IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ED HAMMITT and BRENDA HAMMIT,	)	
	)	
	)	
Plaintiffs,	)	**CIVIL ACTION FILE NO.**
	)	**4:08-CV-162-HLM**
vs.	)	
	)	
KEN BUSBIN, TERESA WATSON and ROMENEWSBYWATSON. COM, INC.	)	
Defendants.	)	

PLAINTIFFS' MOTION TO REMAND AND SUPPORTING MEMORANDUM

This case is a companion case to Civil Action No. 4:08-CV-158-HLM.

COME NOW the Plaintiffs, Ed Hammitt and Brenda Hammitt ("the Hammitts") , and make, serve and file this Motion to Remand and Supporting Memorandum in response to the "Notice of Application for Removal to Federal Court..."filed by the defendants ("the Watson defendants") on October 3, 2008. The bases for this motion are:

1. This case is not and never has been removable under 28 U.S.C. § 1441, et seq.; and

2. This case is not removable because the Watson defendants have blatantly failed to comply with the time requirement for removal under 28 U.S.C. § 1446(b).

(I) FACTS PERTINENT TO THIS MOTION TO REMAND

The Hammitts filed their Complaint for libel against the Watson defendants on December 28, 2007 in the Superior Court of Chattooga County, Georgia (Exhibit "A" hereto). The Hammits have never amended their Complaint in any way. The Watson defendants filed their responsive pleadings on January 29, 2008 and February 4, 2008 (Collective Exhibit "B" hereto), with the February 4 filing being 242 days prior to their "Notice of Application for Removal to Federal Court…" As part of their Answers, the Watson defendants asserted numerous affirmative defenses, including the "Eleventh Defense" of the January 29 responsive pleading which provides

"Eleventh Defense

Plaintiffs' claim against defendant is barred by 47 U.S. sec. 230(e)(3)"

and in the February 4 responsive pleading

"Third Defense

Defendants are not liable to Plaintiffs for any comments posted on the website for, among other reasons, protections set forth in 47 U.S.C. § 230".

and

"Eleventh Defense

Plaintiffs' claim against these defendants are (sic) barred by 47 U.S.C. § 230(e)(3)."

Nowhere in the Watson defendants' responsive pleadings is there any statement, suggestion, inference or innuendo that any allegation of the Hammits' Complaint was vague, not well pled or otherwise defective. Nowhere is there any indication of any kind that the Watson defendants failed to understand either the nature of the Hammitts' Complaint or the plain meaning of their allegations. Nowhere is there any statement, suggestion, inference or innuendo that the Watson defendants were

moving or would be moving for a more definite statement under O.C.G.A. § 9-11-12(e). Indeed, the record in the case contains no § 9-11-12(e) motion whatsoever.

Fifty seven (57) days prior to filing their "Notice of Application for Removal to Federal Court...", the Watson defendants filed their August 6, 2008 "Defendant's Motion to Dismiss, Incorporating Brief" (Exhibit "C" hereto) to which the Hammits responded on September 5, 2008 (Exhibit "D" hereto).

(II) ARGUMENT AND CITATIONS OF AUTHORITY

The Watson defendants' alleged bases for removal are contained in paragraphs 2 and 15 of their Notice wherein they allege, in pertinent part:

"...the initial Complaint [i.e., the Hammitts' Complaint]...was not well-pled, but defendants above only recently ascertained that the single alleged state law claim is preempted by the Communications

Decency Act, 47 U.S.C. § 230 ('§ 230') under the 11th Circuit's 'super' or 'complete preemption' doctrine." [1] (underscoring supplied)

and

"This Notice is being filed within 30 days of Defendants' receipt of Plaintiff's Response (¶¶ 7ff.), pursuant to 28 U.S.C. § 1446(b)'s 'other papers' clause." [2]

The balance of the Watson defendants' "Notice of Application for Removal to Federal Court..." is a rambling diatribe of why they believe 47 U.S.C. § 230 insulates them from liability for the Hammitts' Complaint for libel.

