading Cialis – Online Pharmacy" search result repeatedly appeared, associated with four additional pornographic websites: www.videosfreefresh.com, www.freeprivatetube.com, www.videofreeonline.com and

² The source code for an individual web page can be seen by first clicking "view" in the browser followed by "source". The code will then appear on the screen and can be printed (R. 1; Apx. p. 29).

www.myprivatetube.com (R. 1; Jt. Apx. pp. 15-19). On each of these websites, the same darkened movie screen with “bev stayart” centered at the top appeared, while the alerts “Watch Free Movie!” and “Connecting!” flashed on the left of the screen. The source code for each of these websites showed “Bev Stayart” as the title tag (Jt. Apx., Ex. H, I, J and L to Complaint). But none of the other language in the Yahoo’s “snippet” appeared in this same source code (*Id.*).

On October 6, 2008, Stayart tried the search term “Bev Stayart Levitra” on Yahoo’s search engine (R. 1; Jt. Apx. p. 16). Levitra® is the brand name for a nationally advertised oral treatment for sexual dysfunction (R. 1; Jt. Apx. p. 20). She discovered the same search result, “Pm 10kb Loading Cialis – Online Pharmacy” (R. 1; Jt. Apx. p. 16).

But this time, when she clicked <http://chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn> beneath Yahoo’s snippet language, Stayart found multiple ads associating her with Levitra®, including “**2. TOP bev stayart levitra for YOU**”, “**13. bev stayart levitra info – Get info on bev stayart levitra from 14 search engines in 1**”, “**17. Bev Stayart Levitra – Looking for Bev Stayart Levitra?**”, and “**18. Bev Stayart Levitra Find the Best Deals – Compare Prices on Bev Stayart Levitra and More.**” (R. 1; Jt. Apx. pp. 16-17; Jt. Apx., Ex. E to Complaint).

On the first page of the <http://chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn> website, Stayart noticed what Yahoo calls “Related Searches,” showing photos of naked or semi-naked women advertising www.AdultFriendFinder.com, an online dating service. The ad copy included the language “Find hot women to f—k in **Janesville**’ and “World’s largest **sex and swinger** personal community” (emphasis in original) (R. 1; Jt. Apx., Ex. K, p. 1 to Complaint). Janesville, Wisconsin is about 20 miles from Stayart’s home (R. 1; Jt. Apx. p. 20 n. 4).

When Stayart performed the same searches on Overture, she found results similar to those of Yahoo (R. 1; Jt. Apx. pp. 20-25; Jt. Apx. Ex. Q, R, S, T, U, V and W to Complaint).

On October 28, 2008, she searched for “bev stayart” on Overture. She found the result “Pm 10kb Loading Cialis – Online Pharmacy” (R. 1; Jt. Apx. p. 23; Jt. Apx., Ex. V to Complaint). When she clicked this result, she entered the website www.videofreeforonline.com. A movie screen with “bev stayart” centered at the top appeared, while the alerts “Connecting!” and “Watch Free Movie!” flashed.. Lacking appropriate software on her computer, she couldn’t play the movie. The same 27 hard-core photos of naked women appeared, as they had previously when she searched for her name on Yahoo on September 10, 2008.

The source code for this website displayed “bev stayart” as the title, but none of the other “snippet” language shown by Overture on its search engine appeared on this source code (Id.).

On September 20, 2008, Stayart used the search term “bev stayart viagra” on Overture (R. 1; Jt. Apx. p. 21). Viagra® is the brand name for a nationally advertised oral treatment for sexual dysfunction (R. 1; Jt. Apx. p. 22). The same pattern repeated.

She found the result “Pm 10kb Loading Cialis – Online Pharmacy.” When she clicked the <http://chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn> result beneath Overture’s snippet, she found several ads connecting her with Viagra®, including “**2. bev stayart Viagra – JUST Buy pills here!**”, “**8. Cheapest Drugs on Net! Buy bev stayart Viagra Here!**”, “**17. Looking for Bev Stayart viagra?**” and “**18. Need Bev Stayart Viagra now? Get great Bev Stayart Viagra results here!**” These ads all had links to other websites (R. 1; Jt. Apx., Ex S to Complaint).

Overture also displayed, as its “Related Searches,” photos of naked or semi-naked women advertising www.AdultFriendFinder.com, with the same ad copy quoted previously (*Id.*).

Stayart found another search result on Overture on September 24, 2008, when she tried the search term “Bev Stayart Cialis Viagra” (R.1; Jt. Apx. p.24). She found her name connected with three sexual dysfunction drugs (R. 1; Jt. Apx., Ex. W to complaint). The search result stated:

I give it my Seal of approval! Nigel Barker.tv
I have always considered it extremely important for people to stand up . . . Bev Stayart on . . . Buy evista Cialis Viagra Levitra hydrocone pictures . . .
www.nigelbarker.tv/blog/2008/02/01/I-give-it-my-seal-of-approval

Nigel Barker, mentioned by Overture in the title of its search result, is a well-known photographer and worldwide spokesperson for the Humane Society of the United States (“HSUS”), based in Washington, D.C. (R. 1; Jt. Apx. p. 24). The HSUS, along with Stayart and Barker, has actively promoted an international campaign to stop the annual commercial slaughter of baby seals in eastern Canada (*Id.*). Although Stayart did post a comment on Nigel Barker’s I give it my Seal of approval blog (R. 1; Jt. Apx., Ex. X to Complaint), her comments, quoted below, bore no resemblance whatsoever to Overture’s search result snippet language:

Bev Stayart on March 29th, 2008 2:41 p.m.

The baby seals are very curious and friendly towards the sealers as the men approach, as any baby is towards someone new in his environment. This is what is so heartbreaking – the seals’ misreading of the cruel intentions of the men. The pain of their death is unimaginable as many are skinned alive. The sadism and cruelty of Canadians have affected me so deeply that I will never buy another Canadian product or set foot on Canadian soil.

Nowhere in Stayart's actual comments, quoted above, after "Bev Stayart on . . . ", does the phrase "Buy . . . Cialis Viagra Levitra" appear. Yet this exact phrase "Buy . . . Cialis Viagra Levitra" appears in Overture's search engine summary immediately after "Bev Stayart on . . . ".

IV. Stayart and AdultFriendFinder.com

Through its AdultFriendFinder service mark, Various markets online, adult-oriented social networking services to individuals, including "the world's largest adult social personals with over 20,000,000 members" (R. 1; Jt. Apx. p.11).

Individuals can purchase a membership at www.AdultFriendFinder.com to find other members' sexually-oriented personal profiles and photos. Other services include sex chat, nude web cams and group sex (Id.). AdultFriendFinder regularly promotes itself on the Internet, with graphic images of fully or partially nude women exhibiting their breasts, buttocks and pubic areas in a sexually suggestive manner (Id.).

AdultFriendFinder runs banner ads, consisting of four or five photos of nude or semi-nude women who live in the viewer's immediate area (identified through the viewer's IP address), seeking to meet other members, with such nicknames as "missydoou," "SlurpBabeSlurp," and "Sweetestladyevr" (R. 1; Jt. Apx. p. 12).

AdultFriendFinder claims over a quarter-million members in Wisconsin (R. 1; Jt. Apx. p. 11). Stayart has never been a member of AdultFriendFinder (*Id.*).

On December 5, 2008, Stayart searched for her name on both Yahoo and Overture (R. 1; Apx. p. 27). She found the following search result on Yahoo (R. 1; Jt. Apx. p. 27; Jt. Apx., Ex. JJ to Complaint):

store.place.007webs.com/free6.html
<http://yorkie-puppies.doorway.orge.pl/dinosaur-main-titles-mp3.html> . . . <http://jewellery-makin.doorway.orge.pl/bev-stayart.html> **bev stayart**
store.place.007web.com/freec6.html – 117k – Cached

Stayart found an almost identical search result on Overture (Ex. 1; Jt. Apx. pp. 27-28; Jt. Apx., Ex. KK to Complaint).

