UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

JANE DOE, Plaintiff, v. DIRTY WORLD ENTERTAINMENT RECORDINGS LLC dba THEDIRT.COM, HOOMAN KARAMIAN aka NIK RICHIE aka CORBIN GRIMES, DIRTY WORLD, LLC dba THEDIRTY.COM, and DIRTY WORLD ENTERTAINMENT, LLC dba THEDIRTY.COM, Defendants.	Case No. 2:09-cv-00219-WOB Judge William O. Bertelsman **DIRTY WORLD, LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

In support of its Motion to Dismiss, Defendant Dirty World, LLC d/b/a THEDIRTY.COM ("DW"), by counsel, submits this Memorandum of Law. As set forth more fully herein, pursuant to Federal Rule of Civil Procedure 12(b)(2) and (6), this Court must dismiss Plaintiff's claims against DW on the basis that this Court lacks personal jurisdiction over DW and because Plaintiff has failed to state a claim against DW upon which relief may be granted. This Court lacks personal jurisdiction over DW because DW has not purposefully availed itself to jurisdiction in this Court pursuant to Kentucky's long arm jurisdiction statute, K.R.S. §454.210, and the Due Process Clause of the Constitution of the United States. Furthermore, Plaintiff has failed to state a claim against DW upon which relief may be granted, because DW is immune from liability for any and all claims asserted against DW by Plaintiff pursuant to the Communications Decency Act, 47 U.S.C. § 230(c)(1) ("CDA"). As such, all claims asserted by Plaintiff against DW in this civil action must be dismissed with prejudice.

I. BACKGROUND

DW operates a website with the address of THEDIRTY.COM. According to the Second Amended Complaint, Plaintiff "Jane Doe" was the subject of a posting on

THEDIRTY.COM. Second Amended Complaint at ¶9. Plaintiff alleges that the information included in the posting constitutes defamation and libel per se. *See* Second Amended Complaint, Counts I and II. Plaintiff asserts against DW theories of liability including defamation, libel per se, publicity that places another in a false light, and intentional infliction of emotional distress. *See* Second Amended Complaint, Counts I, II, IV, and V. Specifically, and critical to the determination of DW's Motion to Dismiss, Plaintiff **does not allege that the substance of the posting was created by DW** but merely that DW "published" such statements. Second Amended Complaint at ¶¶9, 10, 26, 33, 47, 50. Implicit in these allegations is the fact that the allegedly actionable statements were authored by third parties[1], not DW, and that DW merely provided a forum for posting such statements.

Based on these claims alone, and without offering specific support, Plaintiff claims that this Court has personal jurisdiction over DW. However, nowhere in Plaintiff's Second Amended Complaint does Plaintiff set forth any specific contacts between DW and the Commonwealth of Kentucky. Plaintiff does not claim that any wrongful act took place in Kentucky, that DW specifically targeted Kentucky residents as its audience for the allegedly actionable posting, or that DW regularly transacts business in Kentucky. The only apparent connection between this cause of action and this forum is that Plaintiff alleges that she resides in Kentucky.

II. ARGUMENT

A. This Court Lacks Personal Jurisdiction Over Defendants

1. Standard for Exercising Personal Jurisdiction

It is axiomatic that "[t]he plaintiff has the burden of establishing a prima facie showing of personal jurisdiction over the defendant." *The Cadle Company v. Schlichtmann*, 123 Fed. Appx. 675, 677 (6th Cir. 2005). "When determining whether there is personal jurisdiction over a defendant, a federal court must apply the law of the state in which it sits, subject to constitutional limitations." *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110, 1115 (6th Cir. 1994) (internal citations

[1] Plaintiff has not named such third parties as defendants in this civil action, either as named defendants or as "John Doe" defendants.

omitted). The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution limit a state's power to render a valid personal judgment against a nonresident defendant. *See generally World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). This restriction exists because the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). For this reason, "[f]oreign defendants have a liberty interest, protected by the due process clause, 'in not being subject to the binding judgments of a forum with which [they have] established no meaningful 'contacts, ties, or relations.'" *Batton v. Tennessee Farmers Mut. Ins. Co.*, 736 P.2d 2, 4 (Az. 1987) (in banc) (brackets in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985)).

"Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state." *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002). (internal citations omitted) "General jurisdiction is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.'" *Id.* (internal citations omitted). However, it has been held that "the fact that [a defendant] maintains a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction [over that defendant]" because said action does not "approximate[] physical presence within the state's borders." *Id.* at 874 (internal citations omitted).

In order to exercise specific jurisdiction over a defendant, "the defendant's contacts with the forum state [must be] related to the case at hand." *Cadle*, 123 Fed. Appx. at 677. The Sixth Circuit's test for specific jurisdiction has been set forth as follows:

> [T]he defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause

> of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Bird, 289 F.3d at 874 (internal citations omitted). "When attempting to obtain jurisdiction over a person not physically present within the state at the time of service in a diversity case, a district court applies the state's long-arm statute." *Cadle*, 123 Fed. Appx. at 677. The long-arm jurisdiction statute upon which Plaintiff presumably relies in alleging that this Court has personal jurisdiction over DW is K.R.S. §454.210, which states:

> (2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:…
>
> 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;[2]

In the context of websites, "[t]he 'operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state…if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Cadle*, 123 Fed. Appx. at 678 (internal citations omitted). However, "a person's action of placing information on the Internet" is not sufficient by itself to "subject[ ]

[2] Plaintiff presumably relied upon this same statute in attempting to effectuate service of process on Dirty World. Proper service of process under this statute, however, is contingent upon personal jurisdiction being proper. As Dirty World contends that Kentucky lacks personal jurisdiction over Kentucky, effective service of process would likewise be lacking.

that person to personal jurisdiction in each State in which the information is accessed." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002). "Otherwise, a 'person placing information on the Internet would be subject to personal jurisdiction in every State,' and the traditional due process principles governing a State's jurisdiction over persons outside of its borders would be subverted." *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (quoting *ALS Scan*, 293 F.3d at 712). "[M]ore than posting and accessibility is needed to "indicate that the [defendants] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state … ." *Young*, 315 F.3d at 263.

"Interactive websites [involving "repeated online contacts with residents of the forum state"] can subject the defendant to specific personal jurisdiction, whereas passive websites ["where the defendant merely posts information on the site"] are less likely to confer such jurisdiction." *Id.* (internal citations omitted). "If a website is 'semi-interactive,' 'the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs." *Cadle*, 123 Fed. Appx. at 67 In the context of allegedly defamatory statements, the "effects test" is employed, and the court must examine the "focal point of the story and the harm suffered." *Id.* at 679 (internal citations omitted). Instructive on this point is *Reynolds*, *supra*, wherein the court found that it lacked personal jurisdiction over a sports organization that published an allegedly defamatory press release about a plaintiff sports athlete who resided in Ohio, the forum, and who allegedly failed a drug test. In finding no jurisdiction over the defendant, the court stated as follows:

> First, the press release concerned [the plaintiff's] activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, [the plaintiff[is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the [defendant' could foresee that the report would be circulated and have

> an effect in Ohio is not, in itself, enough to create personal jurisdiction. Finally, although [the plaintiff] lost Ohio corporate endorsement contracts and appearance fees in Ohio, there was no evidence that the [defendant] knew of the contracts or of their Ohio origin.

23 F.3d at 1120.

Similarly, in *Cadle*, *supra*, the court ultimately held that it lacked personal jurisdiction over defendants, a lawyer and his firm, in a case in which the plaintiff alleged defamation as a result of postings on a website established by the lawyer defendant. The court based its holding upon the fact that the website did not discuss the plaintiff's activities in Ohio, the forum, and no interaction between defendants and Ohio [the forum] residents was alleged. The court further found that "nothing on the website specifically targets or is even directed at Ohio readers, as opposed to the residents of other states. *Cadle*, 123 Fed. Appx. at 679. *Oxford Round Table, Inc. v. Mahone*, 2007 U.S. Dist. LEXIS 82915 (W.D. Ky. 2007) (wherein, in a case involving a claim of defamation against a foreign defendant who allegedly posted defamatory content on a website, the court held that it did not have personal jurisdiction over defendant because defendant did not purposefully avail herself to Kentucky jurisdiction in that her actions took place completely outside of the state and the cause of action did not arise primarily from activity within Kentucky despite the fact that defendant's actions "may have harmed a corporate resident of Kentucky" and even though the court recognized the possibility that no court in the United States may have jurisdiction over defendant); *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (wherein, in a case involving claims of defamation against foreign defendants website and individual who allegedly posted defamatory content on website, the court held that it lacked personal jurisdiction over defendants because the website article in question "contains no reference to Texas [the forum state], nor does it refer to the Texas activities of [the Plaintiff], and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered."); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2nd Cir. 2007) (wherein the court held that it lacked personal jurisdiction over

