IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NEMET CHEVROLET LTD. 153-12 Hillside Avenue Jamaica, NY 11423 and THOMAS NEMET, d/b/a NEMET MOTORS, Plaintiffs, v. CONSUMERAFFAIRS.COM, INC., 11350 Randon Hills Road Suite 800 Fairfax, VA 22030 Defendant.	**Civil Action No. 1:08CV254 (GBL/TCB)**

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR STRIKE PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs Nemet Chevrolet Ltd. and Thomas Nemet d/b/a Nemet Motors ("Nemet") hereby oppose Defendant ConsumerAffairs.com's Motion to Dismiss or Strike ("Def.'s Mot.") because: (1) Defendant is responsible for creating and/or developing the false, malicious and libelous statements concerning Plaintiffs' business that are published on Defendant's website, thereby forfeiting the protection of Section 230 of the Communications Decency Act ("CDA" or "Section 230"); (2) Defendant's motion to strike punitive damages is contrary to well-recognized

Commonwealth procedure; and, (3) Plaintiffs' commercial interests have been injured by Defendant's violations of the Lanham Act.[1]

Perhaps the most significant proof that Defendant is responsible for the content on its website is the inherently commercial purpose and nature of ConsumerAffairs.com. Defendant's website is not a consumer watchdog, like the official New York City Department of Consumer Affairs ("NYCDCA" or "Department") that has regulatory authority over auto dealers in New York. Rather, Defendant's website is a for-profit enterprise that generates advertising revenue by offering website users the promise of financial reward in exchange for a very specific type of content. Specifically, on its website, Defendant: a) touts its relationships with consumer class action lawyers and promises compensation in the form of possibly joining a consumer class action lawsuit; b) advises website users about how to craft complaints that will be most attractive to consumer class action lawyers; c) provides a "complaint" button for website users to post content; and d) provides specific categories of alleged misconduct by Plaintiffs to guide website users' complaints. Here Defendant is targeting a healthy, upstanding dealership rather than helping consumers or focusing on true consumer fraud.[2]

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[1] Plaintiffs recognize that this Court dismissed the Lanham Act claims from the original Complaint and repeat such allegations in this Amended Complaint merely to preserve their right to appeal.

[2] This misleading profit-making enterprise, which purports to act as a consumer watchdog, has relentlessly defamed Plaintiffs while ignoring major consumer fraud and crimes of violence associated with other New York automobile dealerships. On August 21, 2003, the NYCDCA issued a press release stating: "The New York City Department of Consumer Affairs (DCA) announced today that it has cited 19 car dealerships citywide - totaling more than 2,800 counts - for deceptive and misleading advertisements, and in some cases, unlicensed activity. The agency monitored advertisements placed in various City newspapers from February to June 2003 citing the most egregious cases. Dealers face possible penalties with fines ranging from $100 - $350 per count. 'Deliberately enticing car buyers with half-truths and exaggerated claims is not just infuriating, its illegal,' said DCA Commissioner Gretchen Dykstra. 'Dealers should know and abide by longstanding rules that were put in place to protect consumers from deceptive

The Department contacts businesses when it receives consumer complaints and attempts to resolve the complaints. If complaints cannot be resolved, the results can be very harsh for businesses. The Department can suspend dealers from doing business, cancel their license, and impose large fines, and has done so to numerous New York automobile dealers recently—but not Nemet Motors. Whereas Plaintiffs have an outstanding reputation with the Department for addressing and resolving complaints, ConsumerAffairs.com has posted numerous false complaints about the Plaintiffs, none of which has ever been addressed with the true consumer

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trade practices. Car dealers should also know that we are keeping a close eye on their advertising practices and will continue issuing violations where warranted - guaranteed."

Plaintiffs were not among the sanctioned dealerships; ConsumerAffairs.com never reported this major news of consumer fraud or enlightened the public about well over a dozen suspect automobile dealerships in the New York market, yet it has targeted Plaintiffs for "Advertising" complaints.

