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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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

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

Plaintiffs,

v.

MEMORANDUM IN SUPPORT  
OF WYBS'S MOTION TO DISMISS  
FIRST AMENDED COMPLAINT

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

Defendants.

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**I. INTRODUCTION**

Plaintiffs Keith Goodridge Construction and Keith Goodridge seek to hold defendant WYBS, Inc., dba MerchantCircle ("MerchantCircle"), an Internet service provider, liable for an anonymous comment that MerchantCircle did not create or encourage but did promptly remove upon plaintiffs' request. In response to MerchantCircle's motion to dismiss

plaintiffs' original complaint, this court offered plaintiffs the opportunity to replead facts that demonstrate MerchantCircle was a "publisher" of the defamatory content. They have failed to do so. Thus, MerchantCircle's motion to dismiss plaintiffs' first amended complaint should be granted.

## II. FACTUAL BACKGROUND

MerchantCircle hosts an online network of local business owners, combining social networking features with a customizable Web listing that allows local merchants to attract new customers at [www.merchantcircle.com](http://www.merchantcircle.com). The Web site allows business owners to upload pictures, blog, create coupons and newsletters, and to connect with other merchants, and allows third parties to freely comment on their experience with various businesses. Only the legal proprietor of a business can claim the listing for that business and manage the listing content. However, much like eBay, CitySearch, Angie's list, and other Internet sites, neither the business nor MerchantCircle can manage the third party comments and reviews regarding the business and its transactions.

Plaintiffs' allegations regarding defamation are based on a comment posted on MerchantCircle's Web site by "Attorney" who plaintiffs initially named as defendant John Doe 1. First Amended Complaint ("Am. Compl."), ¶¶ 5, 8, 24, 29-34, 42-44, 54-57. Although MerchantCircle promptly removed the posting, plaintiffs allege that a MerchantCircle "directory" references the posting. *See* Am. Comp., ¶ 10, Ex. C. However, the "directory" attached as Exhibit C to the Amended Complaint is, in fact, an Internet search via [www.google.com](http://www.google.com)—a Web site completely unrelated to MerchantCircle. *Id.*

On October 16, 2008, MerchantCircle moved to dismiss plaintiffs' initial action under Fed R Civ P 12(b)(6), based on the provisions of the Communications Decency Act

("CDA"), 47 USC § 230, which provides Web sites acting as passive conduits, like MerchantCircle, with complete immunity from publisher liability.

On December 12, 2008, plaintiffs notified MerchantCircle of a second offensive posting under the Total Pest Control business listing. MerchantCircle removed the posting within an hour of plaintiffs' notification. A copy of MerchantCircle's notification is attached as Exhibit 1. Am. Compl., ¶ 12-15.

Plaintiffs again refer to a MerchantCircle "directory" that referenced the second posting, and yet again, the referenced Exhibit H is another Google search page. Even more confusing, the Google search references a Craig's List posting, attached as Exhibit 2, with wholly unique content than has ever appeared on MerchantCircle's Web site. MerchantCircle is not and has never been associated with Craig's List, it does not contribute material to Craig's List, and plaintiffs do not allege such in their amended complaint.

The court heard oral argument on January 14, 2009. Plaintiffs' main arguments were that MerchantCircle "republished" and "developed" or "encouraged" the defamatory content, and that because the content provider was unknown, anyone, including MerchantCircle, could have provided the content. As detailed below, both arguments are contrary to 47 USC § 230 and the case law thereunder. Further, plaintiffs have failed to plead any additional facts demonstrating that MerchantCircle was a "publisher" or otherwise played a role in development of the allegedly defamatory content.

### **III. STANDARD OF REVIEW**

Dismissal for failure to state a claim under Fed R Civ P 12(b)(6) is appropriate when it appears beyond doubt that the plaintiffs can prove no set of facts to support the claim

that would entitle them to relief. *Keniston v. Roberts*, 717 F2d 1295, 1300 (9th Cir 1983) (citing *Conley v. Gibson*, 355 US 41, 45-46, 78 S Ct 99, 2 L Ed 2d 80 (1957)). Moreover, "material allegations in a complaint must be taken as true and viewed in the light most favorable to the plaintiff." *Geraci v. Homestreet Bank*, 347 F3d 749, 751 (9th Cir 2003) (citing *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F3d 1131, 1133 n.1 (9th Cir 2001)).

