Patrick A. Fraioli (SBN 191824)
pfraioli@ecjlaw.com
Russell M. Selmont (SBN 252522)
rselmont@ecjlaw.com
ERVIN COHEN & JESSUP LLP
9401 Wilshire Boulevard, Ninth Floor
Beverly Hills, California 90212-2974
Telephone (310) 273-6333
Facsimile (310) 859-2325

Wendy E. Giberti (SBN 268933)
wgiberti@igeneralcounsel.com
iGeneral Counsel, P.C.
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212
Telephone (310) 300-4082
Facsimile (310) 300-8401

Attorneys for Defendant
INTERNET BRANDS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANE DOE No. 14,

Plaintiff,

v.

INTERNET BRANDS, INC., D/B/A MODELMAYHEM.COM

Defendant.

Case No. CV-12-3626 JFW (PYX)

DEFENDANT INTERNET BRANDS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Declaration of Patrick A. Fraioli]

Date: August 6, 2012
Time: 1:30 p.m.
Place: Courtroom No. 16

The Honorable John F. Walter
Courtroom No. 16

ERVIN COHEN & JESSUP LLP

TO THE PLAINTIFF HEREIN AND TO HER COUNSEL OF RECORD:

COMES NOW Defendant, Internet Brands, Inc. ("Internet Brands"), and hereby moves this Court for an Order dismissing Plaintiff's single claim for Negligence against Defendant pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the only cause of action fails to state a claim upon which relief may be granted. A conference pursuant to Local Rule 7-3 took place on June 29, 2012.

Internet Brands' Motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities, the Declaration of Patrick A. Fraioli, Esq. the pleadings, records and files in this action, and upon such oral and documentary evidence as may be presented at the hearing of this Motion.

DATED: Julv 3. 2012 ERVIN COHEN & JESSUP LLP

By: /s/
Patrick A. Fraioli
Attorneys for Defendant,
INTERNET BRANDS. INC.

ERVIN COHEN & JESSUP LLP

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Headquartered in El Segundo, California, Internet Brands is a media company that operates various websites and also develops and licenses internet software and social and professional media applications. Within its Consumer Internet Division, Internet Brands owns and operates more than 200 principal websites in seven different categories. One of the websites owned and operated by Internet Brands is modelmayhem.com (the "Website"), which is a social and professional networking site for models, make-up artists, stylists, and photographers.

Plaintiff Jane Doe No. 14 ("Plaintiff") alleges she was assaulted by someone she met through the Website, which for purposes of this motion only, the Court may assume to be true.[1] Specifically, Plaintiff alleges she was "lured to come to South Florida" where she was drugged and assaulted by unrelated third parties. *See Complaint*, paragraph 11(a-e). Plaintiff then alleges that the Website owner should be liable for the acts of these third parties because, (1) "Jane Doe was never warned nor given any information about this scheme by Internet Brands, despite the fact that she was a MODELMAYHEM.COM member, which made her particularly vulnerable to the scheme" and (2) Internet Brands had the requisite knowledge to avoid future victimizations of MODELMAYHEM.COM users by warning user of online predators generally, and of the scheme employed by Flanders and Callum in particular." *Id.*, at paragraphs 10 and 28, respectively. Plaintiff further alleges the Website owner had a duty to warn, a duty to disclose, and a "duty of protection from reasonably foreseeable harm." *Id.*, at paragraphs 33 and 34. Finally, plaintiff alleges that her injuries were caused, "as a direct and proximate result of the

[1] Internet Brands specifically denies the alleged assailant contacted Plaintiff through the Website.

fraudulent solicitation, drugging, and rape…" *Id*., at paragraph 14. Put simply, Plaintiff's claim relies entirely on her theory that Internet Brands had a common law duty to warn.

II.

STANDARD OF REVIEW

Federal Rules of Civil Procedure, Rule 12(b), provides, in pertinent part, as follows:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> * * *
>
> (6) failure to state a claim upon which relief can be granted.
>
> * * *

A Motion to Dismiss under Rule 12(b)(6) is similar to the common law general demurrer, i.e., it tests the *legal sufficiency* of the claims stated in the Complaint. "The issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish [her] claims." *Scheuer v. Rhodes* (1974) 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90. In considering a Motion to Dismiss brought under Rule 12(b)(6), the court's duty is to, "determine whether or not it appears…under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs' claims." *De La Cruz v. Tormey* (1978) 582 F.2d 45, 48. "A complaint may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc*., 749 F.2d 530 (9th Cir. 1984).

In the present matter, it is clear that plaintiff's only claim, a claim of negligence for failure to warn, is fatally defective. Applicable law does not create a duty of care, a duty to warn, and provides absolute immunity in the circumstances

alleged in this Complaint. As "no relief can be granted under any set of facts that might be proved in support of plaintiff's claim" as pleaded, it must be dismissed pursuant to Rule 12(b)(6).

III.

ISSUE TO BE DECIDED BY THIS HONORABLE COURT

The issues presented by this Motion are whether Plaintiff's only cause of action, negligence, should be dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6).

IV.