The Court will note, however, from the Watson defendants' Motion to Dismiss (Exhibit "C" hereto) that they clearly attempted to assert federal preemption under 47 U.S.C. § 230 when they filed that Motion (August 7, 2008). [see the Watson defendants' federal preemption argument on the

[1] The Watson defendants' "Notice of Application for Removal to Federal Court and Memorandum of Law," ¶ 2.
[2] Id, ¶ 15.

sixth page of Exhibit "C" hereto, which they filed fifty seven (57) days prior to their removal notice].

Therefore, the Watson defendants' alleged bases for removal are their claims that 47 U.S.C. § 230 provides "...'super' or complete preemption..." under Eleventh Circuit law and, in the face of their own affirmative defenses and their own preemption argument in state court, that they only ascertained this "...'super' or 'complete preemption'..." when the Hammitts filed and served their September 5, 2008 response (Exhibit "D" hereto) to the Watson defendants' Motion to Dismiss. In essence, and incredible as it is, their position before this Court is that their opportunity to remove was triggered under 28 U.S.C. § 1446(b) when the Hammitts responded to their Motion to Dismiss and explained the law to them. That position is ludicrous at best, diametrically opposed to the facts and an insult to the intelligence of both this Court and counsel for the Hammitts.

Moreover, the Watson defendants cite no case which supports their alleged bases for removal; indeed, the cases they do cite clearly support the Hammitts' Motion to Remand.

(1) The Applicable Law

28 U.S.C. § 1441 and 1446 provide, in pertinent part:

28 U.S.C. § 1441:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in

interest properly joined and served as defendants is a citizen of the State in which such action is brought."

28 U.S.C. § 1446:

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

"(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if

such initial pleading has then been filed in court and is not required to be served on the defendant; whichever period is shorter.

"If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."

(2) **The Hammitts' Motion to Remand Should be Granted Because This Case is Not Now and Never Has Been Removable**

This case is not now and never has been removable. The only removal cases cited by the Watson defendants are Smith v. Wynfield Dev. Co., Inc., 238 Fed. Appx. 451, 2007 WL 1654149 (11th Cir. [Ga], 2007);

Metropolitan Life Ins. Co. v. Taylor, 451 U.S. 58, 107 S. Ct. 1542 (1987); and Englehardt v. Paul Revere Life Ins. Co., 139 F. 3d. 1346 (1998). All of these cases involve ERISA, not 47 U.S.C. § 230; and the distinction between ERISA and 47 U.S.C. § 230 in the context of federal question jurisdiction on removal is as clear as it is critical.

As the Court will see, the bottom line is that this case is not and never has been removable because 47 U.S.C. § 230 does not govern state defamation law; instead, 47 U.S.C. § 230 (known as the Communications Decency Act or "CDA") provides certain immunity for internet service providers in the limited circumstances described in the statute and in certain of the various cases construing it. In the often cited case of Zeran v. America Online, Inc., 129 F. 3d 327 (4th cir, 1997), cert. den. 524 U.S. 937 (1998) --- a case relied upon by the Watson defendants as support for their State Court Motion to Dismiss (Exhibit "C" hereto) --- the Fourth Circuit stated (129 F. 3d at 330):

> "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service. Specifically, § 230

precludes courts from entertaining claims that would place a computer service provider in a publisher's role..." (underscoring supplied).

In Zeran, the Fourth Circuit affirmed the United States District Court's holding in Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va, 1997). The District Court discussed federal preemption considerations at length in the context of 47 U.S.C. § 230. In distinguishing 47 U.S.C. § 230 from ERISA, and in otherwise addressing preemption, the District Court stated (958 F. Supp. 1130 --- 1132):

"The Supreme Court has observed that "preemption fundamentally is a question of congressional intent." *English v. General Elec. Co.*, L.Ed.2d 65 (1990) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct 1145, 1150, 99 L.Ed2d 316 (1988)). Congress' intent to preempt a particular field can be expressed or implied. Express preemption occurs where Congress 'defines explicitly the extent to which its enactments preempt state law', *English,* 496 U.S. at 78, 110 S.Ct.at 2275, whereas intent to preempt is implied where a scheme of federal regulation is so

pervasive that it leaves no room within which a state may act. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (194710; *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1412 (4th Cir. 1994).

