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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SCOTT P.,

Plaintiff,

v.

CRAIGSLIST, INC., FOSTER DAIRY FARMS, FOSTER POULTRY FARMS, MICHAEL O. SIMPSON, ALBERT CARRENO, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CGC-10-496687

REPLY IN SUPPORT OF DEFENDANT CRAIGSLIST, INC.'S DEMURRER

Department 301
Judge: Hon. Peter Busch
Date: June 2, 2010
Time: 9:30 a.m.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiff's opposition to craigslist's Demurrer has no surprises and adds nothing new. His claims against craigslist still fail as a matter of law.

As expected, Plaintiff argues that *Barnes* opened the door wide for claims of promissory estoppel to circumvent the broad immunity under § 230(c)(1). But Plaintiff ignores the careful criteria the *Barnes* court considered and applied to make its decision in that case, and he ignores the fact that application of those same criteria here leads to the inevitable conclusion that § 230(c)(1) bars his claims. He also argues that § 230(c)(2) could only apply if craigslist had independently identified and removed objectionable posts about Plaintiff on its own initiative rather than in response to Plaintiff's requests. But this would impose an obligation on interactive computer service providers (hereinafter "online service providers") to police all content on their services, which § 230 was designed to prevent. As to his § 17200 claim, Plaintiff argues that § 230(c)(1) cannot apply because his claim is based on craigslist's status as a corporation and because the claim does not address "content-based" publisher functions. However the question is not craigslist's status but whether the claim treats craigslist as a publisher, and Plaintiff's attack on craigslist's policies and procedures for publication of third-party content plainly does treat craigslist as a publisher. Furthermore, § 230(c)(1) is not restricted to "content-based" publisher duties or activities. With respect to Plaintiff's failure to meet requisite elements of his promissory estoppel claim or to establish standing for his § 17200 claim, Plaintiff offers self-serving conclusions, but the allegations of the Amended Complaint and its Exhibits speak for themselves.

II. RELEVANT FACTS

As the Court well knows, the relevant facts for purposes of this Demurer are those set forth in the Amended Complaint and its Exhibits. They are not Plaintiff's interpretation of, deductions from or conclusions based on those alleged or evident facts, as recited in the "Statement of Relevant Facts" in Plaintiff's opposition brief. craigslist rests its Demurrer on the factual allegations of the Amended Complaint and the Exhibits attached by Plaintiff, and

reiterates that the inconsistencies between the allegations of the Amended Complaint and its Exhibits (provided by Plaintiff) must be resolved in favor of the Exhibits.

III. LEGAL ARGUMENT

As Plaintiff explains, a demurrer must be decided based on the alleged material facts of a complaint and not on contentions, deductions or conclusions of fact or law. (Plaintiff's Opposition to Defendant craigslist's Demurrer ("Opposition") at 5). As noted in craigslist's Demurrer, the United States Supreme Court agrees. (Demurrer at 6 (citing *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007) ("more than labels and conclusions" are required)). Moreover, "[w]here the complaint's allegations or judicially noticeable facts reveal the existence of an affirmative defense, the 'plaintiff must plead around the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action.'" *Doe II v. MySpace, Inc.*, 175 Cal.App.4th 561, 566 (2d Dist. 2009) (quoting *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 824 (4th Dist. 2002)).

A. PLAINTIFF'S PURPORTED "PROMISSORY ESTOPPEL" CLAIM TREATS CRAIGSLIST AS A "PUBLISHER" AND IS BARRED BY § 230(C)(1)

The parties agree that what matters in assessing the application of § 230(c)(1) is not the name of the alleged claims; rather, what matters is whether the claims treat craigslist as a publisher. (Opposition at 7; Demurrer at 8). Plaintiff argues that each telephone call he placed to craigslist's customer service – in which he described the objectionable posts, explained the impact on him and his family, asked for removal of the posts, asked for information about the identity of the poster and asked craigslist to prevent all future possible posts related to Plaintiff, and the unvarying responses of the assorted unidentified customer service representatives that they would "take care of it" – created a binding contract and therefore his promissory estoppel claim treats craigslist as a contractor or promisor, not a publisher. The practical effect of Plaintiff's proposed liability model confirms why and how it fails to circumvent § 230(c)(1).