defendant because allegedly defamatory statements posted by defendant on his website were not purposefully directed to residents of the forum state as opposed to a nationwide audience); *Griffis v. Luban*, 646 N.W.2d 527, 536 (Minn. 2002) (wherein the court found that it did not have personal jurisdiction over the defendant, holding that "[t]he mere fact that [the defendant, who posted allegedly defamatory statements about the plaintiff on the Internet] knew that [the plaintiff] resided and worked in Alabama is not sufficient to extend personal jurisdiction over [the defendant] in Alabama, because that knowledge does not demonstrate targeting of Alabama as the focal point of the ... statements.").

2. DW's alleged actions do not satisfy Kentucky's personal jurisdiction statute.

The face of Plaintiff's Second Amended Complaint fails to demonstrate that DW is subject to personal jurisdiction in Kentucky. Plaintiff does not allege that DW had contacts with Kentucky of "a continuous and systematic nature," and Plaintiff does not specifically refer to any such contacts that would satisfy this test. *See Bird*, 289 F.3d at 873. Furthermore, as stated in *Bird*, operating a website that is accessible to Kentucky residents is insufficient to establish that general personal jurisdiction is proper. *Id.* at 874. It does not appear that Plaintiff seeks to have this Court believe that it may exercise general personal jurisdiction over DW.

Regarding specific jurisdiction, under K.R.S. §454.210, Plaintiff must sufficiently allege facts that would show DW caused "tortious injury in [Kentucky] by an act or omission outside [of Kentucky]" **and also** that DW "regularly does or solicits business, or engaged in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in [Kentucky]" and that such alleged tortious injury is related to such contacts. In her Second Amended Complaint, however, Plaintiff fails to satisfy her burden. Instead, this case is more like those cited above, *Reynolds*, *Cadle*, *Oxford*, and *Revell*, and *Best Van Lines*, wherein the courts found that specific personal jurisdiction could not be exercised, as Plaintiff

merely alleges that DW "broadcast information to persons in the Commonwealth of Kentucky." Second Amended Complaint at ¶7.

Although Plaintiff generally states that DW "did transact business and had sufficient minimum contacts in the Commonwealth of Kentucky," Plaintiff offers no support for this and does not provide any specific examples of said contacts. Instead, it appears that Plaintiff is attempting to merely rely on the fact that DW's website is accessible by Kentucky residents to satisfy this prong and, as noted above, this is woefully insufficient. There are no allegations by Plaintiff of any of the following: that DW specifically targeted Kentucky residents as opposed to readers nationwide, that Kentucky was specifically mentioned in the allegedly defamatory online posting, or that DW engaged in repeated online contacts with Kentucky residents. In sum, Plaintiff cannot show that DW could have "reasonably anticipate[d] being haled into court [in Kentucky] to answer for the truth of the statements made … ." *Young*, 315 F.3d at 264 (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)); *see also World-Wide Volkswagen Corp.*, 444 U.S. at 297 (1980) (holding the touchstone of "the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") As such, it would not be proper for this Court to exercise specific personal jurisdiction over DW. Therefore, Plaintiff's claims against DW must be dismissed.

B. Plaintiff's Second Amended Complaint Fails to State a Cause of Action Against DW for Which Relief May Be Granted.

1. The CDA Bars Website Liability for Third Party Speech.

As noted above, Plaintiff alleges that DW is liable on various theories of liability, including defamation, libel per se, publicity that places another in a false light, and intentional infliction of emotional distress, for merely "publishing" allegedly actionable statements. Once again, however, Plaintiff does **NOT** allege that DW authored any of the allegedly actionable statements. Instead, it is implied that such actionable statements were authored by third parties. As such, the theories alleged by

Plaintiff are strictly precluded by federal law through the Communications Decency Act, 47 U.S.C. § 230(c)(1). This federal statute, which was passed by Congress with the intent to "promote unfettered speech," provides in relevant part:

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

47 U.S.C. § 230(c)(1) (emphasis added).[3] The CDA preempts any inconsistent state law, as it states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Green v. America Online,* 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role, and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone, or alter content.'").