Stayart then typed the following URL in the computer browser:

<http://jewellery.makin.doorway.orge.pl/bev-stayart.html> (R. 1; Jt. Apx. p. 28). When she clicked this link, a website appeared titled “Meet AdultFriendFinder members near Janesville – Over 20 Million Members” containing an AdultFriendFinder banner ad of five graphic images of fully or partially nude women exhibiting their breasts and buttocks in a sexually suggestive manner (R. 1; Apx. p. 28; Jt. Apx., Ex. LL to Complaint).³

The photos were accompanied by the age, nickname and city of residence of the women. The URL, <http://jewellery-makin.door.orge.pl/bev-stayart.html>, at the bottom of the website contained the name “bev stayart” (*Id.*). Upon accessing the source code of this website, she found “bev stayart” centered at the top of the page as the “title tag”. The name “adultfriendfinder” was also found in this source code document (R. 1; Jt. Apx. p. 29; Jt. Apx., Ex. NN to Complaint).

³ Banner advertisements consist of a small, oblong banner displayed as part of a website, which when clicked by a user, directs the user’s browser to the destination website of the advertiser. Barbara K. Kaye & Norman J. Medow, JUST A CLICK AWAY: ADVERTISING ON THE INTERNET 36-37 (2001).

SUMMARY OF THE ARGUMENT

The district court improperly dismissed those portions of Stayart's complaint, alleging violation of the Lanham Act, for failure to state false endorsement claims, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Stayart sufficiently demonstrated prudential standing as a commercial party by alleging she had a unique and distinctive personal name and was involved in public advocacy against the mistreatment of animals and, accordingly, her name had commercial value. She also sufficiently demonstrated a reasonable interest requiring protection by alleging that her name was deceptively used as the title tag in the hidden source code of Internet websites, thereby driving commercial traffic to those websites.

Stayart further alleged a reasonable belief that she was damaged by this misconduct by asserting that there was a "likelihood of confusion" that Internet searchers would believe that she endorsed these scurrilous websites. The implication of an endorsement and likelihood of confusion are factual questions not readily resolved by a motion to dismiss.

The district court erred in concluding that Internet search engines Yahoo and Overture were entitled to statutory immunity for Lanham Act claims. Under the express terms of the Communications Decency Act of 1996, no immunity is provided for conduct which involves "any law pertaining to intellectual property." Further, these defendants cannot qualify for such immunity, given their direct involvement in the development of the content at issue.

The district court erred in ruling that there was a "fatal flaw" in Stayart's Lanham Act claims against Yahoo and Overture because she did not show they used Stayart's name in connection with "their own goods and services." Such a requirement is unnecessary for a false

endorsement claim under the Lanham Act. Further, these defendants did use “Bev Stayart” in their proprietary search results, which are their own good and services.

The district court erred in failing to retain jurisdiction over Stayart’s state law claims for misappropriation of her name for commercial value by not allowing her to allege diversity jurisdiction. The parties possessed diverse citizenship, and it was not a legal certainty that Stayart could not recover in excess of \$75,000 on such claims against each defendant. Compensatory damages, punitive damages and attorney fees were possible for a successful plaintiff pursuing the tort of invasion of privacy under Wisconsin law.

ARGUMENT

I. The District Court Erred in Concluding That Stayart Lacked Prudential Standing to Bring False Endorsement Claims Under Section 43(a) of the Lanham Act

The district court erred in concluding that Stayart lacked prudential standing to bring false endorsement claims under Section 43(a) of the Lanham Act. She qualifies as a commercial party within the meaning of the Lanham Act because of her public advocacy in favor of the humane treatment of animals on the Internet and in her community. The term “services” under the Lanham Act is construed broadly and is not limited just to parties who place products into the stream of commerce. Stayart further alleges that she has a unique and distinct personal name and that her name has commercial value, in part, because of such endeavors (R. 1; Jt. Apx. pp. 3-4).

Stayart also possesses a “reasonable interest” to be protected against activities which violate Section 43(a) of the Lanham Act. She has a reasonable interest in stopping the repeated use of “bev stayart” as a metatag in the hidden programming code of websites. This leads search engine users looking for information about Stayart to instead find illegitimate websites, which improperly implies her endorsement of them.

A. The Complaint Must Be Liberally Construed

An appellate court reviews standing issues de novo. Bochese v. Town of Ponce Inlet, 405 F. 3d 964, 975 (11th Cir. 2005).

The Supreme Court has stated that the burden of showing prudential standing at the inception of a case is not difficult. “[B]oth the trial and reviewing courts must accept as true all

material allegations of the complaint, and must construe the complaint in favor of the complaining party.” Warth v. Seldin, 442 U. S. 490, 501 (1975); Lujon v. Defenders of Wildlife, 504 U. S. 555, 561 (1992) (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for we presume that general allegations embrace those specific facts that are necessary to support them”).

Facts need not be pled with particularity, unless otherwise provided by Rule 9 of the Federal Rules of Civil Procedure. Leather v. Tarrant County Narcotics Intelligence Unit, 507 U. S. 163, 168 (1991). Section 43(a) claims for false endorsement under the Lanham Act are not subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). Indiaweekly.com, LLC v. Nehaflix.com, Inc., 2009 WL 189867 (D. Conn. 2009). Section 43(a) “has been characterized as a remedial statute that should be broadly construed.” PPX Enter., Inc. v. Audiofidelity, Inc., 746 F. 2d 120, 125 (2d Cir. 1984).

B. Different Elements Exist for False Endorsement and False Advertising Claims Under Section 43(a)

Section 43(a) has two parts: false endorsement claims under Sec. 43(a)(1)(A) – also called false association/sponsorship claims – like the claims in this case, and false advertising claims under Sec. 43(a)(1)(B). While certain legal standards apply to both, others diverge depending on the type of claim.

A registered trademark is unnecessary to pursue either type of claim. “One who may suffer adverse consequences from a violation of [Sec.] 1125(a) has standing to sue regardless of whether he is the registrant of a trademark.” Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F. 2d 154, 160 (1st Cir. 1977).

A leading treatise on trademark law suggests that a plaintiff could bring false endorsement claims under either (a)(1)(A) or (a)(1)(B). J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* Sec. 28.15, at 28-20 (2006) (“Both prongs of the post-1989 version of Sec. 43(a) would seem to be implicated in false endorsement cases.”) However, Stayart in this case brings false endorsement claims only under (a)(1)(A).

These claims for false endorsement only require proof of a likelihood of confusion. But a claim involving impliedly false statements under (a)(1)(B), alleging false advertising, require a showing of actual confusion or misleading statements. Facenda v. NFL Films, Inc., 542 F. 3d 1007, 1021 (3d Cir. 2008).

A false advertising claim under (a)(1)(B) expressly requires “commercial advertising or promotion” but the statutory language for a false endorsement claim under (a)(1)(A) contains no such limitation. The traditional plaintiff under the second prong of Section 43(a) is “a competitor who was injured in his line of business as a result of false advertising.” Dovenmuehle v. Gildorn Mortgage Midwest Corp., 871 F. 2d 697, 699 (7th Cir. 1989).

Courts have often recognized false endorsement claims involving celebrities. But “celebrity” status is not required. Commercial value may be established by proof of (1) the distinctiveness of the name or identity and (2) the degree of recognition of the person among those receiving the publicity. Hauf v. Life Extension Foundation, 547 F. Supp. 2d 771, 777 (W.D. Mich. 2008). Accord: Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996) (to succeed on a false endorsement claim, plaintiff may be a celebrity or have public recognition). See also, Doe v. FriendFinderNetwork, Inc., 540 F. Supp. 2d 288, 306 (D. N.H. 2008).

C. Non-Competitors Have Prudential Standing to Sue for False Endorsement

Prudential standing jurisprudence is designed to “limit access to the federal courts to those litigants best suited to assert a particular claim.” Phillips Petroleum Co. v. Shutts, 472 U. S. 797, 804 (1985). In applying prudential standing rules, a litigant’s grievance must “fall within the zone of interests protected or regulated by the statutory provision involved in the suit.” Bennett v. Spear, 520 U. S. 154, 162 (1997).

False endorsement typically involves conduct which leads the public to believe that a product which it knows does not originate from the plaintiff is nevertheless associated with her in some manner. As a result, confusion of endorsement may arise out of the defendant’s use of a similar name in connection with a product or services wholly unrelated, or even alien, to the plaintiff.