On July 7, 2007, the New York Post reported that "Detectives are investigating possible links between the men accused of gunning down two Brooklyn cops and an alleged million-dollar scam at a Long Island auto dealership. While probing the murder of car salesman Collin Thomas outside the showroom of Universal Auto World in Lawrence, L.I., in January, cops unraveled what they said was a massive scam at the dealership. Employees at Universal allegedly stole and bought identities, then used the IDs to obtain at least $1.3 million in financing for fancy cars, court records show." On July 24, 2008, Newsday reported that "A financial scheme operating out of two Lawrence car dealerships -- and uncovered during a murder probe -- helped drug dealers, pimps and gang members buy luxury cars and keep their names off motor vehicle records, Nassau District Attorney Kathleen Rice charged Wednesday. The scheme operated out of Universal Auto World and Victory Toyota, Rice said. Ten managers and salesmen and Universal Auto have been charged. Most defendants, including the dealership, were charged with scheme to defraud and grand larceny, as well as other charges. Nassau police began probing the dealerships after the 2007 shooting death of Collin Thomas, a salesman at Universal Auto. Rice's office is also investigating a link between the Thomas slaying and a car stolen from another Five Towns dealership that was used in the 2007 shooting of two New York City police officers. Thomas' death remains unsolved."

Clearly, the primary focus of Defendant's website is turning a profit at the expense of healthy, honest businesses, not exposing true consumer fraud or protecting consumers. For Defendant to have the temerity to accuse *other* businesses of fraudulent or misleading business practices is the height of irony, if not an utter lack of shame.

agency. Defendant uses these false posts and the resulting public attention to attract advertising revenue, while continuing to steer website users toward negative, false posts about Nemet and other upstanding businesses. Defendant ConsumerAffairs.com's website is most certainly not an "interactive computer service" that Congress intended to protect under the CDA.

Introduction

The Court dismissed Plaintiffs' original defamation and tortious interference claims in the Complaint, limiting its analysis to the four corners of the complaint and declining to consider the allegations and arguments regarding Defendant's CDA affirmative defense asserted in a declaration and opposition brief. Plaintiffs then amended the Complaint by leave of Court on July 15, 2008. The Amended Complaint contains detailed allegations, supported by extensive documentation, more fully stating Plaintiffs' claims and demonstrating why the CDA affirmative defense does not apply.

The Amended Complaint contains specific, factual allegations—based largely on the text of Defendant's website itself—that cut straight to the heart of Defendant's CDA affirmative defense. Specifically, Plaintiffs allege that ConsumerAffairs.com helped guide and develop many of the postings on Defendant's website that contain false, malicious and defamatory statements about the Plaintiffs. (Am. Compl. ¶¶ 37-39, 40-42, 51-53, 54-56, 57-59, 73-75, 76-78, 87-89, 90-92, 97-99, 100-102, 103-105.) Plaintiffs also allege that Defendant is the original author and creator of certain postings on Defendant's website that contain false, malicious and defamatory statements regarding Plaintiffs' business. (Am. Compl. ¶¶ 43-46, 47-50, 61-64, 65-68, 69-72, 79-82, 83-86, 93-96.) Ultimately, as a developer and creator of these statements, Defendant is functioning as an information content provider that is not protected by the tort immunity reserved under CDA for pure interactive service providers. Accepting all of Plaintiffs'

factual allegations as true—the correct standard for a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6)—the Court should deny ConsumerAffairs.com's Motion to Dismiss so that discovery may be had on the merits.

I. Applying the Standard, the Court Should Deny ConsumerAffairs.com's 12(b)(6) Motion.

Defendant's Motion mischaracterizes the allegations in the Amended Complaint as "unsupported, unreasonable, and unwarranted conclusory assertions" because Defendant is well aware that all factual allegations and reasonable inferences from those factual allegations must be accepted as true and in the light most favorable to Plaintiffs when considering a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). *See also Nortec Communs., Inc. v. Lee-Llacer*, 548 F. Supp. 2d 226, 229 (E.D. Va. 2008) ("In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true."). Because the Amended Complaint clearly pleads both the elements of the claims and the factual reasons that the CDA defense does not apply, Defendant's only hope for dismissal is to miscast the Amended Complaint and hope the Court rejects factual allegations and reasonable inferences. However, even if the Court were to "doubt" Plaintiffs' factual allegations, such doubts would be insufficient to support a Rule 12(b)(6) motion to dismiss. *See Bell Atl. Corp.*, 127 S. Ct. at 1965.

As set forth below, Defendant's reliance on *Eastern Shore Markets, Inc. v. J.D. Associates Limited Partnership*[3] and *Edwards v. City of Goldsboro*[4] in accusing Plaintiffs of

[3] 213 F.3d 175 (4th Cir. 2000).

making "unsupported, unreasonable, and unwarranted conclusory assertions" (Def.'s Mot. 6-9, 16-17), is inapposite: the Amended Complaint makes factual allegations and reasonable factual inferences, not legal conclusions. Therefore, neither *Eastern Shore Markets* nor *Edwards* supports dismissal in this case.