The operation of an Internet website that allows access by multiple users is an activity that it unequivocally protected by the CDA. *See Carafano v. Metrosplash.com,*

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[3] Likewise, under the CDA, operators of website are immune from liability for editing or altering content as long as the content was initially created by a third party. "[T]he CDA is a complete bar to suit against a website operator for its 'exercise of a publisher's traditional editorial functions-such as deciding whether to publish, *withdraw, postpone or alter content*.'" *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929, 932 (D.Ariz. 2008) (emphasis added) (quoting *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997); *see also Batzel v. Smith*, 333 F.3d 1018, 1031–32 (9th Cir. 2003) (holding that CDA applied to claims against website operator despite editorial changes made to content created by third party). Indeed, as explained by the Fourth Circuit Court of Appeals, one of the primary reasons the CDA was enacted was to *encourage* website operators to review and edit content posted by third parties without fear that doing so would expose the operator to liability:

> Congress enacted § 230 to remove the disincentives to selfregulation created by the *Stratton Oakmont* [*v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995)] decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

Zeran, 129 F.3d at 331 (emphasis added).

Inc., 339 F.3d 1119 (9th Cir. 2003); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. App. 2001). Indeed, federal courts that have considered the issue have consistently held that the CDA immunizes a web site operator for defamatory material it publishes if it is not the creator of the content at issue. *See generally*, *Batzel*, 333 F.3d at 1027-28 (wherein the court recognized that "[m]aking interactive computer services and their users liable for speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet."), *quoting Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983-84 (10th Cir. 2000). "Essentially, the CDA protects website operators from liability as publishers, but not from liability as authors." *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 U.S. Dist. LEXIS 77551, *7 (D. Ariz. 2007) (emphasis added).

On the other hand, if defamatory text was created by a third party without material alteration from Defendants, the CDA prohibits imputing liability to defendants for another person's statements, as "[t]his is precisely the kind of situation for which section 230 was designed to provide immunity." *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008). This distinction is pivotal because, "[u]nder the CDA, website operators are only considered 'information content providers,' for the information at issue that the operators are responsible for creating or developing." *GW Equity v. Xcentric Ventures LLC*, 2009 U.S. Dist. LEXIS 1445, * 21-22 (N.D. Tx. 1009) (emphasis added) (citing *Carafano*, 339 F.3d at 1123). Put another way, if a website creates 1% of a posting, the site is liable only as to *that* 1%. If the other 99% was created solely by a third party, the website is not responsible for that part of the text. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833 note 11, (Cal. App. 4th 2002) (explaining, "the fact appellants allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which appellants seek to hold it liable. It is not inconsistent for eBay to be an interactive service provider and also an information content provider; the

categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading.") (emphasis added).

The Ninth Circuit Court of Appeals has explained that the CDA must be carefully construed in favor of immunity to ensure the prompt dismissal of meritless cases unless there is clear evidence that a website directly participated in the creation of unlawful content:

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

Fair Housing, 521 F.3d at 1174–75 (emphasis added).

Secondary authority has explained the effect of the CDA as follows:

> [The CDA's] provisions set up a complete shield from a defamation suit for an online service provider, absent an affirmative showing that the service was the actual author of the defamatory content. Accordingly, a number of courts have ruled that the ISP was immune from liability for defamation where allegedly libelous statements were made available by third parties through an ISP or were posted by third parties on the server's billboards, as the ISP fell within the scope of 47 U.S.C.A. § 230.

Jay M. Zitter, J.D., Annotation—*Liability of Internet Service Provider for Internet or E–mail Defamation* § 2, 84 A.L.R.5th 169 (2000) (emphasis added).