Under Plaintiff's model, each time craigslist customer service responds to a telephone call or email from the public expressing concern about content on its service and craigslist tries to address the concern rather than rebuff the request, craigslist is not acting as a publisher but is

entering into a binding contract and should be liable for breach of that purported contract if its efforts to help are thwarted, ineffectual or otherwise imperfect. This result would rip the heart out of § 230(c)(1) and its goal to encourage good Samaritanism and self-regulation.

Specifically, if a response to a request for assistance in customer service calls was all it took to circumvent § 230 (c)(1), online service providers would be best off returning to the scenario that § 230 was intended to remedy – where online service providers risked liability if they took measures to prohibit and prevent objectionable content on their services but were not exposed to liability if they did nothing. H. R. Conf. Rep. No. 458, 104th Cong., 2d Sess. *194 (1996) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy*[1] and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); *see also* 141 Cong. Rec. H8469-70 (Aug. 4, 1995) (statement of Rep. Cox) (footnote added) (explaining that § 230 "will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers."); 141 Cong. Rec. H8470 (Aug. 4, 1995) (statement of Rep. Barton) (also explaining that § 230 was intended to provide online services "a reasonable way to . . . help them self regulate themselves without penalty of law").

It would also contradict long-standing precedent allowing online service providers to respond cooperatively to notices of allegedly objectionable content and provide assistance without heightened risk of liability if they prove unsuccessful. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330-33 (4th Cir. 1997) (holding that § 230 barred claims that, on notice from the plaintiff, the online service provider (AOL) was required to remove the offensive posting promptly and effectively screen out future offensive material regarding the plaintiff); *Schneider v.*

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[1] This reference is to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 805178, Case No. 31063/94 (N.Y. Sup. Dec. 11, 1995); 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995), which held that an interactive computer service provider was a "publisher" of third-party content posted on its electronic bulletin board because the service provider advertised its practice of controlling content and screened and edited messages posted on its bulletin boards. The decision created a disincentive to self-regulation by online service providers because, following *Stratton*, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability to a greater degree than computer service providers who did not.

Amazon.com, Inc., 108 Wash.App. 454, 459-67, 31 P.3d 37, 39-43 (Wash. App. Div. 1 2001) (same barring breach of contract claim). *See also Barrett v. Rosenthal*, 40 Cal.4th 33, 45-46, 53 (2006) (rejecting a liability that "would defeat 'the dual purposes' of section 230, by encouraging providers to restrict speech and abstain from self-regulation" and stating "the immunity conferred by section 230 applies even when self-regulation is unsuccessful, or completely unattempted.").

Indeed, under Plaintiff's theory, if craigslist's customer service representatives had refused to remove the posts Plaintiff complained about or prevent future posts, Plaintiff would have no claim – these would be acts as a publisher and § 230(c)(1) would bar liability. If this is the law, craigslist is best advised to eliminate its customer service entirely because any response to a call about content on its service could create liability where none would otherwise exist.

But this is not the law. As the Ninth Circuit's careful statement that a mere "attempt to help particular person, on the part of an interactive computer service . . . does not suffice for contract liability," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1108 (9th Cir. 2009) demonstrates, *Barnes* did not sweep away § 230(c)(1)'s history or force. In contrast to Plaintiff's allegations, *Barnes* did not involve communications initiated by the plaintiff to an online service provider's anonymous customer service representatives – service functions that are the regular operations of an online service provider hosting third-party content and that courts have consistently held are traditional publisher functions. *See id.* at 1098-99; *see, e.g., Zeran*, 129 F.3d 330-31. The communication in *Barnes* that supported a duty beyond that of a publisher was a telephone call (1) *initiated by the online service provider* to the plaintiff, not by the plaintiff to the online service provider; (2) by the online service provider's executive Director of Communications, *i.e.*, a *member of the online service provider's management*, not an unspecified, unidentified customer service representative; and (3) in which the Director of Communications *affirmatively stated* a *specific commitment* to take a *specific measure* (remove the offensive profiles of plaintiff) rather than respond generally to a litany of grievances and demands by a unknown caller. *Compare Barnes*, 570 F.3d at 1098-99, *with* Am. Cmplt. ¶¶ 56, 57, 62, 63.