"The focus of the inquiry for express preemption is the statutory language. A familiar example of statutory language reflecting Congress' preemption intention can be found in § 514(a) of the Employee Retirement Income Secuity Act ("ERISA"), which provides, in relevant part, that provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. 29 U.S.C. § 1144(a). The ERISA statute further directs that 'State law' superseded by ERISA pursuant to § 514(a) includes 'all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.' 29 U.S.C. § 1144(c)(1). And finally, the ERISA statute explicitly exempts certain state laws from preemption, including state laws regulating insurance, banking,

or securities, and state criminal laws. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896-97, 77 L.Ed.2d 490 (1983) (citing 29 U.S.C. § 1144(b)). Thus, ERISA explicitly defines the extent to which Congress intended federal preemption of state law.

"The CDA, in sharp contrast to ERISA and other similar provisions, contains no explicit expression of congressional intent with respect to the scope of preemption. Section 230 of the CDA section addresses the provision's effect on state law, providing that:

> 'Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.' 47 U.S.C. § 230(d)(3). "This provision does not reflect congressional intent to preempt state law remedies for defamatory material on an interactive computer service. To the contrary, § 230(d)(3) reflects Congress' clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA.'

"This conclusion is supported by the second prong of the intentional preemption inquiry, namely the search for implied preemption. Congressional intent to occupy a field exclusively, and thereby preempt state law, can be implied where Congress has regulated 'so pervasively in the field as not to leave any room within which a state may act.' *Feikema,* 16 F.3d at 1412. In other words, where the dominance of federal intervention in a field is such that any state law addressing the field would duplicate or be in direct conflict with federal law, Congress is held to have intended to preempt the field. As a threshold matter, it is worth noting that where, as here, Congress has clearly expressed an intent not to preempt the field, the Congressional intent inquiry should ordinarily end. In other words, implied preemption through pervasive occupation of a field is merely a means of determining congressional intent with respect to pre-emption, an exercise unnecessary where, as here, that intent is otherwise clearly expressed. But, nonetheless, that exercise points to the same result.

> "The purposes and objectives of the CDA support the conclusion that Congress did not intend to occupy the field of liability for providers of online interactive computer services to the exclusion of state law. Section 230's language and legislative history reflect that Congress' purpose in enacting that section was not to preclude any state regulation of the Internet, but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content. This purpose belies any congressional intent to bring about, through the CDA, exclusive federal regulation of the Internet. Accordingly, the CDA reflects no congressional intent express or implied, to preempt all state law causes of action concerning interactive computer services."
>
> (underscoring supplied)

In Zeran, the District Court went on to examine theories of direct conflict preemption and concluded that the CDA does not preempt all state law causes of action, but only those where a state law cause of action directly conflicts with both the express language and purpose of the CDA. [See 958 F.Supp at 1135.]. The essence of the Hammitts' response to the Watson

defendant's Motion to Dismiss in state court (and apparently, the essence of Judge Matthews' denial of their Motion) is that the Hammitts' claims, as set forth in their Complaint, are not covered by and, therefore, cannot conflict with the CDA (47 U.S.C. § 230).

Taking the analysis one step further, even if there was a direct conflict between the Hammitts' claims and the CDA (which there is not), the ERISA cases make it clear that more is required to invoke federal question jurisdiction on removal.

In Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542 (1987), the Supreme Court addressed the issue head-on. The Court's reasoning and holding (481 U.S. at 63-67) is particularly applicable here. After reviewing the legislative history and the applicable provisions of ERISA, the Court found that in ERISA's § 502(a) Congress had "clearly manifested" an intent to make causes of action within the scope of § 502(a)'s enforcement provisions removable to federal court. The Court described ERISA as having "unique pre-emptive force". The Court noted also that "[f]ederal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense it does not appear on the face of a well-

pleaded complaint and, therefore, does not authorize removal. "(481 U.S. at 63). Justice Brennan, joined by Justice Marshall wrote, in concurrence (481 U.S. at 67-8):

"While I join the Court's opinion, I note that our decision should not be interpreted as adopting a broad rule that *any* defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* mainifested an intent to make causes of action... *removable to federal court.*" *Ibid.* (emphasis added). In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court."