The existence of competition between plaintiff and defendant is not a prerequisite for a cause of action for false endorsement. CNA Financial Corp. v. Local 743, 515 F. Supp. 942, 945 (N.D. Ill. 1981); Polaroid Corporation v. Polaroid, Inc., 319 F. 2d 830, 834-35 (7th Cir. 1983).

The Lanham Act is concerned not only with confusion over the source of goods or services, but with deceptive appearance of approval. Brach Van Houton Holdings, Inc. v. Save Brach’s Coalition for Chicago, 856 F. Supp. 472 (N.D. Ill. 1994). This new concern has been characterized as an innovation in the Lanham Act. California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. 2d 971 (7th Cir. 1947).

Most courts assume that the harm from confusion regarding endorsement is the same as that caused by confusion regarding actual source. See, e.g., Triangle Publications, Inc. v. Rohrlich, 167 F. 2d 969, 973 (2d Cir. 1948):

[T]he wrong of the defendant consisted in imposing upon the plaintiff a risk that the defendant's goods would be associated by the public with the plaintiff and it can make no difference whether that association is based upon attributing defendant's goods to plaintiff or to a sponsorship by the latter when it has been determined that plaintiff has a right to protect its trade name.

In Dovenmuehle v. Gildorn Mortgage Midwest Corp., the Seventh Circuit analyzed the parties who have standing under Section 43(a). 871 F. 2d 697, 699-700.

A family had used the surname "Dovenmuehle, Inc." for a loan company. Dovenmuehle, 871 F. 2d at 698. But in 1969, the family sold all of its interest in the business to Chase. Id. Later, some of the assets and the trade name "Dovenmuehle" were sold to Percy Wilson Mortgage Corporation. It operated the former Dovenmuehle business under the name "Port Dearborn Corporation." Id. Percy Wilson then sold its interest to Gildorn, which decided to again use the Dovenmuehle name after concluding that it owned the rights. Id.

The Dovenmuehle family sued, claiming a violation of Section 43(a). Gildorn moved to dismiss because of lack of standing. The motion was converted to a motion for summary judgment, and then granted. Id. at 699.

This court, on appeal, explained that "[a] party need not be in direct competition with a defendant to challenge a defendant's practices under the Lanham Act. All a commercial party needs to bring suit under the Act is a 'reasonable interest to be protected' against activities that violate the Act." Id. at 700.

The Dovenmuehle court further stated that the Second Circuit had held that standing is limited to "commercial parties" in a case involving consumers, who were denied standing under Section 43(a), but nonetheless explained that "the class of parties with standing in [Sec.] 43(a) is quite broad." Id. The Dovenmuehle court observed that other circuits had also been reluctant to limit 43(a) standing to a "commercial class," as in the Second Circuit, noting that other circuits

have held that the issue of standing “turns on whether the party ‘has a reasonable interest to be protected against.’” Id.

The Dovenmuehle court concluded that the Dovenmuehle family lacked standing to sue Gildorn. This was because they had sold the trade name and not reacquired it, and because “they are not even arguably engaged in commercial activity.” The family had no intention of using their name in any current business or “even some future commercial enterprise.” Id. at 701, 701 n. 3. The family no longer had a “reasonable interest to be protected” since they had sold their interest and did not intend to use their name in any [other] commercial endeavor. Id. at 700. The family had sold this business 20 years prior to the start of their litigation.

Here, by sharp contrast, Stayart has never sold the right to use her unique personal name. She is currently involved, and for many years has been deeply involved, in public advocacy on behalf of animals on the Internet. Such activities include, but are not limited to, her direct support of a commercial boycott of Canadian seafood to preserve the baby seal population in eastern Canada, and her efforts to educate the general public about the annual slaughter of baby seals in eastern Canada solely for their fur.

D. Stayart Has a Commercial Interest in Her Name Within the Meaning of the Lanham Act

The district court mistakenly held that Stayart lacked prudential standing to pursue her false endorsement Lanham Act claims. It stated (R. 41; Apx. p. 9):

In order to satisfy the prudential standing requirement for a false endorsement claim under the Lanham Act, Stayart must “at least allege an existing intent to commercialize an interest in identity.”

Condit v. Star Editorial, Inc., 259 F. Supp. 2d 1046, 1052 (E.D. Cal. 2003); Hutchinson v. Pfeil, 211 F. 3d 515, 521 (10th Cir. 2000) (“mere potential of commercial interest . . . is insufficient to confer standing for [a] false association claim”); Stanfield v. Osborne Indus., Inc., 52 F. 3d 867, 873 (10th Cir. 1995) (“Although plaintiff asserts that he has plans to compete . . . and would like to use his name in a trademark, the mere potential of commercial interest . . . is insufficient to confer standing”).

None of these cited cases are from the Seventh Circuit. In the Seventh Circuit, all a commercial party needs to bring suit for a false endorsement claim under the Lanham Act is a “reasonable interest to be protected” against activities which violate the Act, regardless of what other circuits may require. Dovenmuehle, Id., at 700.

The district court then held (R. 41; Apx. p. 9):

Stayart is not engaged in the commercial marketing of her identity, and she does not allege an intent to commercialize. Stayart alleges that her name has commercial value, but it is clear that Stayart’s complaint arises from the distasteful association of her name with pornographic images, advertisement for sexual dysfunction drugs, and a sexually-oriented dating service.

This contention is flatly wrong. “Commercial’ in the context of the Lanham Act involves advertising or promotion for the purpose of influencing the purchasing decisions of the consuming public. Fashion Boutique of Short Hills v. Fendi USA, 314 F. 3d 48, 56-57 (2d Cir. 2002). As an animal rights activist, this is exactly what Stayart does.

Stayart qualifies as a commercial party within the scope of the Lanham Act, contrary to the erroneous view of the district court. Her interests in her name and identity were created by her own actions, are sufficient to establish prudential standing at the pleading stage under

Section 43(a) of the Lanham Act. Stayart alleges that she has a unique and distinct personal name; that she regularly uses her name on the Internet and elsewhere with her endeavors; that she engages in public advocacy for animal protection programs throughout the world; and that her name has commercial value, in part, because of her humanitarian efforts for animals (R. 1; Apx. pp. 3-4).

Animal rights groups, their members and supporters are often involved in boycotts to achieve a commercial objective.

For example, the HSUS called for an international commercial boycott of Canadian seafood to force the Canadian fishing industry and Canadian government to halt the annual slaughter of baby seals every spring in eastern Canada. See, the full-page ad of the HSUS in the N.Y. TIMES, June 12, 2006, sec. A, at p. 21. Stayart, as noted, was directly involved in this boycott and associated activities supporting this boycott, on the Internet, and in her own community (R. 1; Jt. Apx. p. 25; Jt. Apx., Ex. X to Complaint) ["I will never buy another Canadian product or set foot on Canadian soil."].

Commercial boycotts have a long history in the United States. According to one commentator (Richard Schaefer, ENCYCLOPEDIA OF RACE, ETHNICITY AND SOCIETY, Vol. 1, at p. 197 (2008)):

Boycotts can take a commercial or political form. Commercial boycotts are directed at businesses or organizations whose practices offend a certain group, and will oftentimes call for participants to not purchase certain products or services. These types of boycotts are most successful when the target produces visible products or when their businesses will suffer as a result of being a target of a boycott. An example of a commercial boycott is the United Farm Workers' grape and lettuce boycotts during the 1960s.

In United We Stand America, Inc. v. United We Stand, America New York, Inc., 128 F. 3d 86 (2d Cir. 1997), the Second Circuit found that a political organization's political activities

were “services” in “commerce” within the meaning of the Lanham Act. 128 F. 3d at 89. The court explained that “services” has been interpreted broadly to persons and organizations furnishing a wide variety of non-commercial public and civic benefits. Id. at 90. Accord: Brach Van Houton Holdings, Inc. v. Save Brach’s Coalition for Chicago, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994); Browne v. McCain, 2009 U.S. Dist. LEXIS 18876 (C.D. Cal. 2009) at *12-13.