In keeping with the spirit of protecting websites from claims based on little more than "creative lawyering," courts have frequently held that the CDA applies even when a defendant adds his own content to defamatory statements from another person. *See Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323 (4th Dist. Ct. App. 2010). In *Hung Tan Phan*, the defendant received an email which allegedly defamed the plaintiff in various ways. *See id.* at 325–26. The defendant forwarded the email (which he did not write) to a third party along with an introductory comment (which he did write). With these facts before it, the court framed the question as follows: "What happens when you receive a defamatory e-mail and you forward it along, but, in a message preceding the actual forwarded document, introduce it with some language of your own?" *Id.* at 325 (emphasis added).

In arguing that the CDA should not apply, the plaintiff in *Hung Tan Phan* suggested that because the defendant added his own comments to the defamatory email before passing it along, he became responsible for the entire message including the text he did not create. *Id.* The trial court rejected this argument and the California Court of Appeals affirmed, finding the defendant was entitled to CDA immunity even though he added his own original content to the third party's email. This conclusion was based on "the rule that a defendant's own acts must *materially contribute* to the illegality of the internet message for immunity to be lost." *Id.* at 326 (emphasis in original). Because the defendant's own words were not defamatory, the Court of Appeals found the CDA applied because, "the only possible defamatory content … found in the e-mail was the original content received by defendant Pham from [the original author]. Nothing 'created' by defendant Pham was itself defamatory." *Id.* at 328. For that reason, the appellate court affirmed the application of CDA immunity. *Id.*

As discussed in *Hung Tan Phan*, many other courts have agreed with this result. *See generally Barrett v. Rosenthal*, 146 P.3d 510 (2006) (CDA provided immunity to

defendant who posted an article authored by a third party to an online newsgroup); *Batzel*, 333 F.3d 1018 (defendant who posted message from third party to an online message board entitled to immunity under the CDA); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (granting defendant's Motion to Dismiss on the grounds that the CDA expressly precluded any claims based on the "monitoring, screening, and deletion of content from [defendants'] network[]" because, "these actions are 'quintessentially related to a publisher's role,' and '§ 230 'specifically proscribes liability' in such circumstances.") (internal citations omitted); *Zeran*, 129 F.3d at 332 (wherein court held that plaintiff's negligence claims were clearly barred by the CDA because they were premised on the harm allegedly caused by AOL's publication of information created by a third party; "both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party--each alleged by Zeran here under a negligence label--constitute publication. … AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity."); *Green*, 318 F.3d 465 (same result); *Whitney Info. Network Inc. v. Xcentric Ventures, LLC*, 2008 U.S. Dist. LEXIS 11632 (M.D. Fla. 2008) (holding defendant website entitled to immunity under the CDA).

The Fifth Circuit also rejected an attempt to use a negligence claim to avoid the CDA, finding such "artful pleading to be disingenuous." *Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) (holding the CDA barred negligence claims against website for failing to screen content). The Seventh Circuit has also rejected the theory that a website has a duty to "vet out" illegal content posted by users, in holding that "[a]n online service could hire a staff to vet the postings, but that would be expensive and may well be futile: if postings had to be reviewed before being put online, long delay could make the service much less useful …." *Chicago Lawyers' Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–669 (7th Cir. 2008)

(holding CDA barred claims against website for failure to screen and remove racially discriminatory statements).

2. DW is Entitled to CDA Immunity for Plaintiff's Claims.

In order for a defendant to avail itself of the CDA's immunity, three elements must be established: "[1] the defendant must be a provider or user of an interactive computer service; [2] the asserted claims must treat the defendant as a publisher or speaker of information; and [3] the information must be provided by another information content provider." *Scneider*, 31 P.3d at 39. The allegations as contained on the face of Plaintiff's Second Amended Complaint establish that DW is entitled to immunity under the CDA.

a. DW is an "Interactive Computer Service."