These distinctions mark the line between a binding promise[2] and a publishers' general duties. The *Barnes* opinion was tailored to the specific facts alleged in that case. If § 230(c)(1) is going to be constricted so that online service providers *are* potentially liable for responding cooperatively to customer service complaints, this change in the federal statutory "Protection for 'good Samaritan' blocking and screening of offensive material," 47 U.S.C. § 230 (c), must come from Congress, not the courts. *See Barrett*, 40 Cal.4th at 63 (observing that plaintiffs are free to pursue the originator of an objectionable online post, but "[a]ny further expansion of liability must await congressional action"). To date, however, Congress has approved of the application of § 230. H.R. Rep No. 107-449, at 13 (2002). Plaintiff's effort to reshape the landscape of online service providers' responsibilities, liabilities and conduct must therefore be rejected.

B. CRAIGSLIST ACTED VOLUNTARILY AND IN GOOD FAITH TO ASSIST PLAINTIFF AND PLAINTIFF'S PURPORTED "PROMISSORY ESTOPPEL" CLAIM IS BARRED BY § 230 (C)(2)

Plaintiff contests craigslist's protection from liability under § 230(c)(2) because craigslist did not, on its own, identify, remove and prevent fraudulent posts elating to Plaintiff; rather, craigslist acted only on notice from Plaintiff. (Opposition at 10 ("CRAIGSLIST never removed and prevented offensive posting targeting SCOTT P. on its own initiative.")). However, § 230 was specifically enacted, among other things, to relieve online service providers from any obligation to screen or police their services because the volume of content is simply too enormous.[3] The concern, acknowledged by Congress, was that it would be impossible for service providers to systematically review and edit all third-party content, and, faced with potential liability for each message posted on their services, online service providers might choose instead to severely restrict the number and type of messages posted. *See* 141 Cong. Rec. H8471 (Aug. 4, 1995) (statement of Rep. Goodlatte) ("There is no way that any of those [online service providers] can take the responsibility to edit out all information that is going to be coming in to them from all manner of sources onto their bulletin board. . . . [T]o have that imposition imposed

[2] The claim in *Barnes* "rested on a promise that scarcely could have been clearer or more direct." *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193, 1201 (N.D. Cal. 2009).

[3] This consideration plainly applies to craigslist. According to the Amended Complaint, craigslist has over 50 million new classified posts per month and is used by more than 50 million people in the United States alone. (Am. Cmplt. ¶ 37).

on them is wrong. [§ 230] will cure that problem . . . ."). An affirmative duty to screen and censor potentially objectionable content would or could result in a restriction of free speech on the Internet by online service providers to the lowest common denominator, *i.e.*, the most restrictive speech demands. *See Barrett,* 40 Cal.4th at 57 (rejecting liability theory that "would allow complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting" because "[t]he volume and range of Internet communications make the 'heckler's veto' a real threat" and "[t]he United States Supreme Court has cautioned against reading the CDA to confer such a broad power of censorship on those offended by Internet speech" (citations omitted)). Such an obligation to "police" content has therefore been rejected. *See Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637 at * 3 (Cal. Super. Nov. 1, 2000) (rejecting claims that "would require precisely the monitoring of third party content that Congress determined should not be mandated").

C. PLAINTIFF DOES NOT AND CANNOT ALLEGE A PLAUSIBLE "PROMISSORY ESTOPPEL" CLAIM

Again, the parties agree on the elements necessary to state a claim for promissory estoppel. (Opposition at 11; Demurrer at 13). And ultimately the Amended Complaint and Plaintiff's Exhibits speak for themselves on this issue.

Nonetheless, Plaintiff's opposition argues that, among the many items of conversation between Plaintiff and varying craigslist customer service representatives in Plaintiff's assorted calls to craigslist's customer service (*see* Am. Cmplt. ¶¶ 56, 57, 62, 63, 77), there were clear, unambiguous promises and meetings of the minds on a particular course of action. But these allegations, even taken as true, are vague and non-specific as to the terms of the promises or meetings of the minds. Indeed, neither the Amended Complaint nor the opposition establishes the requisite "legally significant event" or a "meeting of the minds" on any specific commitment.