The question of immunity under the CDA is appropriately addressed in a motion to dismiss. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 564 F Supp 2d 544, 550 (ED Va 2008) (evaluation of defendant's immunity defense in the context of a Fed R Civ P 12(b)(6) motion is proper when the necessary facts are apparent on the face of the complaint); *MCW, Inc. v. Badbusinessbureau.com*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*7 (ND Tex Apr. 19, 2004).

#### IV. ARGUMENT

##### A. **The Communications Decency Act immunizes a Web site against liability for content created by third parties.**

Under 47 USC § 230(c)(1), an "interactive computer service" cannot be treated as the publisher or speaker of information provided by another information content provider. An "interactive computer service" encompasses any information service or system, so long as the service allows multiple users to access a computer server, which includes Web sites. *See Batzel v. Smith*, 333 F3d 1018, 1030 (9th Cir 2003) (citing 47 USC § 230(f)(2)).

An "information content provider" is defined as someone "who is responsible, in whole or in part, for the creation or development of the offending content." 47 USC § 230(f)(3). A Web site helps to develop unlawful content, not merely by displaying or augmenting content

generally, but by "contribut[ing] materially to the alleged illegality of the conduct." *Fair Housing v. Roommates.com, LLC*, 521 F3d 1157, 1167-68 (9th Cir 2008).

The Ninth Circuit has repeatedly concluded that Section 230(c) was enacted to immunize interactive computer services from liability for the speech of third parties and to prevent lawsuits from shutting down Web sites and other services on the Internet. *See Batzel*, 333 F3d at 1028; *Carafano v. Metrosplash.com, Inc.*, 339 F3d 1119, 1123-24 (9th Cir 2003); *Roommates.com*, 521 F3d at 1163. So long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process. *Carafano*, 339 F3d at 1124.

The Ninth Circuit has therefore held that even close cases "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." *Roommates.com*, 521 F3d at 1174.

Thus, MerchantCircle cannot be held liable if it is an interactive computer service and a third party provided the content, unless MerchantCircle materially contributed to the alleged illegality of the conduct.

**1. Plaintiffs clearly allege a third party—and not MerchantCircle—provided the allegedly defamatory content.**

MerchantCircle is without question an interactive computer service. Even in their amended complaint, plaintiffs make no suggestion that MerchantCircle was the "content provider" of the allegedly defamatory posting on its Web site. In fact, plaintiffs specifically

allege that an unknown person using the alias "Attorney" authored the posting. Am. Compl., ¶¶ 5, 8, 24, 29-34, 42-44, 54-57.<sup>1</sup>

In *Batzel*, the editor of an e-mail newsletter published a tip submitted for publication that falsely alleged that some artwork had been stolen. The Ninth Circuit held that the editor's minor changes to spelling, grammar, and length of third-party content did not strip him of Section 230 immunity because the actions did not add to the libelousness of the material. *Batzel*, 333 F3d at 1031. "The 'development of information,'" the court said, "means something more substantial than merely editing portions of an e-mail and selecting material for publication." *Id.*

In *Carafano*, an unknown person posted a false profile of actress Christianne Carafano on Matchmaker.com. Although some of the content was formulated in response to Matchmaker.com's questionnaire, the Ninth Circuit held that the Web site was not an "information content provider" because the profile had no content until a user actively created it. *Carafano*, 339 F3d at 1124.<sup>2</sup>

In *Roommates.com*, the Ninth Circuit remanded a district court's dismissal based on 47 USC § 230 in order to determine whether the Web site's questionnaire contributed to

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<sup>1</sup> Although not germane to this motion to dismiss, plaintiffs' allegation that MerchantCircle has sought to protect the identity of the authors of the two offensive postings has no basis in fact. Am. Compl., ¶ 16(5). First, reviewers need not leave name, zip code, and e-mail address. *See* Am. Compl., Ex. K (no asterisk next to those fields indicating required information.) Second, MerchantCircle provided plaintiffs with the IP addresses of both posting parties. *See* Exhibits 1 and 2. Further, plaintiffs have subpoenaed the identity of the owners of the ISP address without objection from MerchantCircle.

<sup>2</sup> In *Roommates.com*, the Ninth Circuit clarified that if a Web site operator contributed to the content's illegality, it could be held liable as a developer, but a Web site providing neutral tools and acting as a passive conduit could not. *Roommates.com*, 521 F3d at 1172.

illegal content, making it a "content developer." But in so doing, it held that the mere fact that an interactive computer service classifies user characteristics does not transform it into a developer of the underlying misinformation. *Roommates.com*, 521 F3d at 1172.