In Committee for Idaho’s High Desert v. Yost, 881 F. Supp. 1457 (D. Idaho 1995), aff’d, 92 F. 3d 814 (9th Cir. 1996), the court held that a non-profit organization engaged in dissemination of information about environmental causes via news releases, newsletters and public advocacy was entitled to Lanham Act protection of its trade name, even if it did not “place products into the stream of commerce.” 881 F. Supp. at 1470-71.

Accordingly, Stayart has alleged a sufficient commercial interest in her name for purposes of prudential standing. Her sustained efforts to influence the public against the mistreatment of animals are “services” in “commerce” within the meaning of the Lanham Act.

E. Stayart Has a Reasonable Interest to Be Protected Under the Lanham Act

Stayart also possesses a “reasonable interest” to be protected against misconduct implying false endorsement in violation of Section 43(a) of the Lanham Act (unlike the plaintiffs in Dovenmuehle, supra.) This interest, coupled with Stayart’s status as a commercial party, are sufficient to give her prudential standing at the pleading stage under the Lanham Act.

Stayart has a reasonable interest in preventing the repeated use of “Bev Stayart” as a metatag in the hidden programming code of websites. This leads Internet search engine users looking for information about her to instead find scurrilous websites.

Metatag keywords are part of the web page's source code, and are used by some search engines to determine whether a site is a "hit" when the user performs a keyword search. See, Playboy Enterprises, Inc. v. Terri Welles, Inc., 78 F. Supp. 2d 1066, 1092 (S.D. Cal. 1999, reversed in part on grounds apart from definition, 279 F. 3d 796 (9th Cir. 2002).

Metatags influence search engine relevancy rankings because they appear at the top of the source code of a web page. Greg Kastkova, "Google's Law," 73 BROOKLYN LAW REV. 1327, 1372 n. 25 (2008). By carefully choosing popular keywords for metatags, one can affect (1) how a search engine will index a page, (2) what searches will result in that page being designated a "hit," and (3) where in the list of search results the web page will appear. David Loundry, "Hidden Code Sparks High-Profile Lawsuit," CHICAGO DAILY LAW BULLETIN, September 11, 1997, p. 6.

"Beverly Stayart" has become a popular keyword phrase. Cf. Plasticolor Molded Prods., Inc. v. Ford Motor Co. 713 F. Supp. 1329, 1332 (C.D. Cal. 1989), vacated on other grounds, 767 F. Supp. 1036 (C.D. Cal. 1991) ("Only relatively recently have trademarks begun to leap out of their role as source-identifiers and, in certain instances, have effectively become goods in their own right.").

According to Internet analytics firms, Compete.com, Stayart's name is a competitive keyword phrase. Between January 15 – April 15, 2009, at least five destination websites have received traffic from Internet searchers using the search term "Beverly Stayart." The same is true with regard to the period February 15 – May, 2009 (R. 21, p. 14; R. 25, Appendices 1-3).

The public's commercialization of "Beverly Stayart" on the Internet inures to her benefit for Lanham Act purposes. This is apart from her own use of her unique name on the Internet and

elsewhere. See, National Cable Television Ass'n. v. Am. Cinema Editors, Inc. 937 F. 2d 1572, 1577-78 (Fed. Cir. 1991);

[E]ven without use directly by the claimant of the right, the courts and the [Trademark Trial and Appeal] Board generally have recognized that abbreviations and nicknames of trademarks or names used only by the public give rise to protectable rights in owners of the trade names or marks which the public modified. Such public use by others inures to the claimant's benefit and, where this occurs, public use can reasonably be deemed use "by" that party on its behalf. (footnote omitted).

"Bait and switch" tactics are possible on the Internet, which involve incorporating unrelated keywords on a web page to draw page "hits," even though a user might be searching for completely different information. This practice can violate Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. Sec. 45.

Various has long used such "bait and switch" marketing. In December, 2007, the FTC sued Various in federal court in San Jose, California, because it was engaged in unfair business practices in violation of Section 5, according to the suit (R. 21, p. 15). Various and its marketing affiliates involved with AdultFriendFinder.com were accused of improperly using pop-up ads, spyware and adware to drive traffic to their websites. These ads included graphic depiction of sexual behavior, exposing consumers, including children, to pornographic images. Users saw such ads when they were searching online for completely different things than an adult "dating service," using innocuous keywords such as "flowers," "travel," or "vacations" (R. 21, p. 16, R. 25-2, Appendix 5).

Various did not contest this suit. It agreed to a permanent injunction as a settlement (R. 21, p. 16; R. 25-2, Appendix 6).

Similar “bait and switch” tactics also can violate the Lanham Act. See, Promatek Industries, Inc. v. Equitrac Corp., 300 F. 3d 808 (7th Cir. 2002) (use of metatags constituted trademark use under Lanham Act; defendant properly enjoined from using Promatak’s mark as metatag): International Profit Associates, Inc. v. Paisola, 461 F. Supp. 2d 672 (N.D. Ill. 2006) (enjoining defendant from using name “International Profit Associates” as a search term so Google searchers would uncover defendant’s complaint website as top “hit,” thereby reading false statements about IPA, in violation of Lanham Act). Indiaweekly.com, LLC v. Nehaflix.com, Inc. 2009 WL 189867 (D. Conn. 2009) (online use of competitor’s trademark on website in order to appear in search engine “hits” states actionable claim under Lanham Act).

F. The District Court Did Not Permit An Opportunity to Amend the Complaint Or to Take Discovery

Stayart’s factual allegations in her complaint were “enough to raise the right to relief above the speculative level” (Bell Atl. Corp. v. Twombly, 550 U. S. 544, 555 & n. 3 (2007)), contrary to the erroneous view of the district court.

The district court, as demonstrated above, refused to credit any of the factual allegations in the complaint that were material to the standing analysis. At the same time, the district court did not permit any discovery.

If the district court was unwilling to interpret the facts and inferences in Stayart’s favor, it should have permitted discovery and allowed Stayart an opportunity to present evidence. A judge should not grant a 12(b)(6) motion to dismiss on a disbelief of a complaint’s factual allegations. Wright v. Metro Health Med. Ctr., 58 F. 3d 1130, 1138 (6th Cir. 1995). As explained by one court, “when determining standing, a district court should resolve disputed

factual issues either at a pretrial evidentiary hearing or at trial.” Bischoff v. Osceola County, 222 F. 3d 874, 879 (11th Cir. 2000).

The district court disregarded this simple rule.

Conversely, if the district court believed that the factual allegations in the complaint regarding standing were too conclusory (despite Rule 8’s liberal standard), it should let Stayart replead. Dismissal without leave to amend is improper unless it is clear upon de novo review that the complaint could not be saved by amendment. Polich v. Burlington N., Inc., 942 F. 2d 1467, 1472 (9th Cir. 1991). When exercising its discretion to deny leave to amend, “a court must be guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” United States v. Webb, 655 F. 2d 977, 979 (9th Cir. 1981).

The district court simply could not both deny discovery and leave to amend. These errors permeated all aspects of the decision below. It is the role of a judge to rule on evidence, not on hypothesis.

II. The District Court Erred in Concluding That There Was No Likelihood of Confusion That Stayart Would Be Associated With Pornographic Materials, Sexual Dysfunction Drugs and a Dating Service

The district court further erred in concluding that there would be no “likelihood of confusion” under Section 43(a) of the Lanham Act as to Stayart’s endorsement of pornographic materials, sexual dysfunction drugs and a dating service. This is a factual determination not susceptible to a motion to dismiss.

A district court’s grant of a motion to dismiss for failure to state a claim is reviewed de novo. Midwest Grinding Co., Inc. v. Spitz, 976 F. 2d 1016, 1019 (7th Cir. 1992).

Issues of fact do not readily lend themselves to a motion to dismiss. Cooper v. Parsky, 140 F. 3d 440 (2nd Cir. 1998) (“The task of the court in ruling on a 12(b)(6) motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.”).

“Likelihood of confusion” is an issue of fact. Scandia Down Corp. v. Euroquilt, Inc., 772 F. 2d 1423 (7th Cir. 1985), cert. denied, 475 U.S. 1147 (1986). The implication of an endorsement is also an issue of fact. Burck v. Mars, Inc., 571 F. Supp. 2d 446 (S.D.N.Y. 2008).

Despite these well-established precepts, the district court inexplicably ruled, as a matter of law, that Stayart’s complaint was deficient.