PLAINTIFF'S ONLY CAUSE OF ACTION, NEGLIGENCE, FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Well-settled authority establishes Internet Brands does not have a duty to warn its users of the harm alleged and is absolutely immune from liability for the harm alleged in this case. *Julie Doe II v. MySpace, Inc.*, 175 Cal.App. 4th 561, is directly on-point. The court in *Julie Doe II* carefully and thoroughly reviewed voluminous state and federal decisions regarding similar claims, and concluded that web-based service providers are not liable for common law torts committed by one user against another user.

> The question posed by this appeal is: Can an internet Web server such as MySpace Incorporated, be held liable when a minor is sexually assaulted by an adult she met on its Web site? The answer hinges on our interpretation of section 230 of the Communications Decency Act. We hold section 230 immunizes MySpace from liability. (citations omitted).

The *Julie Doe II* court's interpretation of the Communications Decency Act, 47 U.S.C. §230(c) (the "CDA"), relied upon extensive and unanimous authority upholding the immunity granted by the CDA to web-based service providers for all civil claims brought by a web user for harm caused by another user, as set forth more fully below. The *Julie Doe II* court's interpretation of section 230 of the CDA

began with a review of the explicit language of the statute, which provides, in relevant part:

> Protection for 'good samaritan' blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
> 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) Civil liability
> No provider or user of an interactive computer service shall be held liable on account of –
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

The *Julie Doe II* court specifically found that section 230 of the CDA applied to all common law torts. "The express language of the statute indicates Congress did not intend to limit its grant of immunity to defamation. Instead, the legislative history demonstrates Congress intended to extend immunity to all civil claims." *Julie Doe II*, at 568.

The court therein then reviewed uniform authority from other jurisdictions, including *Jane Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) ("*Jane Doe v. MySpace*"); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); and *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) ("*Zeran*"). Each of those cases is directly on point; the first two of which involve the sexual exploitation, abuse, or assault of women and girls. The *Julie Doe II* court concluded that the *Jane Doe v. MySpace* case was "exactly on point" and similarly ruled that the CDA provided immunity to the web-based service provider. *Julie Doe II*, at 573, fn. 6. In the *Jane Doe v. MySpace* case, the Fifth Circuit also addressed actual knowledge of the alleged tortious conduct and held that the immunity provision of the CDA still applied. "Thus like strict liability, liability upon notice has a chilling effect on the

freedom of Internet speech. . . Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulations are directly contrary to §230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact." *Jane Doe v. MySpace*, supra, at 419 (quoting *Zeran*, supra, at 333.)

The *Julie Doe II* court also relied upon the Fourth Circuit Court of Appeals decision in *Zeran*, supra, quoting:

> Congress' purpose in providing the §230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 567. (quoting *Zeran*, at 331). Finally, authority is also well-settled that a web-based service provider need not adopt safety measures in order to receive the protection afforded by the CDA. *Julie Doe II*, at 572-73 ("That appellants characterize their complaint as one for failure to adopt reasonable safety measures does not avoid the immunity granted by section 230").

In this case, Plaintiff's allegations are identical to those pleaded in the *Julie Doe II* and *Jane Doe v. MySpace* cases. She alleges she was contacted through the Website and was "lured" to South Florida by her assailants. Her harm occurred off-line as a result of tortious conduct by two individuals un-affiliated with Internet Brands. As in the other cases cited by the *Julie Doe II* court, the allegations do not give rise to a cause of action against the web-based service provider. Internet Brands did not owe Plaintiff a duty to warn and is protect by the immunity provided by the CDA. Therefore, Plaintiff has failed to state a claim for relief and the requested dismissal is appropriate.

Lastly, Plaintiff does not even plead that the Internet Brands' alleged failure to perform in accordance with any legally recognized duty was the cause of her injuries. As with the *Julie Doe II* and *Jane Doe v. MySpace* cases, the injury occurred off-line, which means the web-based service provider was not the proximate cause of the plaintiff's injury. *Julie Doe II*, at 574. Here, Plaintiff pleaded that her injuries were caused by unrelated third parties, not Internet Brands. As such, and consistent with authority on this point, she cannot state a claim for relief in the absence of a causation allegation, which is an independent basis to dismiss the Complaint.

V.

CONCLUSION

The law is well-settled and unanimous; the CDA provides immunity to web-based service providers for common law torts committed by website users. Persons injured or otherwise damaged by third party tortfeasors are not without remedy, and may hold directly liable the person(s) causing the harm. Plaintiff may file a claim against the alleged third party tortfeasors, but her claim against Internet Brands runs afoul of the CDA.

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WHEREFORE, Internet Brands, prays as follows:

1. That judgment be entered in favor of Internet Brands, Inc., that the Complaint and any claims therein against Internet Brands be dismissed with prejudice and that Plaintiff take nothing by way of her Complaint;
2. For attorneys' fees;
3. For costs of suit incurred herein; and
4. For such other and further relief as the Court may deem just and proper.

DATED: July 3, 2012

ERVIN COHEN & JESSUP LLP
Patrick A. Fraioli
Russell M. Selmont

By: /s/
Patrick A. Fraioli
Attorneys for Plaintiff
INTERNET BRANDS, INC