The distinction between factual assertions and inferences, as opposed to legal conclusions, was discussed in *Eastern Shore Markets* and does not favor Plaintiffs' overbroad mischaracterization of the Amended Complaint. The court explained that on a motion to dismiss, "we assume the truth of all facts alleged in the complaint *and the existence of any fact that can be proved, consistent with the complaint's allegations.*" 213 F.3d at 181 (emphasis added). At the same time, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.* Defendant offers no insight or authority about the meaning of an "unwarranted inference" or an "unreasonable conclusion," other than hurling empty accusations. However, the allegations about how Defendant developed the content of posts on its website, as well as the allegations that Defendant authored certain posts, are facts that can be proved, not legal allegations. *Eastern Short Markets* does not support dismissal.

At this early stage of the case, a complaint based on "unwarranted inferences" may be dismissed only if the inference is clearly unjustified on its face. In *Mosely v. Price*, 300 F. Supp. 2d 389 (E.D. Va. 2007), this Court dismissed under Rule 12(b)(6) a complaint that was based on "unwarranted inferences." In that case, the plaintiff argued that when a voter registration card was returned to the county clerk as undeliverable, it was the clerk's procedure to resend the card "with no adverse consequences" to the registrant, and that "the County's initiation of an

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[4] 178 F.3d 231 (4th Cir. 1999). In *Edwards*, the court noted that it is "not *required* to accept as true the legal conclusions set forth in a plaintiff's complaint" on a Rule 12(b)(6) motion to dismiss. *Id.* at 244 (emphasis added).

investigation" regarding his returned card "constituted the implementation of a change that had not been pre-cleared," in violation of the Voting Rights Act. *Id.* at 395. The Court held that the plaintiff's inferences were not justified because "nothing in the written procedure invites or justifies such an inference." *Id.* at 395-96. "To the contrary, common sense and state law invite a different inference, namely that while a returned card must be resent if the address is verified as correct, any allegation of fraud may be investigated." *Id.* at 396.

Applying this authority, the Court should deny Defendant's Motion to Dismiss because Plaintiffs' allegations about how Defendant develops defamatory content on its website are purely factual and rooted in the undisputed structure and content of Defendant's website itself. More importantly, Plaintiffs' allegations that ConsumerAffairs.com actually authored certain defamatory posts about the Plaintiffs are not legal conclusions; they are a reasonable *factual* inference based on Plaintiffs' inability to identify an actual customer authored the post after reviewing detailed records of customer names and the make and model of car referenced in the website post. In other words, Defendant's repeated accusations about "unwarranted inferences" are completely toothless and cannot serve as a valid basis for dismissal. Rather, because the allegations about the inapplicability of the CDA defense "can be proved consistent with the complaint's allegations," *Eastern Shore Mkts.*, 213 F.3d at 181, Defendant's motion must be denied.

II. The CDA Defense Does Not Apply to the Relevant Posts on ConsumerAffairs.com

The simple truth is that a website like ConsumerAffairs.com, that guides and helps develop specific categories of negative content, is functioning as an information content provider and thus is not protected by the CDA. Section 230 provides civil immunity for "interactive service providers," but not for "information content providers." 47 U.S.C. § 230(c). Section 230

defines an information content provider 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." § 230(f)(3). Thus, under the CDA, one who "creates" or "develops" "information provided through the Internet" is "responsible" for that content, is an "information content provider," and therefore is not immune. In other words, under the CDA, there are two basic paths to becoming an information content provider: "creation *or* development."

The Amended Complaint alleges that ConsumerAffairs.com has engaged in both types of content development: 1) Defendant helps website users develop specific categories of negative content with the promise of compensation, and with the goal of attracting advertising revenue; and 2) it has created negative posts and therefore authored some of the defamatory content about Plaintiffs on ConsumerAffairs.com's website. In both cases, Defendant has participated "in whole or in part" in developing the content on its website and is not entitled to immunity under the CDA.

A. ConsumerAffairs.com Authored a Number of the Defamatory Posts About Plaintiffs

The Amended Complaint unequivocally avers that Defendant authored a number of the defamatory posts about Plaintiffs that appear in Defendant's website. Consequently, Plaintiffs have stated a claim upon which relief could be granted. Plaintiffs squarely allege that Defendant is the original and sole author of eight of the postings in question. (Am. Compl. ¶¶ 47, 50, 64, 68, 72, 82, 86, 96.) Thus, for purposes of ruling of this Rule 12(b)(6) motion, the Court should rule that Defendant is "responsible" for these statements, is an information content provider, and is not entitled to CDA immunity.