The district court first held that Stayart had “pleaded herself out of court on her Lanham Act claim[s]”. The district court said (R. 41; Apx. pp. 12-13):

Even if Stayart is engaged in commercial activity with respect to her identity, a commonsense reading of the complaint demonstrates that there could be no likelihood of confusion.

Courts analyze a variety of factors to determine whether the use of a mark creates likelihood of confusion . . . Stayart cannot satisfy this requirement as a matter of law because her complaint explicitly disavows any association with pornographic materials, sexual dysfunction drugs, or sexually-oriented dating services (i.e., Various’ website AdultFriendFinder.com). As noted above, Stayart alleges that “in no way has [she] ever engaged in a promiscuous lifestyle, or other overt sexual activities, which she and a large portion of her community and social circle consider perverse and abhorrent.” Complaint, para. 20. This allegation contravenes the likelihood of confusion, and Stayart pleaded herself out of court on her Lanham Act claims[s]. No one who accessed these links could reasonably conclude that Bev Stayart endorsed the products at issue.

Such an assertion defies all common sense. The raison d'etre for a false endorsement claim is falsity. Rather than having pled herself out of court, Stayart has pled herself into court. Cf. Marketing Products Management, LLC v. Heartlandbeautydirect.com, Inc., 333 F. Supp. 2d 418, 430-31 (D. Md. 2004) (“inventor’s” image in infomercial for patented bicycle did not constitute claim for false endorsement where plaintiff was member of design team and did promote product as desirable for bikers); Muzikowski v. Paramount Pictures Corp., 477 F. 3d 899 (7th Cir. 2007) (athletic coach who alleged movie portrayed his life without his permission could not challenge movie’s claim “inspired by a true story” since claim was not false).

The district court then observed (R. 41; Apx. p. 14):

The Court’s prior discussion still rings true. Stayart’s identity is completely unrelated to the services offered by the AdultFriendFinder site The type of person looking for information about Bev Stayart would not be fooled into using an online adult-oriented dating website.

Again, this observation defies all common sense. Although it may come as a surprise to the district court, people interested in humane treatment of animals or genealogy might also be interested in joining a dating service to meet someone of the opposite sex. Similarly, it may come as a surprise to the district court to learn of the past endorsement of Viagra® by a former United States Senator and candidate for President. See, “Pfizer Hires Bob Dole for TV Ad Campaign,” L.A. TIMES, December 12, 1998, at C2.

The district court ignores the intentional copying of Stayart’s name in the title of the source code for this dating website. This misconduct alone creates a presumption of “likelihood of confusion.” Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F. 2d 1100, 1111

(6th Cir. 1991). This inference arises where the defendant intended to benefit from the reputation or goodwill of the trademark owner. Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F. 2d 1482, 1485 (10th Cir. 1987).

Furthermore, this reasoning of the district court is faulty because there is no requirement that goods or services be “related” for a false endorsement claim under Section 43(a) under the Lanham Act. Even though the products or services of the litigants are so unrelated that it is clear that the defendant’s goods or services do not come from the plaintiff, the misleading impression may be created that the defendant’s business is related to, or otherwise connected with, the plaintiff. Boston Professional Hockey Ass’n. v. Reliable Knitting Works, Inc., 178 U.S.P.Q. 274, 1973 WL 19860 (E.D. Wis. 1973).

“Sponsorship” or “affiliation” are broad concepts that could refer to virtually any relationship, and courts have traditionally been fairly aggressive in interpreting such terms. See, Adolph Kastor & Bros. v. FTC, 138 F. 2d 824, 825 (2nd Cir. 1943) (“At the outset we hold therefore that the word, ‘Scout,’ when applied to a boy’s pocket knife, suggests, if indeed it does not actually indicate, that the knife is in some way sponsored by the Boy Scouts of America.”) (emphasis added); Copacabana, Inc. v. Breslauer, 101 U.S.P.Q. 467, 468 (Com’r Pat. & Trademarks 1954) (rejecting application to register Copacabana for cosmetics in light of prior use of Copacabana for nightclub and restaurant despite finding that cosmetics are “entirely different” from the nightclub and restaurant because customers may assume that the cologne was “made by, sponsored by, or in some way connected with Copacabana, Inc.”) (emphasis added).

It is understood by the public that permission is required to use someone’s name for endorsement purposes. “Advertising is the primary means by which the connection between a

name and a company is established . . .” Beneficial Corp. v. Beneficial Capital Corp., 529 F. Supp. 445, 448 (S.D.N.Y. 1982).

The district court completely ignores that Stayart found her name in the URL of a website which contained only a banner ad for AdultFriendFinder. URLs can be divided into three parts: the protocol (<http://>); the domain or host name, consisting of everything before the first forward slash (“jewellery.makin.doorway.orge.pl”); and the file path, consisting of everything after and including the first single forward slash (“/bev-stayart.html”). See, National A-1 Advert. v. Network Solutions, Inc., 121 F. Supp. 2d 156, 174 (D. N.H. 2000).

Someone who places a trademark in the post-domain “path” of a URL thereby hopes to increase the number of visits to that web page. If they do not own the mark they are trading on the goodwill and brand recognition of the owner, and may be guilty of trademark infringement. Dale M. Cendali, et al., “An Overview of Intellectual Property Issues Relating to the Internet,” 89 TRADEMARK REPORTER 485, 510 (May – June 1989).

Here, instead of a trademark, the name “bev stayart” was used by Various in the post-domain “path” of this URL to generate customer traffic. Such conduct could easily deceive consumers into registering with the dating service in the hope of interacting with Stayart. Misuse of her name, in the manner alleged, falsely suggests her endorsement of AdultFriendFinder.com.

Even the banner ad copy, mentioning Janesville, Wisconsin, creates reliability. People in this area (twenty miles from Stayart’s home) may more readily accept the word of a known “local,” as opposed to an unknown “national,” spokesperson. It is alleged in the complaint that AdultFriendFinder.com created this banner ad. But it is believed that discovery will show that Yahoo and Overture supplied the locality of Janesville, Wisconsin, based on the IP address of the computer which Stayart used.

On the issue of likelihood of confusion, the district court fails to acknowledge that Stayart must only show at trial that a relatively small proportion of consumers are likely to believe that she endorsed AdultFriendFinder.com. There is no minimum threshold number necessary. See, for example, Exxon Corp. v. Tex. Motor Exch. of Houston, Inc., 628 F. 2d 500, 507 (5th Cir. 1980) (finding a 15% level of confusion was strong evidence of likelihood of confusion); James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F. 2d 266, 279 (7th Cir. 1976) (finding a 15% level of confusion was neither small nor de minimis). In one case the court held that a 8.5% level of confusion was “strong evidence” of a likelihood of confusion. Grotian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons, 365 F. Supp. 707, 716 (S.D.N.Y. 1973), modified on other grounds, 323 F. 2d 1331 (2d Cir. 1975).

Various’ business model, as noted, relies heavily on “bait and switch” marketing, using unexpected and untoward advertising on the Internet. In the context of trademark law, this is sometimes called “initial interest confusion.” Syndicate Sales, Inc. v. Hampshire Paper Corp., 192 F. 3d 633 (7th Cir. 1999) (holding that initial interest confusion is one way in which a “likelihood of confusion” is established).

The district court’s last contention that Various’ alleged behavior “has little or no meaningful effect in the marketplace” (R. 41; Apx. p. 14) borders on the incredible! See, e.g., Holiday Inns Inc. v. Trump, 617 F. Supp. 1443, 1456 (D. N.J. 1985) (holding that Section 43(a) proscribes not only conduct that would qualify as trademark infringement, but also unfair competition practices involving actual or potential deception); Intel Corp. v. Terabyte International, Inc., 6 F. 3d 614, 618 (9th Cir. 1993) (noting that trademark policies are designed, in part, “(1) to protect consumers from being misled as to the enterprise or enterprises, from which the goods or services emanate or which they are associated”).