The point here is that the clearly manifested congressional intent found in the "unique pre-emptive force" of ERISA is nowhere to be found in the CDA (47 U.S.C. § 230). The District Court in Zeran made that abundantly clear and, when you employ Justice Frankfurter's famous three-fold imperative ("read the statute, read the statute, read the statute")

there is no such intent anywhere in 47 U.S.C. § 230. See, also, Kemp v. IBM Corp 109 F. 3d 708 (11th Cir., 1997). Moreover, the Hammitts seeks no relief under 47 U.S.C. § 230; their complaint is in tort for libel under state law. See Kemp, supra and Engelhardt v. Paul Revere Life Ins. Co., 139 F. 3d 1346 (11th Cir., 1998).

The Hammits' Motion to Remand this case should be granted because this case is not now and never has been removable.

(3) **The Hammits' Motion to Remand Should be Granted Because the Watson Defendants Have Blatantly Failed to Comply With the Time Requirement For Removal Under 28 U.S.C. . § 1446(b)**

Notwithstanding all of the above, the Hammitts' Motion to Remand should be granted because the Watson defendants, having asserted affirmative defenses based on 47 U.S.C. § 230 at the time they filed their responsive pleadings (January 29, 2008 and February 4, 2008), could have had no more than thirty (30) days from those dates (i.e., until and including

February 28, 2008 and March 5, 2008) to attempt removal.[3] They did nothing. Instead, over 240 days after their responsive pleadings and 57 days after their own Motion to Dismiss they now seek to remove by telling this Court they could not have ascertained their alleged bases for removal until the Hammitts' September 5, 2008 response to their Motion. While the Hammitts have clearly shown that no bases for removal have ever existed, the Watson defendants, in a desperate attempt to escape state court, have blatantly and intentionally misrepresented the factual posture of this case to this Court. The fact is that the Watson defendants' "Notice of Application for Removal to Federal Court..." is way outside the time requirement of 28 U.S.C. § 1446(b) and, as such, the Hammitts' Motion to Remand should be granted.

(III) CONCLUSION

The Watson defendants' attempt to escape from state court to federal court, apparently with the hope that this court will not force them to face the consequences of their libelous, reprehensible conduct. Their "Notice of

[3] Pursuant to 28 U.S.C. § 1446(b), any attempt at removal should have been made even earlier (i.e., with 30 days after service of the summons and complaint).

Application for Removal to Federal Court…" is a sham, and is supported neither by applicable statutory law nor applicable case law. Moreover, the Watson defendants have misrepresented the factual posture of the case in an effort to come within the 30 day requirement of 28 U.S.C. § 1446(b). Their removal attempt is as defective as it is untimely. For all of the reasons set forth hereinabove, the Hammitts respectfully move the Court to remand this case to the Superior Court of Chattooga County, Georgia.

Respectfully submitted,

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By: ______________________

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ED HAMMITT and BRENDA HAMMIT,))) **Plaintiffs,**)) **vs.**)) **KEN BUSBIN, TERESA WATSON**) **and ROMENEWSBYWATSON. COM, INC.**) **Defendants.**)	**CIVIL ACTION FILE NO. 4:08-CV-162-HLM**

CERTIFICATE OF SERVICE

This is to certify this day that I am counsel for the Plaintiffs in the above-captioned matter and that I have this day served the above and foregoing **MOTION TO REMAND AND SUPPORTING MEMORANDUM** by mailing a copy thereof to the attorney of record for the defendants in a properly addressed envelope with sufficient affixed thereon as follows:

L. Vincent Anderson
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This 27 day of October, 2008

COOK & CONNELLY

By:

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