The *Roommates.com* opinion unequivocally ruled that content created by the website itself cannot benefit from the protections of Section 230 of the CDA. The website in *Rommates.com* asked certain questions that may have violated the Fair Housing Act (e.g., by asking users to identify their "sex, sexual orientation and whether he would bring children to the household"). *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1161 (9th Cir. 2007). The court held that the website "undoubtedly is the 'information content provider' as to the questions . . .", because the website was the creator of these statements and therefore is "responsible" for them under Section 230. *Id.* at 1164. The court therefore held that the website is not entitled to Section 230 immunity for these questions. *Id.*

Similarly, Plaintiffs allege here that Defendant also is the sole, original author (*i.e.*, creator) of certain statements on its website, in particular postings that cannot be tracked back to any identifiable Nemet customer or sale and therefore appear to have been fabricated. The original content (i.e., discriminatory questions) in *Roommates.com* may have violated the Fair Housing Act. The fabricated complaints are defamatory, and assuming Defendant made them, as Plaintiffs allege in the Amended Complaint and as the Court must assume to be true, then Defendant also is not protected by Section 230. *Roommates.com* clearly favors Plaintiffs.[5]

[5] Defendant's attempt to distinguish *Roommates.com* is strained at best. Defendant asserts, without any citation to the text of the opinion itself, that Roommates.com "is narrowly limited to conduct by website operators that is alleged to violate laws prohibiting discriminatory practices, in which it is not the content itself . . . which results in liability but the type of content . . . which is solicited, developed, and then published." (Def.'s Mot. 13). In truth, the *Roommates.com* opinion makes no distinction between liability flowing from "the content itself" and from "the type of content which is solicited," nor did the Ninth Circuit limit the applicability of Roommates.com to cases involving alleged violations of the Fair Housing Act by websites. Moreover, Defendant offers no authority for the implicit proposition that a defamatory statement is unlawful because of "the content itself" and not because of "the type of content" it contains. Like the website in *Roommates.com*, Defendants here have "design[ed] its system around the dissemination of unlawful content"—defamatory statements being the unlawful content here. 521 F.2d at 1172.

ConsumerAffairs.com's only retorts to these plain allegations do not provide a valid basis for dismissal. First, Defendant asserts that third-parties authored all the defamatory posts. (*See, e.g.*, Def.'s Mot. 1: "Over the course of several months, third-party users of the ConsumerAffairs Website posted seven articles about the Plaintiffs . . .") The motion to dismiss describes the posts as the work of third-party users approximately two dozen times. (Def.'s Mot. 1, 4-11, 13, 15 n.4, 16, 17, 20.) However, repeatedly stating these alleged facts cannot change that they are *factual* in nature and *contradict* the allegations in the Amended Complaint. Disputing the facts alleged in the Amended Complaint does not justify a Rule 12 dismissal. Rather, such disputes are explored in discovery and resolved, if the material facts are not disputed, on a motion for summary judgment.

Second, Defendant attempts to mischaracterize the factual allegations of the Amended Complaint as "unsupported, unreasonable, and unwarranted conclusions," an argument that is untenable. The extent to which the Defendant authored posts on its website is a fact "that can be proved, consistent with the complaint's allegations." *Eastern Shore Mkts.*, 213 F.3d at 181. In particular, the Amended Complaint alleges:

(a) "Defendant's founder and president, in sworn written testimony, admitted that ConsumerAffairs.com's 'sole source of income is advertising on the website'" (Am. Compl. ¶ 22.);

(b) Defendant's website "solicits and shapes statements appearing on its website by enticing visitors with the possibility of participating in a class-action lawsuit" (Am. Compl. ¶ 29); and,

(c) Depending entirely on advertising revenue, and "enticing visitors with the possibility of a class action lawsuit," it is entirely conceivable that Defendant is the sole and original author

of some of the "consumer complaints" published on its website. Plaintiffs' outstanding record with the New York City Department of Consumer Affairs—"the state agency actually responsible for addressing consumer complaints"—makes it even more likely that Defendant would have to spin false, malicious and defamatory allegations out of whole cloth, if only to fill out its website. (Am. Compl. ¶¶ 12-20.); and,