III. The District Court Erred in Concluding That Internet Search Engines Yahoo And Overture Were Entitled to Statutory Immunity Under the Communications Decency Act of 1996

The district court further erred in concluding that Internet search engines Yahoo and Overture were entitled to statutory immunity as to Stayart's Lanham Act claims because of statutory immunity, pursuant to the Communications Decency Act of 1996. Such immunity is unavailable for false endorsement claims under Section 43(a) of the Lanham Act. Someone who is otherwise immune under Section 230 loses that immunity if they violate the Lanham Act because this is an exception under Section 230. Further, the allegations in Stayart's complaint indicate that these defendants may have played a material role in creating and developing the content of their search results.

A. Yahoo's Immunity Defense Is Foreclosed By the Plain Language of Section 230(e)

Section 230 of the Communications Decency Act of 1996 ("CDA") protects certain Internet-based actors from some kinds of lawsuits. The CDA is intended to facilitate the use and development of the Internet by providing certain services an immunity from civil liability arising from content provided by others. See, Zeran v. Am. Online, Inc., 129 F. 3d 327, 330-31 (4th Cir. 1997).

The immunity contained within the CDA does not provide protection for enforcement of federal criminal statutes or intellectual property claims. 47 U.S.C. Sec. 230(e). The language "any law pertaining to intellectual property" in the statute refers to the three traditional forms of

intellectual property: copyright, patent and trademark. Allison v. Vintage Sports Plaques, 136 F. 3d 1443, 1448 (11th Cir. 1998).

Section 230(e) unambiguously precludes applying the CDA to immunize interactive service providers from trademark claims. Almeida v. Amazon.com, Inc., 456 F. 3d 1316, 1322 (11th Cir. 2006); Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009).

There is also no immunity for contributory liability for trademark infringement under the CDA. Guicci America, Inc. v. Hall & Associates, 135 F. Supp. 2d 409 (S.D.N.Y. 2001) (holding that CDA immunity does not immunize an ISP from allegations of trademark infringement arising from the actions of the ISP's customer).

B. Yahoo Cannot Qualify for CDA Immunity

The district court held that Yahoo was entitled to immunity under the CDA, explaining (R. 41; Apx. pp. 16-17):

Yahoo! search results include abstracts, or snippets, that contain multiple samples of text appearing in various places on the third-party websites. Yahoo! does not create this content, it only displays the content in response to a C-user's search results. It follows that Yahoo! did not create the content Stayart complains about.

This bold conclusion finds absolutely no support in the record!

An Internet-based actor must meet three requirements to qualify for immunity under the CDA. First, immunity is available only to a "provider or user of an interactive computer

service.” 47 U.S.C. Sec. 230(c)(1). Second, liability must be based on defendant being regarded as a “publisher or speaker.” Id. Third, immunity can be claimed only with respect to “information provided by another information content provider.” Id. If a party fails to establish any one of these three elements, it is not entitled to immunity. FTC v. Accusearch, Inc., 570 F.3d 1187, 1196 (10th Cir. 2009).

Yahoo and Overture cannot meet the third element in this case, at least at the pleading stage. An “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. Sec. 230(f)(3) (emphasis added). The actions of information content providers are not immune from liability under the CDA. Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F. Supp. 2d 1037, 1045 (N.D. Cal. 2004) (citations omitted).

As explained (infra, at pp. 8-12), Yahoo and Overture provide summaries, or “snippets,” for their search results for Stayart. But the language in the summaries cannot be found on any of the underlying web pages to which the searcher is referred, nor in the source code for each web page. The only exception is the name “Bev Stayart.” This is true with respect to both the website chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn and the website nigelbarker.tv/blog/2008/02/01/I-give-it-my-seal-of-approval.

Yahoo has not shown that its summaries came from a third party or even came from the Internet. Since CDA immunity is an affirmative defense, Yahoo bears the burden of proof, not Stayart. Litigants need not try to plead around affirmative defenses. Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003). In this regard, Yahoo can simultaneously be both an “information

content provider” and an “interactive computer service provider.” Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1263 n. 6 (N.D. Cal. 2006).

The district court further held (R. 41; Apx. pp. 17-18):

[T]he only way Yahoo! could exert any control over the results of a search engine query would be to change its underlying, proprietary algorithm. This goes to the heart of Yahoo!’s role as an interactive computer service. “[O]rdinary search engines [such as Google and Yahoo!] do not use unlawful criteria to limit the scope of searches conducted on them, nor are they designed to achieve illegal ends Therefore, such search engines play no part in the ‘development’ of any unlawful searches.” Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F. 3d 1157, 1167 (9th Cir. 2008). In this respect, Yahoo! should be entitled to immunity because it acted as an interactive computer service, even though Stayart’s claims are nominal intellectual property claims. (Citing three cases).

Again, this bold conclusion finds absolutely no support in the record, and is contrary to the allegations in Stayart’s complaint.

Yahoo cannot claim CDA immunity for a second reason. An information content provider includes “any person . . . that is responsible, in whole or in part, for the creation or development of information.” (emphasis added). Id. “This is a broad definition, covering even those who are responsible for the development of content only ‘in part.’” Universal Commc’ns Sys., Inc. v. Lycos, Inc., 478 F. 3d 413, 419 (1st Cir. 2007). “Accordingly, there may be several information content providers with respect to a single item of information (each being “responsible,” at least “in part,” for its “creation or development.” FTC v. Accusearch, Inc., 570 F. 3d 1187, 1197 (10th Cir. 2009) (citing 47 U.S.C. Sec. 230(f)(3)).

“Development” is not defined in the CDA. But as explained by the Tenth Circuit in Accusearch, 570 F. 3d at 1198:

The word develop derives from the Old French desveloper, which means, in essence, to unwrap. Webster’s Third New International Dictionary 618 (2002) (explaining that desveloper is composed of the word veloper, meaning “to wrap up,” and the negative prefix des). The dictionary definition for develop correspondingly revolves around the act of drawing something out, making it “visible,” “active,” or “usable.” Id. Thus, a photograph is developed by chemical processes exposing a latent image. See id.

Applying this broad definition, Yahoo played a material role in the development of the offending content. Yahoo’s proprietary search technology read the deceptive metatag “Bev Stayart” embedded in the hidden source codes of all the web pages involved in this litigation. Yahoo’s proprietary search technology then publicly displayed these metatags in its search results and summaries on its search engine.⁴

No one forced Yahoo (or Overture) to do this. As explained by one commentator:

The keyword metatag responds to a single question the website author assumes a [search engine’s] bot or spider will ask his page: “What bin(s) would you like to put your web page in?” Thus, the keyword meta tag can be analogized to a request form. [Search engines] are free to command their bots and spiders to respect or ignore these requests as they see fit when they attempt to structure the content and order of [their search results]. Some search engines ignore this request completely.

F. Gregory Lastowka, “Search Engines, HTML, and Trademarks: What’s the Meta For?” 86 VA. L. REV. 835, 864 (2000) (footnote omitted).

Not only was Yahoo not forced to display these deceptive metatags in its search results for “Bev Stayart,” it affirmatively represents that it will not do so. Yahoo states in its content quality guidelines that it will not tolerate web pages in its databases “with . . . irrelevant

⁴“Each search engine use[s] its own algorithm, based on the domain name, website text, and the metatags, to arrange the results in a proprietary sequence.” Brookfield Communications, Inc. v. West Coast Entm’t Corp., 174 F. 3d 1036, 1045 (9th Cir. 1999).

keywords” or that “seem deceptive, fraudulent, or provide a poor user experience” (infra, at pp. 7-8).

Yahoo also bears responsibility for the development of the offending content, in the sense of being morally accountable. Yahoo is hardly some neutral conduit of information, as naively portrayed by the district court (R. 41; Apx. pp. 17-18).

There are at least a dozen other commercial search engines, yet none of the offensive content challenged by Stayart appeared on any other search engines, apart from a search engine sharing Yahoo’s proprietary technology (i.e., Overture).

This is because each search engine uses a different algorithm to organize its indexed materials. As a result, the list of web pages generated in response to a search will differ, depending on which search engine is being used. Intermatic Inc. v. Toppen, 947 F. Supp. 1227, 1231-32 (N.D. Ill. 1996).

The district court committed reversible error in thereby dismissing Lanham Act claims against Yahoo and Overture based on their asserted “immunity” under the CDA. Cf. Whitney Info. Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738, 744 (11th Cir. 2006) (where complaint contained allegations illustrating defendants’ involvement in creating or developing the alleged defamatory content of consumer complaints posted on their website, district court erred in dismissing complaint).

