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DISTRICT OF NEW MEXICO

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

No. CIV 97-0485LH/LFG

AMERICA ONLINE, INC.,

Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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AMERICA ONLINE, INC.,

Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The threshold issue raised in this case is whether a provider of an interactive computer service, such as Defendant America Online, Inc. ("AOL"), may be held liable for allegedly false and defamatory information that a third party provides through its service. Every court to consider this question has unequivocally held that service providers such as AOL are immune from such liability as a matter of federal law pursuant to 47 U.S.C. § 230 ("Section 230"). In accordance with those precedents and the plain meaning of the statute, Section 230 bars all of the plaintiff's claims in this case.

In its First Amended Complaint for Defamation, Negligence and Injunctive Relief (the "Amended Complaint"), plaintiff Ben Ezra, Weinstein and Company, Inc. ("BEW") alleges that AOL published erroneous information concerning the price and volume of sales of BEW's publicly-traded stock and that the alleged errors damaged its reputation and business. As detailed below, Section 230 bars any cause of action that seeks to make the provider of an interactive computer service (such as AOL) liable for harm that is alleged to have resulted from the availability through its service of information provided by a third party. The declarations

submitted in support of AOL's motion for summary judgment conclusively demonstrate that the allegedly false information at issue in this case was provided not by AOL, but by S&P ComStock, Inc. ("ComStock"), a third-party financial information service, and Townsend Analytics, Ltd. ("Townsend"), a third-party computer software developer. Accordingly, Section 230 plainly bars all of BEW's claims at the threshold.<sup>1/</sup> Because there are no genuine issues of material fact concerning this defense, AOL is entitled to a grant of summary judgment in its favor. Fed. R. Civ. P. 56.

### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

AOL's motion for summary judgment rests on the following material facts that plaintiff BEW cannot controvert:

1. AOL now provides, and at all times relevant to this lawsuit has provided, an electronic information service (the "AOL service") that enables millions of subscribers to access various information and information services, including the Internet, through modem connections to computer servers. (Declaration of Robert C. Shenk Jr. ("Shenk Decl.") ¶ 4; Am. Comp. ¶ 4.)<sup>2/</sup>

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<sup>1/</sup> While Section 230 thus controls this case, the ultimate outcome of the case would be the same even if this statute did not exist. AOL has a plethora of non-statutory defenses that would also defeat BEW's claims as a matter of law. See, e.g., Answer to First Amended Complaint ("Answer") at 9-13.

<sup>2/</sup> The Shenk Declaration is included at tab 1 of the accompanying Appendix of Exhibits and Authorities in Support of Defendant's Motion for Summary Judgment ("Appendix").

2. AOL is now, and at all times relevant to the Amended Complaint has been, a “provider . . . of an interactive computer service” within the meaning of 47 U.S.C. § 230(c)(1). (Shenk Decl. ¶ 4; Am. Comp. ¶ 4.)

3. During all times relevant to the Amended Complaint, all of the continuously updated information concerning prices and trading volumes of particular stocks that was available through the Quotes & Portfolios area of the AOL service, including all of the allegedly erroneous information concerning BEW’s stock that is the subject of the Amended Complaint, was provided by one or both of two entities that are separate and independent from AOL, namely ComStock and Townsend. (Shenk Decl. ¶¶ 9, 13-14; Declaration of Michael C. Hsu (“Hsu Decl.”) ¶¶ 5-6, 8-14.)<sup>3/</sup>

4. ComStock’s role in providing this information was to collect and then electronically transmit to AOL’s computer facilities in Virginia a stream of coded data purporting to track, on a contemporaneous or nearly contemporaneous basis, ongoing trading activity in thousands of securities traded through various exchanges and markets (the “ComStock Data Stream”). (Am. Comp. ¶ 9; Hsu Decl. ¶¶ 8.A-B; Shenk Decl. ¶ 10.)

5. Townsend’s role in providing this information was to supply and periodically update the computer software (the “Townsend Software”) that was run on AOL computers to handle and decode the ComStock Data Stream and transform it into an electronic database (the “ComStock/Townsend Database”) that purported to reflect detailed statistical

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<sup>3/</sup> The Hsu Declaration is included at tab 2 of the accompanying Appendix.



information (including certain price and volume data) concerning nearly current trading activity of particular securities. (Hsu Decl. ¶¶ 8.C-E.)

6. ComStock recommended and arranged for Townsend to be the supplier of the computer software that was needed to handle, decode, and transform the ComStock Data Stream into the ComStock/Townsend Database. (Shenk Decl. ¶ 13.)

7. At all times relevant to the Amended Complaint, all of the values for price and daily trading volume for particular securities that were contained in the continuously updated stock quotation information available through the Quotes & Portfolios area of the AOL service were taken directly and without substantive alteration from the ComStock/Townsend Database. (Shenk Decl. ¶¶ 15-16; Hsu Decl. ¶¶ 9-14.)