(d) Defendant recently added at least 13 new posts to its website, each of which contains false, malicious and libelous statements about Plaintiffs. (Am. Compl. ¶ 60, ¶¶ 61-105.) Eleven of these new posts are "dated" prior to April 25—the date that Plaintiffs prepared a print-out of the website that it submitted to Court as an attachment to its Response to Defendant's Motion to Dismiss, which obviously did not include these statements. (Am. Compl. ¶ 60, Exs. K & S.) Having consulted its business records to compare the names and make and model of automobile referenced in each post, Plaintiffs are unable to determine to which customer, if any, six of these posts pertain. (Am. Compl. ¶¶ 61, 65, 69, 79, 83, 93.)

The hollow allegation that the Amended Complaint contains unwarranted conclusions flies in the face of these factual allegations. The posts on the website generally contain a first name and make and model of motor vehicle, and Plaintiffs have been unable to match the majority of the posts on Defendant's website with any past customer by comparing the information on the website with Plaintiffs' business records. It is a reasonable factual inference that some of the posts are false, and that Defendant, which has control over its website and a profit motive to continue to attract complaints, authored the false posts. The prospect of false posts is heightened by the fact that the date of numerous new posts about Plaintiffs on Defendant's website are inconsistent with the date they first appeared on the website. It is therefore reasonable to infer that Defendant has manipulated or falsified the dates on these

newly-added "consumer complaints," and to infer that a defendant willing to manipulate or falsify the dates of postings on its website may have fabricating posts in their entirety. In contrast, it is ludicrous to suggest that the Amended Complaint's allegations about false postings authored by the Defendant, which are factual in nature, are "unwarranted legal conclusions." Rather, these allegations are "facts that can be proved," per *Eastern Shore Markets*.

On Defendant's Motion to Dismiss, the Court must accept all Plaintiffs' factual allegations as true. This includes: the revenue source and purpose of Defendant's website; the manipulation of dates on the rash of defamatory statements that recently appeared on its website; and, the allegation that Defendant is the sole and original author of certain of the postings in question. Defendant offers nothing except rhetoric to suggest these factual allegations are either "unwarranted inferences" or "unreasonable conclusions." These facts, which are assumed to be true, eliminate CDA immunity for the defamation and tortious interference claims in the Amended Complaint and mandate that the Motion be denied.

B. Defendant Participated in Developing Defamatory Website Posts about Plaintiffs

In addition to voiding CDA immunity by creating content, a website also loses Section 230 immunity for information that it is at least partially responsible for "developing." For the remainder of the postings at issue in this case, the Amended Complaint alleges facts, also assumed to be true, that establish ConsumerAffairs.com's partial responsibility for developing the contents of those posts. Because ConsumerAffairs.com participated in developing the content of the posts, it acted as an information content provider as to those posts and is not considered an interactive computer service. Specifically, the Amended Complaint alleges that Defendant's profit motive to attract advertising revenue and attention from consumer class action lawyers led Defendant to encourage and help website users post specific types of negative

content about the Plaintiffs. Therefore, the Defendant is not entitled to immunity under the CDA.[6]

In *Roommates.com*, the court held that the structure of the defendant's website made the defendant "much more than a passive transmitter of information provided by others" but rather "the developer, at least in part, of that information." *Roommates.com*, 521 F.3d at 1166. The defendant thus became an information content provider of the users' profile pages, "because every such page is a collaborative effort between Roommate and the subscriber." *Id.* at 1167. The same is true for ConsumerAffairs.com.[7]

One of the first components of this steering process appears on the front page of Defendant's website, which "feature[es] a very overt and visible 'complaint button.'" (Am. Compl. 28, Ex. I.) There is no "compliment" button, and the means for posting positive comments about a business, until after Plaintiffs filed suit, has been much more difficult to locate and is still downplayed compared to the big, red complaint button. This first component, which Defendant misleadingly refers to as part of its "fairly content neutral" website, helps ensure that

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[6] Plaintiffs identify the customers described in these postings (Am. Compl. ¶¶ 38, 41, 52, 55, 58, 74, 77, 88, 91, 98, 101, 104) and supply detailed business records demonstrating each of the posts are false. (Exs. N-R, T-X).