The district court’s holding on this issue is also internally inconsistent. When Stayart similarly alleged in her complaint that Various was a content provider for the dating website she challenged, the district court refused to find immunity. The district court correctly held (R. 41; Apx. pp. 18-19):

Things are less clear with respect to Various. In some contexts, the AdultFriendFinder website acts as an interactive computer service, but Stayart's complaint relates to the content of the AdultFriendFinder banner ad that was associated with the <http://jewellery-makin-doorway.org.pl/bev-stayart.html> URL Various' role in the creation of the banner ad content is unclear. At the pleading stage, the Court is unable to conclude that Various is entitled to immunity.

Yet the district court illogically refused to entertain the view that Yahoo (and Overture) was also a content provider of its search results for "bev stayart."

Such internally inconsistent findings constitute clear error. Mendiola v. United States, 994 F. 2d 409, 410 (7th Cir. 1993):

Findings are clearly erroneous if the trial court's interpretation of the facts is implausible, illogical, internally inconsistent, or contradicted by documentary or other extrinsic evidence.

Further proceedings are therefore needed in the district court. Mor-Cor Packaging Prods., Inc. v. Innovative Packaging Corp., 328 F. 3d 331, 336 (7th Cir. 2003) (remanding on the basis of internally inconsistent findings).

IV. The District Court Erred in Concluding That Internet Search Engines Yahoo and Overture Could Not Be Sued for False Endorsement Claims Because They Did Not Use Stayart's Name of Their Own Goods or Services

The district court erred in concluding that there was a "fatal flaw" in Stayart's Lanham Act claims against Yahoo and Overture because they did not use her name in their own good and services. This is not a requirement for a false endorsement claim under Section 43(a) of the

Lanham Act.⁵ Also, these search engines did use Stayart's name in their search results, which are their own goods and services.

An Internet service provider's liability for violation of the Lanham Act must turn on the provisions of trademark law, not on those of the CDA. As one treatise states (Louis Altman and Malla Pollack, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (4th ed. 2008), 2009-1 Cumulative Supplement, Sec. 22:44 at 22-560)):

. . . the Communications Decency Act (CDA) does not insulate anyone from the consequences of a trademark infringement, no matter how innocent

To establish a violation of Section 43(a), Stayart must demonstrate "(1) the mark is valid and legally protectable; (2) the mark is owned by the plaintiff; and (3) the defendant's use of the mark to identify goods or services is likely to create confusion concerning the origin of the goods or services." Fisons Horticulture, Inc. v. Vigoro Indust., Inc., 30 F. 3d 466, 472 (3d Cir. 1994). The "mark" at issue in this case is Stayart's identity, as explained by the district court (R. 41; Apx. p. 8).

These three elements are all properly alleged in Stayart's complaint. However, the district court opined that there was a "fatal flaw" in Stayart's complaint. The district court said (R. 41; Apx. p. 16):

[I]f Stayart successfully stated a claim for false endorsement under the Lanham Act, Yahoo! would not be immune from liability for those claims because such a claim would probably be considered an intellectual property claim. However, one of the fatal flaws in Stayart's Lanham Act claim is that Yahoo! did not use Stayart's name in connection with their own goods or services. See, Heartbrand Beef, Inc. v. Lobel's of New York, LLC, No. V-08-02, 2009 WL 311087, at *3 (S.D. Tex. Feb. 5, 2009).

⁵ Yahoo and Overture used Stayart's name in purported summaries of the challenged websites in their search results. Yet their summaries do not reflect the actual language contained in these same websites.

This is entirely incorrect. The only flaw is in the analysis of the district court. The plain language of 15 U.S.C. Sec. 1125 suggests there is no “trademark use” requirement for a false endorsement claim under Sec. 43(a)(1)(A). There is no false advertising claim in this case.

The defendant’s conduct must occur “in commerce” under Section 43(a), but this requirement “would be met in a typical Internet message.” Kraft Food Holdings, Inc. v. Helm, 205 F. Supp. 2d 942, 947 (N.D. Ill. 2002).

A party may obtain trademark rights under the Lanham Act by using a mark on its own products or services. But this requirement is unnecessary for a successful false endorsement claim.

Today, Section 32 of the Lanham Act, 15 U.S.C. Sec. 1114(1)(a), expressly defines infringing use both on and in connection with goods and services.

The district court’s reliance on Heartbrand Beef, supra, is misplaced. There, the plaintiff was a seller of Akaushi beef, a type of beef from Japan. It alleged that when an Internet user searched for “Akaushi” on Yahoo, the first “paid listing” was lobels.com.beef. Defendant Yahoo allegedly sold Lobels the keyword “Akaushi” so it would be the first search result for this search term (2009 WL 311087, at *1-2).

A false designation of origin claim against Yahoo was dismissed because the plaintiff could not identify any actual statement made by Yahoo about “Yahoo’s products or services” because it was not in the business of selling beef (Id., at *3). However, this is not necessary. Cf. J. Thomas McCarthy, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION Sec. 23:11:50 (2006) (“the Lanham Act nowhere explicitly states that ‘use as a trademark’ is required for an accused use to be an infringement”).

Furthermore, the district court overlooks that Yahoo is using the name “bev stayart” in connection with its own goods and services. Yahoo’s search results are its goods and services, and contain false snippets and spurious links to scurrilous websites, according to the complaint.

A search engine is hardly a passive intermediary. Rather it is a commercial, for-profit enterprise. Yahoo is a media company, not a neutral provider of information. Cf. Search King, Inc. v. Google Tech., Inc., 2003 WL 21464568 (W.D. Okla., May 27, 2003) (characterizing the ranking of a publisher via a relevancy algorithm as an “opinion”).

Information is not sent by a search engine by third parties to third parties. Instead, search engines like Yahoo actively go out and seek information on the Internet. Yahoo profits from its ability to aggregate, index, rank and redistribute the information it collects through its online advertising revenues.

Yahoo (and Overture) are generating advertising revenue in this case from their “related searches” for “bev stayart” which are nothing but paid ads for AdultFriendFinder.com (infra, at pp. 10-11). If, as believed, Yahoo is providing the Janesville, Wisconsin location for the banner ad of AdultFriendFinder.com, based upon the IP address of the user’s computer, this also generates revenue for Yahoo and Overture and is, in itself, a service provided by Yahoo and Overture as a content provider.

Yahoo attracts customers to see this advertising by collecting content. It makes money by using third-party content (i.e., in a data base) for profit, not for personal use.

Yahoo regards its search database as a proprietary asset. Cf. eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (discussing eBay’s attempts to keep its database of third-party auction listings proprietary).

V. **The District Court Correctly Concluded That Various Was Not Entitled to Statutory Immunity Under the Communications Decency Act**

The district court correctly held that Various was a content provider of the language of the banner ad on the dating website Stayart challenged. Therefore, Various was not entitled to statutory immunity under the CDA. The district court held (R. 41; Apx. pp. 18-19):

Things are less clear with respect to Various. In some contexts, the AdultFriendFinder website acts as an interactive computer service, but Stayart's complaint relates to the content of the AdultFriendFinder banner ad that was associated with the <http://jewellery-makin-doorway.org.pl/bev-stayart.html> URL Various' role in the creation of the banner ad content is unclear. At the pleading stage, the Court is unable to conclude that Various is entitled to immunity.

A. **Various' Immunity Defense Is Foreclosed By the Plain Language of Section 230(e)**

The immunity contained within the CDA does not accord protection for a defendant who commits trademark infringement. 47 U.S.C. Sec. 230(e). Various' misuse of Stayart's name in the manner alleged falsely suggests her endorsement of AdultFriendFinder.com. This violates Section 43(a) of the Lanham Act.

B. **Various Cannot Qualify for CDA Immunity**

The actions of information content providers are not immune from liability pursuant to the CDA. Since Stayart has stated in her complaint that Various was responsible for the content

of the dating service website she found, Various' alleged conduct precludes its claim of immunity.