Plaintiff's opposition claims that there was a meeting of the minds on a commitment to prevent all future posts related to Plaintiff.[4] (Opposition at 3-4, 11-12). However, the evidence

[4] Plaintiff's Amended Complaint and briefs continuously refer to purported promises by craigslist to "*remove* and prevent" objectionable posts as the basis for his alleged promissory estoppel claim. (*See* Am. Cmplt. ¶¶ 56, 61, 63, 67, 70, 71, 77, 78, 79, 82; Opposition at 1, 8, 10;

Plaintiff relies upon definitively negates this claim. Plaintiff's opposition argues that craigslist's April 18, 2009, email stating that "'additional steps have been taken" to stop the harassing posts (Am. Cmplt. Ex. 23), proves that his various telephone calls with various complaints to various craigslist customer service representatives, all of whom allegedly uniformly responded that they would "take care of it," were an "express admission" of craigslist's "earlier enforceable promises to the Plaintiff to prevent the harassing internet posts." (Opposition at 12). However, read in full, this portion of craigslist's email states: "Those posts have been removed from the listings, additional steps have been taken that *may help* prevent this issue from happening again." (Am. Cmplt. Ex. 23 (emphasis added)). Setting aside whether craigslist could even comply with Plaintiff's broad demand for prevention of any future posts related to him by name, address, telephone numbers and email, as a pragmatic matter, there is no way the phrase can be deemed to confirm a legally binding commitment to prevent any and all future objectionable posts regarding Plaintiff. "May help" simply does not mean "will absolutely and for all time and under all circumstances" prevent future objectionable posts. Plaintiff called craigslist's customer service about the purportedly fraudulent posts, and unknown craigslist customer service representatives tried to help him. This is not an actionable promise.

D. PLAINTIFF'S PURPORTED § 17200 CLAIM TREATS CRAIGSLIST AS A "PUBLISHER" AND IS BARRED BY § 230(C)(1)

Plaintiff argues that his purported § 17200 claim evades § 230(c)(1) because it is based on craigslist's status as a corporation, not its role as a publisher, and because it addresses policy and practices for posting third-party content, not the substance of third-party content. Neither argument holds water. The Court must look at whether the claim treats craigslist as a publisher.

Plaintiff's § 17200 claim is founded on craigslist's purported "policy and practice of not requiring identifying information from posters." (Am. Cmplt. ¶ 91; *see also id.* ¶¶ 89, 90, 92, 93, and ¶¶ 10, 11, 13, 38, 39, 41, 42, 43, 48, 49, 51, 58). Thus, while craigslist is a corporation, the

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Plaintiff's Opposition to Defendants' Motion to Change Venue at ii, 4. In his opposition to this Demurrer, however, Plaintiff concedes that his claim rests only on craigslist's purported promise but failure to perfectly prevent any and all future posts related to Plaintiff. (Opposition at 3-4, 11-13). This is because craigslist did promptly remove all posts. (*See* Demurrer at 7 n.5).

purported § 17200 claim is not derived from this status.[5] Rather, the claim arises only due to craigslist's role as an online publisher of third-party content and would impose liability only based on craigslist's publisher functions. On its face, the § 17200 claim therefore treats craigslist as a publisher. *See Gentry*, 99 Cal.App.4th at 820, 836 (applying § 230 to bar unfair competition claim under § 17200); *Perfect 10, Inc. v. CCBill, LLC*, 481 F.3d 751 (9th Cir. 2007) (same); *see also Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1117-18 (W.D. Wash. 2004) (§ 230 barred Washington state consumer protection claim).

Furthermore, § 230(c)(1) is not restricted to "content-based editorial decisions" that treat an online service provider as a publisher of third-party content as Plaintiff argues. (Opposition at 9, 10). It prohibits any treatment of an online service provider as the publisher of any third-party content (but not its own content). *See* 47 U.S.C. § 230 (c)(1). And, as stated in § 230(e), "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(e) (emphasis added). Thus, claims based on policies or practices related to an online service provider's publication of third-party content are barred by § 230 (c)(1) irrespective of whether they address particular content. This conclusion is also consistent with existing California case law under § 230. *See Doe II*, 175 Cal.App.4th at 565-66, 573, 575 (§ 230 barred claims that plaintiffs expressly alleged were "not content based" but purportedly "rest[ed] on MySpace's failure to institute reasonable measures to prevent older users from directly searching out, finding, and or communicating with minors"); *see also Delfino v. Agilent Technologies, Inc.*, 145 Cal.App.4th 790, 797, 808 (6th Dist. 2006) (§ 230 barred claims that defendant failed to protect plaintiffs from co-worker's threatening communications).

Plaintiff's demand, under § 17200, that the Court require craigslist to collect personal identifying information from every user before it can allow the user's content to be published on the website is a demand for regulation and a restriction of anonymous speech on the Internet, which § 230 bars. *See Barrett*, 40 Cal.4th at 56, 63 (§ 230 "serves to protect online freedom of expression and to encourage self-regulation, as Congress intended."); *Zeran*, 129 F.3d at 330

[5] craigslist does not deny that it is a corporation. However, claims under § 17200 are not limited to corporations. Thus, Plaintiff's argument his § 17200 claims necessarily treats craigslist as a corporation is nonsensical.