[7] The plaintiffs in *Badbusinessbureau.com* claimed "that the defendants actively encourage, instruct, and participate in the consumer complaints posted on the websites." *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, 2004 U.S. Dist. LEXIS 6678, *32 (N.D. Tex. Apr. 19, 2004). Because the defendants allegedly were "participating in the process of developing information," Section 230 did not shield the defendant from liability for the consumer complaints, either. *Id.* at *34-*35. The titles and headings which Defendant indisputably authored are comparable to those in *Badbusinessbureau.com* (if somewhat less strident). *See id.* at *32 n.10. Defendant is as aggressive as the defendant in *Badbusinessbureau.com*, but in slightly different ways. For example, *Badbusinessbureau.com* involved allegations that the defendant encouraged a third party to photograph the plaintiff's business. There is no such allegation here, but Plaintiffs do allege Defendant's website featured instructions by a class action attorney on how to phrase a complaint, using the possibility of monetary recovery to encourage individuals to follow these instructions. This is the kind of "six-of-one-half-dozen-of-another" factual differences that one should expect when comparing any two cases.

Defendant attracts the negative postings it needs to attract advertising and attention from consumer class action lawyers.

Next, as alleged in the Amended Complaint, Defendant has original content that explains to website users how class action lawsuits work, and how the "first step" in a class action is finding a lawyer, which "is not nearly as easy as it used to be." (Am. Compl. 29, Ex. I.) Fortunately for users of the website, "ConsumerAffairs.com tries to help" by steering website users toward a hyperlinked "complaint form" and a hyperlinked article by attorney Joan Lisante entitled "Plaintiff Power: Not Dead Yet." *Id*. Attorney Lisante's article explains that "to qualify as a class action, a lawsuit must affect a broad class of individuals, all similarly harmed by the defendant's action or inaction." (Am. Compl. ¶30). The ubiquitous complaint button also appears at the bottom of Attorney Lisante's article. In this way, Defendant's website "actually advises visitors to the website on how to craft their complaint to better support a lawsuit." (Am. Compl. ¶ 30, Ex. J.)

In the section of Defendant's website regarding Plaintiffs, Defendant further steers website users by organizing complaints into a number of suggestive titles, categories, and headings to "steer[] and shap[e] the content of their complaints into specific categories to organize them for class action lawyers." (Am. Compl. ¶ 19, 32-33, Ex. K.). These categories of complaints include "changing prices," "lease terminations," "Extended warranties," "Advertising," and "Honoring court judgments." *Id*. Defendant also reinforces these categories in other parts of its website. For example, another section about Plaintiffs, authored by the Defendant, accuses Plaintiffs of "everything from prices engraved in sand to advertising that overlooks certain crucial elements." (Am. Compl. ¶ 34, Ex. L.). The same section of the website states: "However, if a dealer advertisers a car at a certain price, it is obligated to honor that price

unless it has clearly disclosed that the price applies only under certain conditions. Does Nemet know this?" (Am. Compl. 35, Ex. M).

Defendant's effort to distinguish *Badbusinessbureau.com* on this point fails. In *Badbusinessbureau.com*, the plaintiff alleged "that the defendants personally write and create numerous disparaging and defamatory messages about [plaintiff] in the form of report titles and various headings." 2004 U.S. Dist. LEXIS 6678 at *32. Plaintiffs not only make the same allegation in the Amended Complaint, but also allege that Defendant authored and fabricated some of the defamatory postings. (Am. Comp. ¶¶ 33-35.) As in *Badbusinessbureau.com*, Defendant does not dispute that it was the creator of the headings that organize the complaints about Plaintiffs. The court in *Badbusinessbureau.com* flatly rejected the defendant's argument that "merely editing and creating titles is insufficient to establish their status as information content providers so as to deprive them of CDA immunity." *Id.* at *28. On the contrary, "the CDA does not distinguish between acts of creating or developing the contents of reports, on the one hand, and acts of creating or developing the titles or headings of those reports, on the other. The titles and headings are clearly part of the web page content." *Id.* at *33. In short, both cases involve defamatory titles and headings of which Defendant indisputably was the creator, and so is not entitled to immunity under Section 230.[8]

[8] Defendant also glosses over the fact that in *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095 (M.D. Fla. 2008), another opinion involving a different alleged consumer website, the Court only issued its ruling regarding the Section 230 defense on a motion for summary judgment, after the facts were fully developed. In that case, Defendants claim that only the website users decided which categories or headings would apply to their postings; in this case, the categories were allegedly created by the Defendant, and complaints were allegedly allocated into categories by the Defendant. (Am. Compl. ¶33, 39)("categorized beefs are listed on the right" . . . "Defendant steer[ed] the complaint into a specific category . . ."). If Defendant is making that choice, Defendant is participating in developing content. *Whitney* demonstrates why Defendant's motion should be denied.