In this case, plaintiffs have clearly alleged that an unknown defendant "Attorney" is responsible for providing the content. Am. Compl., ¶¶ 5, 8, 24, 29-34, 42-44, 54-57. Plaintiffs also allege that MerchantCircle owns and operates the Web site [www.merchantcircle.com](http://www.merchantcircle.com), which is an Internet Web site that is not password-protected and is open to the public. Am. Compl., ¶ 23. Thus, taking the allegations of plaintiffs' complaint as true, they have alleged that: (1) MerchantCircle is an interactive computer service; and (2) a third party was responsible for providing the content posted on MerchantCircle's Web site. Under 47 USC § 230, MerchantCircle is therefore immune, unless plaintiffs can show that MerchantCircle was a developer of the underlying misinformation.

**2. Plaintiffs have not alleged that MerchantCircle materially contributed to the defamatory content.**

Plaintiffs have not alleged—and cannot in good faith allege—that MerchantCircle developed the allegedly defamatory content. Consequently, they have failed to state a claim for relief.

In *Roommates.com*, the Ninth Circuit addressed whether the Web site Roomates.com ("Roommate") could be held liable for discriminatory statements displayed in an "Additional Comments" section of profile pages. *Roommates.com*, 521 F3d at 1173. The Web site encouraged subscribers to describe what they were looking for in a roommate and, sometimes, the content included criteria that was illegal under the Fair Housing Act, e.g. race, religion, or gender. *Id.* Roommate published the comments as written, without any guidance as

to what the statement should contain, nor did it encourage the inclusion of discriminatory preferences. The Ninth Circuit described Roommate as being "not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate." It further went on to say:

"Without reviewing every essay, Roommate would have no way to distinguish unlawful discriminatory preferences from perfectly legitimate statements. Nor can there be any doubt that this information was tendered to Roommate for publication online. This is precisely the kind of situation for which section 230 was designed to provide immunity.

"The fact that Roommate encourages subscribers to provide *something* in response to the prompt is not enough to make it a 'develop[er]' of the information under the commonsense interpretation of the term we adopt today. It is entirely consistent with Roommate's business model to have subscribers disclose as much about themselves and their preferences as they are willing to provide. But Roommate does not tell subscribers what kind of information they should or must include as 'Additional Comments,' and certainly does not encourage or enhance any discriminatory content created by users. Its simple, generic prompt does not make it a developer of the information posted." 521 F3d at 1174 (internal citations omitted, emphasis in original).

Plaintiffs previously argued that MerchantCircle "encouraged" or "developed"<sup>3</sup> the defamatory posting by "posting of the comment on a separate portion of their website." Plaintiffs' Memorandum of Law in Opposition to Defendant WYBS's Motion to Dismiss at 2. In their amended complaint, plaintiffs again make amorphous allegations that MerchantCircle has "published" the posting in multiple "directories," some of which are apparently the result of searches plaintiffs performed on Google. Am. Compl., ¶¶ 14-16. Plaintiffs' allegations regarding "directories" are still murky. Even assuming that the comments by "Attorney" automatically appeared in more than one place on MerchantCircle's Web site (e.g. the main

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<sup>3</sup> Plaintiffs' only allegation that Merchant Circle has provided any original content points to a Web page that purports to be a blog for "Goodridge Keith Construction"; such blogs, as stated above, are pre-programmed tools to enable businesses to participate.



business listing and a more specific customer review page), their claim still fails unless MerchantCircle is alleged to have materially contributed to the unlawfulness of the content.

Plaintiffs' only allegations that MerchantCircle "encouraged" the defamatory content points to Exhibit D, which appears to be the same posting made by "Attorney" in Exhibit A, but from a day prior. Plaintiffs seem to suggest that MerchantCircle somehow encouraged the defamatory posting because it encourages business reviews. Am. Compl., ¶ 16. While plaintiffs correctly state that MerchantCircle encourages posting of reviews, they do not allege MerchantCircle encourages, much less materially contributes to any illegal content. Am. Compl., ¶ 26. *Cf. Roommates.com*, 521 F3d at 1174 (generic prompt for information is consistent with business model, and does not make Web site a developer of information).