("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

E. PLAINTIFF LACKS STANDING TO SUE UNDER § 17200

Plaintiff asserts that he has standing to sue because he suffered injury in fact and lost money as a result of craigslist's alleged violations of § 17200. (Opposition at 13-14). Plaintiff specifically mentions his "humiliation, mental anguish and emotional and physical distress," therapy expenses for emotional distress, telephone bills for calling craigslist, and lost earnings. (*Id.* at 14.) None of the supposed loss Plaintiff identifies is compensable under the statute.

The statute limits standing "to individuals who suffer losses of money or property that are eligible for *restitution*." *Buckland v. Threshold Enters. Ltd.*, 155 Cal.App.4th 798, 817(2d Dist. 2007) (emphasis added). Whereas restitution requires the defendant to "return something he wrongfully received," damages "compensate a party for injuries suffered." *Inline, Inc. v. A.V.L. Holding Co.*, 125 Cal.App.4th 895, 903 (4th Dist. 2005). Plaintiff does not identify any money craigslist wrongfully received from him that craigslist can return. More fundamentally, Plaintiff cannot obtain damages for his physical and emotional distress in the guise of restitution. *See generally Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757-58 (N.D. Cal. 1993) ("Plaintiffs argue that they are not seeking damages but are merely seeking restitutionary relief reflecting the value of what was taken from them. This theory is not plausible. Plaintiffs are seeking a remedy for the embarrassment and emotional distress caused by Defendants' publication of the incident at her home. Plaintiff is not arguing that she could have sold her story to another network and that the CBS broadcast effectively misappropriated the value of her story. Under Plaintiffs' approach, any damage claim could be converted into an argument for restitution."). Plaintiff therefore lacks standing to sue under § 17200 and craigslist's Demurrer must be sustained with prejudice.

F. PLAINTIFF'S CLAIMS AGAINST CRAIGSLIST SHOULD BE DISMISSED WITH PREJUDICE

Plaintiff cannot amend his Amended Complaint to state a claim against craigslist that is not barred by § 230 or otherwise deficient. The § 230 bar and the lack of an enforceable promise, the lack of reliance by Plaintiff on any alleged promise, and the lack of any compensable loss are

established by the factual allegations of the Amended Complaint and Exhibits. Plaintiff cannot amend his complaint to allege new facts inconsistent with the factual allegations of the Amended Complaint and its Exhibits. *See Colapinto v. County of Riverside,* 230 Cal.App.3d 147, 151-152 (4th Dist. 1991) (where a party files an amended complaint attempting to avoid the defects of the original complaint by either omitting facts or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and disregard inconsistent allegations). Consequently, any further amended complaint would be equally doomed.

G. CRAIGSLIST'S DEMURRER WAS TIMELY

Plaintiff frivolously argues that craigslist's demurrer is untimely "having been filed more than 45 days after service of Plaintiff's Amended Complaint on craigslist on March 18, 2010." (Opposition at 6). Plaintiff served craigslist by substituted service on March 18, 2010, and mailed a copy of the complaint on March 22, 2010. (*See* Chang Decl. In Support of Plaintiff's Opposition to Defendant craigslist's Demurrer Ex. 1 (proof of service)). Substituted service is deemed complete on the tenth day after mailing of the complaint. *See* Cal. Code Civ. Pro. § 415.20(b). Thus craigslist was deemed served on April 1, 2010. A demurrer is due 30 days after service of the complaint. *See id.* § 430.40. Thus craigslist's demurrer would have been due on May 1, a Saturday, so the actual due date was Monday, May 3. *See id.* § 12a. The demurrer was filed and served on May 3.[6]

IV. CONCLUSION

craigslist respectfully requests that this Court sustain its Demurrer and dismiss Plaintiff's Amended Complaint as to craigslist with prejudice.

DATED: May 25, 2010

PERKINS COIE LLP

By: _____
Philip A. Leider

Attorneys for Defendant
craigslist, Inc.

[6] Any objection to the Demurrer based on timeliness has also been waived. *See* Cal. Code Civ. Pro. § 435(b)(3) (motion to strike demurrer must be set concurrently with hearing on demurrer); *Carlton v. Quint*, 77 Cal.App.4th 690, 697 (2000).