The Amended Complaint clearly alleges that the structure of Defendant's website, the experience of a typical user that sees the site, is designed to attract complaints with the promise of attention from consumer class action lawyers and the prospect of potential compensation, then by shaping and steering the content of website posts in a particular direction and into specific negative categories. "Defendant participated in the preparation of this complaint by soliciting the complaint, steering the complaint into a specific category designed to attract attention by consumer class action lawyers, contacting [the original author] to ask her questions about her complaint and to help her draft or revise her complaint, and promising [the original author] that she could obtain some financial recovery by joining a class action lawsuit." (Am. Compl. ¶¶ 39, 42, 53, 56, 58, 75, 78, 89, 92, 99, 102, 105.) Plaintiffs offer substantial documentary evidence to support these factual allegations, so they are definitely not unwarranted inferences or legal conclusions.

Defendant's participation in developing the content of postings on its website does not stop with the structure of the website itself. Plaintiffs allege that Defendant contacts the authors of postings to help him or her "draft or revise" the complaint, with the promise of a financial recovery through a class action lawsuit. Defendant appears to admit that it does contact the individuals in question, but claims that "[s]uch activities (the selection and editing of content) are among the traditional functions of a publisher" discussed in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997). (Def.'s Mot. 17.) *Zeran* describes traditional editorial functions as "deciding whether to publish, withdraw, postpone or alter content." *Id.* at 330.

However, nothing in *Zeran* suggests that *contacting a website user* to help the user draft or revise the *substance* of a complaint is part of the traditional editorial function allowed by Section 230 of the CDA. Rather, contacting a website user to help the user draft or revise the

substance of a complaint is the essence of being "responsible, in whole or in part, for the creation or development of the information alleged to violate the law." (Def's Mot. 5) (citing *Badbusinessbureau.com*, 2004 U.S. Dist. LEXIS 6678) Ultimately, at this early stage in the case the Court cannot determine whether Defendant's contacts with website users to draft or revise complaints are merely part of the "traditional editorial function" described in *Zeran*, or whether Defendant is "developing the information alleged to violate the law." If the latter, then Defendant is an information content provider, and has forfeited CDA immunity, which is reserved solely for interactive service providers. At bottom, this is a factual issue that cannot be decided on a motion to dismiss. One can easily think of reasonable circumstances where such contacts and conversations would cross the line from traditional editing to developing content or information. Defendant's citation of *Zeran* is premature at best.

Therefore, as in *Badbusinessbureau.com*, Plaintiffs claim "that the defendants actively encourage, instruct, and participate in the consumer complaints posted on the websites," whether by direct contact (Am. Compl. ¶¶ 39, 42, 53, 56, 59, 75, 78, 89, 92, 99, 102, 105) or by the structure of the website (categories, headings, instructions from a class action lawyer, the "complaint button," promises that the statements will be reviewed by a class action lawyer, original defamatory statements) (Am. Compl. ¶¶ 27-35). Ultimately, Defendant's activities result in the same kind of "collaborative effort" that precluded Section 230 immunity in *Roommates.com* and *Badbusinessbureau.com*.

Defendant's motion cannot dispute the substance of the Amended Complaint, so it instead repeatedly characterizes the Amended Complaint as "unsupported and unreasonable conclusions and unwarranted inferences disguised as supporting "facts." (Def's Mot. 6). To the contrary, the exhibits to the Amended Complaint show that the new allegations in the Amended

Complaint are supported by content on Defendant's website itself. Frankly, Defendant's repeated and somewhat desperate argument about the alleged improper conclusions and unwarranted inferences is a last-ditch effort to avoid the well-recognized Rule 12 standard of review, to try to convince the Court to not accept the allegations in the Amended Complaint and reasonable inferences as true, notwithstanding the requirements of the Federal Rules of Civil Procedure.

III. Defendant's Arguments about Other Website Content Is a Canard

Though the Amended Complaint alleges that Defendant authored a number of negative and biased statements about the Plaintiffs and posted that material on the ConsumerAffairs.com site, Plaintiffs do not allege that these comments are independently defamatory. This is a false argument, because Plaintiffs have not alleged that *all* content on the ConsumerAffairs.com website is defamatory.