"Interactive Computer Service" has been defined by the CDA and interpreted by various courts as "'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server…'" *Batzel*, 333 F.3d at 1030, *quoting* 47 U.S.C. §230(f)(2). This definition includes any website that allows multiple users to connect to it. *See*, *e.g.*, *Gentry*, 99 Cal. App. 4th at 831 and n. 7. (wherein court held that online auction website www.eBay.com is an "interactive computer service"); *Schneider*, 31 P.3d at 40-41 (wherein court held that online bookstore www.amazon.com is not an "interactive computer service");; *Ben Ezra*, 206 F.3d at 985 (wherein parties conceded that AOL was an "interactive computer service" when it published an online stock quotation service"); *Zeran*, 129 F.3d at 330 (wherein court found AOL to be an "interactive computer service" when it operated bulletin board service for subscribers); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-50 (D.D.C. 1998) (wherein parties conceded that AOL was an "interactive computer service" even when it published online gossip column).

In Plaintiff's Second Amended Complaint, Plaintiff concedes that DW operates a website that is "publically [sic] accessible to any user." Second Amended Complaint at ¶¶4, 12. Furthermore, Plaintiff concedes that DW's website "includes a blog section

where viewers can post responses to the post." Second Amended Complaint at ¶19. As such, there can be no question that DW's website plainly falls within the CDA's definition of "interactive computer service." Therefore, the first element of CDA immunity has been established. [4]

b. Plaintiff's Claims Treat DW as a Publisher/Speaker.

The second element of CDA immunity is also easily established, as Plaintiff undisputedly seeks to impose liability upon DW for "publish[ing]" material about Plaintiff on DW's website. Second Amended Complaint at ¶¶9-10. Plaintiff's claims against DW treats DW as standing in the shoes of the speaker of the allegedly actionable material, which the CDA expressly prohibits. As such, this element is easily satisfied.

c. The Allegedly Actionable Language Was Created by Third Parties.

Finally, Plaintiff does not allege that DW created the substance of the allegedly actionable statements, and none of Plaintiff's alleged theories of liability against DW are based upon an allegation DW created the substance of the allegedly actionable posting. Instead, said substance was created by third parties, who were the "information content providers." Plaintiff's proposed basis for holding DW liable for these comments is expressly precluded under the CDA. *See Barrett*, 146 P.3d at 529 (wherein the court held that "Plaintiffs are free under Section 230 to pursue the **originator** of a defamatory Internet publication. Any further expansion of liability must await Congressional action." (Emphasis added).

In sum, Plaintiff's claims seek to hold DW (the operator of an interactive computer service) directly liable for content created by others. The nature of claims asserted by Plaintiff against DW in this civil action are precisely those for which the CDA was enacted to immunize defendants like DW from liability. Like every prior case in which the CDA was found to protect defendants, the current action attempts to

[4] Although DW easily meets the definition of provider of interactive computer service, the CDA also provides immunity to users of an interactive computer service. DW would also qualify under the definition of user.

use creative lawyering and fancy-sounding allegations to accomplish exactly what the law does not permit—imposing liability on DW for material they did not create or alter in any material respect. Courts have unanimously determined the CDA expressly bars this proposed action by Plaintiff and, as noted above, even close cases must be resolved in favor of immunity to defendants. As such, DW's Motion to Dismiss must be granted, resulting of dismissal of Plaintiff's claims against DW with prejudice.

III. CONCLUSION

As set forth fully above, Plaintiff's claims against DW must be dismissed for two separate and distinct reasons: (1) pursuant to Federal Rule of Civil Procedure 12(b)(3), DW is not subject to personal jurisdiction in this Court; and (2) pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff has failed to state a cause of action against DW upon which relief may be granted. Regarding personal jurisdiction, Kentucky's long-arm jurisdiction statute simply does not extend as far as Plaintiff would wish. Instead, DW has done nothing to purposefully avail itself to jurisdiction in this forum, and exercising personal jurisdiction over DW would violate the Due Process Clause of the Constitution of the United States. Regarding Plaintiff's failure to state a claim upon which relief may be granted, the CDA operates to immunize DW from claims, such as the ones at issue in this civil action, based upon allegedly actionable content created by third parties. As such, DW's Motion to Dismiss must be granted.

Wherefore, for the foregoing reasons and as so moved in its Motion to Dismiss, Defendant Dirty World, LLC respectfully requests that this Court grant its Motion to Dismiss, and for such other relief as the Court deems appropriate.

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Dirty World, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2010, I electronically filed the foregoing Memorandum with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s Alexander C. Ward
Counsel for Defendant, Dirty World, LLC