Whether MerchantCircle profits from postings as alleged in ¶ 26 (which it does not) is not a factor under the CDA or Ninth Circuit law. Rather, like Roommate, MerchantCircle is passively displaying comments posted by individuals regarding their interaction with a company. As such, MerchantCircle cannot be held to be an information content developer, and remains immune under the CDA.

**3. Plaintiffs have no objectively reasonable basis for allegations that MerchantCircle is responsible for material appearing on Google or Craig's List.**

Plaintiffs further have not alleged any objectively reasonable basis for their allegations attempting to hold MerchantCircle liable for what appears on completely unrelated Web sites.

Plaintiffs make the baseless allegation that MerchantCircle "republished" the statement because a search via Google—an interactive service provider completely unrelated to

MerchantCircle—turns up remnants of the statement. Am. Compl., ¶¶ 14-16. Plaintiffs' reasoning for seeking to hold MerchantCircle liable for material published on Google is at best unclear.

Even more confusing is plaintiffs' claim that MerchantCircle "republished" the November 21, 2008, statement in Exhibit H. Am. Compl., ¶¶ 14-15. Exhibit H, another Google search result page, refers to a Craig's List page, which contains content that never appeared on MerchantCircle's Web site.

MerchantCircle is not and has never been associated with Craig's List, it does not contribute material to Craig's List, and plaintiffs do not allege any such relationship in their amended complaint. Again, plaintiffs fail to put forth any argument that MerchantCircle materially contributed to any content on Google's or Craig's Lists' Web sites.

The bottom line of Section 230 is this: if the interactive computer service is not the content provider, it cannot be held liable as the publisher. Because an interactive computer service cannot be liable for classifying information or "additional comments," as the Ninth Circuit held in *Roommates.com*, or for editing portions of an e-mail as in *Batzel*, certainly it cannot be liable for the effect of a mechanical code, resulting in the automatic appearance of a third party's original content on another company's search engine, or for soliciting objective reviews.

Plaintiffs' complaint should therefore be dismissed.

**B. Oregon defamation statutes do not apply.**

Plaintiffs cite ORS 31.215 as the basis for their defamation claim and demand for a retraction. Am. Compl, ¶¶ 13-14, 20-28. However, Oregon's defamation statutes by their terms do not apply to Web sites.

ORS 31.205 provides:

**"Damages recoverable for defamation by radio, television, motion pictures, newspaper or printed periodical.** Except as provided in ORS 31.210, in an action for damages on account of a defamatory statement published or broadcast in a newspaper, magazine, other printed periodical, or by radio, television or motion pictures, the plaintiff may recover any general and special damages which, by competent evidence, the plaintiff can prove to have suffered as a direct and proximate result of the publication of the defamatory statement." ORS 31.205 (emphasis added).

ORS 31.215 provides:

"(2) The publisher of the defamatory statement shall have not more than two weeks after receipt of the demand for correction or retraction in which to investigate the demand; and, after making such investigation, the publisher shall publish the correction or retraction in:

"(a) The first issue thereafter published, in the case of newspapers, magazines or other printed periodicals.

"(b) The first broadcast or telecast thereafter made, in the case of radio or television stations.

"(c) The first public exhibition thereafter made, in the case of motion picture theaters." ORS 31.215(2) (emphasis added).

Neither statute provides a remedy for publication on a Web site. Thus, under Oregon's defamation statutes, plaintiffs have failed to state a claim upon which relief can be granted.

**V. CONCLUSION**

In sum, not only do the defamation statutes cited by plaintiffs fail to provide a remedy against a Web site, but plaintiffs' allegations, taken as true, demonstrate that

MerchantCircle is entitled to immunity under 47 USC § 230. Plaintiffs have alleged that MerchantCircle is an interactive computer service, and that a third party provided the defamatory content. Further, they have failed to provide any basis for alleging that MerchantCircle "developed" the allegedly defamatory content by materially contributing to the unlawfulness of the material, which would take MerchantCircle out of Section 230 immunity. In view of the court's warning that plaintiffs should not replead without a good faith basis to allege MerchantCircle played a role in developing the defamatory content, plaintiffs' claims against MerchantCircle should be dismissed with prejudice.

DATED this 17th day of February, 2009.

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I hereby certify that I served the foregoing Memorandum in Support of WYBS's

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

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

DATED this 17th day of February, 2009.

s/ Bruce Campbell  
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*Of Attorneys for Defendant WYBS, Inc.,  
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