VI. Various Has Violated Section 43(a) of the Lanham Act

Various' misconduct in using Stayart's name as the title tag in the source code of the dating website, as well as in the post-domain path of the URL for such website, violates the Lanham Act. See, infra, pp. 25-28, 31-34).

Various obviously obtained a commercial benefit from its misappropriation of Stayart's name. Why else would they do it? Because of the decentralized nature of the Internet, a key problem is how to direct Internet traffic to a particular website. Attention from searchers translates into dollars because a certain percentage of web visitors will choose to transact business with a website they reach, even inadvertently.

VII. The District Court Erred in Failing to Retain Jurisdiction Over Stayart's State Law Claims

In the alternative, should this court affirm the dismissal of Stayart's false endorsement Lanham Act claims, it is submitted that the district court erred in failing to retain jurisdiction over her remaining state law claims because of diversity. The parties were of diverse citizenship, and it was not a legal certainty that Stayart could not recover more than \$75,000 on such claims, given the availability of compensatory damages, attorney fees and punitive damages under Wisconsin law.

Subject matter jurisdiction is a question of law subject to do novo review. Darden v. Ford Consumer Fin. Co., 200 F. 3d 753, 755 (11th Cir. 2000).

The general rule is that “federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue sua sponte.” Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F. 3d 742, 750 (3d Cir. 1995). Appellate courts also have a responsibility to examine the subject matter jurisdiction of the district courts in actions they review. Kirkland v. Midland Mortgage Co., 243 F. 3d 1277, 1280 (11th Cir. 2001).

This authority permits a court to find jurisdiction where it is obvious from the face of the complaint, even if it is not specifically pled. Averbach v. Rival Mfg. Co., 809 F. 2d 1016, 1019 (3d Cir. 1987) (finding subject matter jurisdiction where plaintiff’s complaint, on its face, satisfied requirements of diversity jurisdiction and diversity jurisdiction unquestionably existed, even though complaint only alleged jurisdiction on basis of 28 U.S.C. Secs. 1331 and 1337); see also, Geller v. Prudential Ins. Co. of Am., Civ. A. No. 96-0676, 2002 WL 1285538, at * 1-2) (E.D.N.Y. June 5, 2002) (noting that where the complaint pled only federal question and supplemental jurisdiction and that jurisdiction was questionable, court would consider whether diversity jurisdiction had been pled on face of the complaint).

Here, while Stayart pled only federal question jurisdiction (28 U.S.C. Sec. 1338) and supplemental jurisdiction, the district court was bound to determine whether it may exercise subject matter jurisdiction on any other basis.

For a court to have diversity jurisdiction, the parties must possess diversity of citizenship and the amount in controversy must exceed \$75,000. 28 U.S.C. Sec. 1332.

Here, the district court noted that “it appears that the parties may be completely diverse” (R. 41; Apx. p. 19 n. 6).

The remaining question is thus whether the minimum requisite jurisdictional amount is present.

Stayart has six remaining state law claims, two against Yahoo, two against Overture and two against Various. She seeks compensatory damages for misappropriation of her name for commercial purposes under both Wisconsin statutory law and Wisconsin common law. No dollar amount in compensatory damages is specified in any remaining counts.

However, in order to dismiss on jurisdictional amount grounds “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount.” St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 289 (1938) (emphasis added); accord, Tongkook America, Inc. v. Shipton Sportswear Co., 14 F. 3d 781, 784 (2d Cir. 1994).

The existence of defenses to the claim which, if valid, would preclude recovery of less than the jurisdictional amount does not affect jurisdiction because they do not go to the presence of a claim of the required size. E.g., Tongkook, 14 F. 3d at 785. Similarly, should Stayart’s ultimate recovery be less than the jurisdictional minimum, it does not establish that a federal court should not have asserted subject matter jurisdiction in the first place.

Under Wis. Stats. 995.50(1), a successful plaintiff bringing an invasion of privacy suit is entitled to any or all of three remedies:

- (a) [e]quitable relief to prevent and restrain such invasion, excluding prior restraint . . . ;
- (b) [c]ompensatory damages, based either on plaintiff’s loss or defendant’s unjust enrichment; and
- (c) [a] reasonable amount for attorney fees.

Compensatory damages are not limited to pecuniary loss alone. Id., 995(4). But damages will “not be presumed in the absence of proof.” Id.

Stayart also seeks punitive damages against each defendant on the basis that their conduct “was intentional, deliberate, and in disregard of her rights” (R. 1; Jt. Apx. p. 34; 35; 38; 40; 42; 43). Such damages may be available pursuant to Wis. Stats. 895.043.

Where a plaintiff seeks unliquidated damages for an intentional tort, such as invasion of privacy, punitive damages are properly considered in determining whether a party has a claim for the requisite amount in controversy. Bell v. Preferred Life Assurance Soc., 320 U. S. 238, 240 (1943); Unified Catholic Schools v. Universal Card Serv., 34 F. Supp. 2d 714, 717 (E.D. Wis. 1991); Anthony v. Security Pac. Fin. Serv., Inc., 75 F. 3d 311, 315 (7th Cir. 1996). Similarly, attorney fees may be included in calculating the amount in controversy determination for diversity jurisdiction when a state statute permits the payment of such fees. Missouri State Life Ins. Co. v. Jones, 290 U. S. 199, 202 (1933).

The district court refused to retain jurisdiction or allow Stayart to re-plead the existence of diversity jurisdiction. Instead, the court stated “it does not seem likely that Stayart could make a good faith allegation that her damages are more than \$75,000” and “the likelihood [is] that her damages are de minimus” (R. 41, Apx. p. 25).

These observations have no support in the record. In measuring damages for misappropriation of the commercial value of a person’s name, an important factor is the nature and extent of the appropriation. RESTATEMENT (THIRD) OF UNFAIR COMPETITION Sec. 49(2)(b)(1995). Here, the name “bev stayart” was connected on the Internet to pornography, sexual dysfunction drugs, and an adult-oriented dating service.

Given the misconduct alleged, as well as the availability of compensatory damages, attorney fees and punitive damages, it simply cannot be said that it would be legally impossible for Stayart to recover more than \$75,000 against each defendant.

The district court abused its discretion in not allowing Stayart to amend her complaint to plead diversity jurisdiction. Fed.R.Civ.P. 15(a) sets forth a liberal standard for allowing plaintiffs to amend their complaints:

In the absence of any apparent or declared reason – such as undue delay, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.” Continental Bank, N.A. v. Meyer, 10 F. 3d 1293, 1298 (7th Cir. 1993) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed. 2d 222 (1962)).

The actions of information content providers are not immune from liability pursuant to the CDA. Since Stayart has stated in her complaint that Various was responsible for the content of the dating service website she found, Various’ alleged conduct precludes its claim of immunity.

CONCLUSION

For the reasons set forth herein, Plaintiff-Appellant Beverly Stayart prays that the Court will reverse the district court’s judgment in favor of Defendant-Appellees Yahoo!, Inc., Overture Services, and Various, Inc., or, in the alternative, will reverse the district court’s refusal to retain jurisdiction over Stayart’s state law claims and allow her to replead the existence of diversity jurisdiction.

Respectfully submitted,

Gregory A. Stayart
N5577 Cobblestone Road
Elkhorn, WI 53121-3820
(262) 745-7395

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12-pt Times New Roman.

Gregory A. Stayart

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Gregory A. Stayart

Date: November 25, 2009

CERTIFICATE OF SERVICE

I, Gregory A. Stayart, the attorney, hereby certify that two (2) copies of the foregoing Brief and Appendix and separately bound Joint Appendix were sent to the following by first-class mail, postage prepaid, on this, the 25th day of November, 2009:

Christian S. Genetski
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005-3364

John F. Hovel
Kravit, Hovel & Krawczyk s.c.
825 North Jefferson - Fifth Floor
Milwaukee, WI 53202

I, Gregory A. Stayart, the attorney, also hereby certify that one (1) digital version in Portable Document Format (PDF) of the foregoing Brief and Appendix was also sent to the following by first-class mail, postage prepaid, on this, the 25th day of November, 2009:

Christian S. Genetski
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005-3364

John F. Hovel
Kravit, Hovel & Krawczyk s.c.
825 North Jefferson - Fifth Floor
Milwaukee, WI 53202

Gregory A. Stayart