The following content is not alleged to be independently defamatory. One section of the website, authored by the Defendant, accuses Plaintiffs of "everything from prices engraved in sand to advertising that overlooks certain crucial elements." (Am. Compl. ¶ 34, Ex. L.) The same section of Defendant's website states: "However, if a dealer advertisers a car at a certain price, it is obligated to honor that price unless it has clearly disclosed that the price applies only under certain conditions. Does Nemet know this?" Another section about Nemet states "sounds great, but some of Nemet's customers aren't so impressed, as the complaints in this section indicate. A selection of assorted complaints appears below, while categorized beefs are listed to the right." (Am. Compl. ¶ 33, Ex. K.) Rather than assert separate counts of defamation for this negative content, the Amended Complaint alleges that *these* negative comments are part of

Defendant's effort to help steer website users and participate in the development of categorized negative content about Plaintiffs.

With respect to *these* statements, Defendant's argument that "[t]ruth is an absolute defense to a defamation claim" is misplaced. The commentary described in the preceding paragraph is offensive and was included in the Amended Complaint to illustrate how Defendant participates in developing defamatory postings on its website. Whether the comments in the preceding paragraph are true, or whether they may be considered opinion, is completely irrelevant. They are not the defamatory statements at issue in this case.

Because the statements referenced in Section IV of this Opposition are not alleged to support independent counts of defamation in the Amended Complaint, they cannot serve as the basis for a dismissal.

IV. Defendant's Argument that Count II of the Amended Complaint Must Be Stricken Is Meritless.

Defendant argues that Count II of the Amended Complaint must be stricken because it is based on tortious interference, which—like defamation—is barred by Section 230 immunity. (Def.'s Mot. 22) Obviously, the same arguments that apply to preclude dismissal of Plaintiffs' defamation claim also preclude dismissal of Plaintiffs' tortious interference claim.

V. The Punitive Damages Claims Should Not Be Stricken.

Defendant argues that Plaintiffs' punitive damages claims should be stricken because Plaintiffs seek damages in excess of the statutory maximum. (Def.'s Mot. 22.) The Court should deny Defendant's motion to strike Plaintiffs' punitive damages claim because Virginia law caps punitive damage *awards*, not the ability to claim punitive damages in excess of the cap. Of course, it is axiomatic under Virginia law that neither a court nor a jury may award punitive

damages in excess of $350,000. Va. Code Ann. § 8.01-38.1. However, the statute clearly acknowledges a party's ability to claim punitive damages in excess of the cap, as well as a jury's power to determine that punitive damages exceeded the cap: "The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section." *Id.*

The Supreme Court of Virginia expressly endorsed this approach in an opinion concerning Virginia's medical malpractice damages cap: "A trial court applies the remedy's limitation only *after* the jury has fulfilled its fact-finding function. Thus, Code § 8.01-581.15 does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process." *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 96 (1989) (emphasis in original). Clearly, the statutory cap limits the amount of punitive damages that can be awarded but does not affect the amount of punitive damages that can be claimed in a complaint.

To the extent the two unpublished cases relied upon by the Defendant create any confusion about how the damages caps actually operate in the courts of the Commonwealth of Virginia, the text of the statute and *Etheridge* control on this issue of state law. *See Faircloth v. Finesod*, 938 F.2d 513, 517 n.9 (4th Cir. 1991) (federal courts generally bound by state court's interpretation of its own statutes); *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1361-62 (W.D. Va. 1979) ("The Virginia Supreme Court's interpretation as to the import of its own law is conclusive."); *Ferguson v. Manning*, 216 F.2d 188, 188 (4th Cir. 1954) ("It is too well settled to admit of argument that the federal courts are bound by the interpretation placed upon the statutes

of a state by its highest court."). Accordingly, Defendant's motion to strike the punitive damages claims should be denied.

VI. Plaintiffs Have Standing Under the Lanham Act.

Recognizing that the Court already has fully considered, and rejected, Plaintiffs' argument on this point, Plaintiffs hereby incorporate by reference the arguments and authorities advanced in its Opposition to Defendant's Motion to Dismiss the original complaint, pages 13-22. (Docket No. 8.)

Conclusion

Based on the foregoing, Plaintiffs respectfully submit that the Court should deny Defendant's Motion to Dismiss in its entirety and direct Defendant to file an Answer Plaintiffs' Amended Complaint within twenty (20) days.

Respectfully submitted,

/s/

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Date: August 15, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of August, 2008, I will electronically file the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STRIKE PLAINTIFFS' AMENDED COMPLAINT with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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