8. At all times relevant to the Amended Complaint, ComStock was responsible, in whole or in part, for the creation or development of the continuously updated price and daily volume information available through the Quotes & Portfolios area of the AOL Service. (Shenk Decl. ¶¶ 9-10, 17; Hsu Decl. ¶¶ 5, 13-14; Am. Comp. ¶ 9.)

9. To the extent that the computer software supplied by Townsend altered the content of the information available through the Quotes & Portfolios area of the AOL Service during any time relevant to the Amended Complaint, Townsend was responsible, in whole or in part, for the creation or development of that information. (Shenk Decl. ¶ 13; Hsu Decl. ¶¶ 6, 8, 10-11, 13-14.)

10. At all times relevant to the Amended Complaint, AOL used computer software created by AOL to perform the task of displaying particular information contained in the ComStock/Townsend Database in response to electronic queries made by individuals using

the Quotes & Portfolios area of the AOL Service. This AOL-created software never changed any of the values for price or daily trading volume from the values that were reflected in the ComStock/Townsend Database. (Hsu Decl. ¶ 8.H.)

11. During the periods relevant to the Amended Complaint, AOL never took any action that altered or changed the reported price or daily volume values of any particular securities, including BEW's stock, that was available in the Quotes & Portfolios area of the AOL service from the values reflected in the ComStock/Townsend Database. (Shenk Decl. ¶¶ 15-16; Hsu Decl. ¶¶ 8-16.)

12. AOL has never altered the Townsend Software from the form in which it has been provided from time to time by Townsend. (Hsu Decl. ¶ 11.)

13. Accordingly, to the extent that there were any errors in the information concerning the price or volume of trading in BEW's stock that was available in the Quotes & Portfolios area of the AOL service during the times relevant to the Amended Complaint, those errors existed in the ComStock/Townsend Database and were exclusively a product of the ComStock Data Feed and the Townsend Software, both of which were provided entirely by entities that were separate and independent from AOL. (Shenk Decl. ¶¶ 9-10, 14-16; Hsu Decl. ¶¶ 5-6, 8-16.)

## **STATEMENT OF THE CASE**

### Overview

Defendant AOL operates the world's largest interactive computer service, through which millions of subscribers in the United States and elsewhere disseminate and receive

information by means of computer modem connections to AOL's computer network. (Shenk Decl. ¶ 4.) Huge quantities of ever-changing information are available to AOL's subscribers through the AOL service. (Id.) Most of this information is created and developed not by AOL, but by third parties. (Id. ¶ 5.) While some of this third-party information originates with AOL's subscribers themselves, much of it is provided by a wide array of other entities -- ranging from large, well-known news organizations to specialty information sources -- that enter into licensing agreements to make their content available through the AOL service in exchange for royalty payments or other consideration. (Id.)

One of the numerous types of third-party information that is available through the AOL service is stock quotation information, i.e., continuously updated information concerning nearly current trading activity of publicly held stocks and securities. (Id. ¶ 8; Hsu Decl. ¶ 4.) Two third-parties -- ComStock and Townsend -- jointly provide this information to AOL. (Shenk Decl. ¶¶ 9-10, 13; Hsu Decl. ¶¶ 5-6.) This information is primarily available through an area of the AOL service that is designated the "Quotes & Portfolios" area. (Shenk Decl. ¶ 8.) By accessing and using this area of the service, subscribers may obtain what purports to be nearly current market information concerning more than 20,000 publicly-traded stocks and securities. (Id. ¶¶ 10, 12.)

The stock quotation information available through the Quotes & Portfolios area includes data about the market price for specific stocks (e.g., the price at which the stock most recently was traded and the high and low prices for the current or previous trading day) and the total number (i.e., volume) of shares of specific stocks traded in the current or previous trading day. (Shenk Decl. ¶ 10.) ComStock continuously updates this information on a slightly delayed

basis (e.g., a delay of approximately fifteen or twenty minutes for domestic stocks). (Id. ¶¶ 10, 22.) The ultimate sources for this information are major national and international stock exchanges and stock markets, including the New York Stock Exchange, the American Stock Exchange, NASDAQ, and the Over-the-Counter (“OTC”) market. (Id. ¶ 10.)

BEW is a small, Albuquerque-based public company whose stock is among the tens of thousands of securities for which stock quotation information can be obtained through the Quotes & Portfolios area of the AOL service. (Am. Comp. ¶¶ 1, 8; Shenk Decl. ¶ 11.) In its Amended Complaint, BEW alleges that there have been three short-lived instances -- once each on March 4, 1997; August 6, 1997; and April 23, 1998 -- in which some of the information concerning the price and/or volume of sales of BEW’s stock that was available through the AOL service was temporarily erroneous. (Am. Comp. ¶¶ 19, 26, 30.) Contending that these errors injured BEW’s reputation and disrupted its business, and repeatedly characterizing AOL as the “publisher” of the errors, BEW has asserted claims against AOL for defamation, negligence, and injunctive relief. (Id. ¶¶ 33-51.)

#### The Third-Party Origins of the Stock Quote Information

The stock quote information available through AOL’s service is provided by ComStock pursuant to an “S&P ComStock Information Distribution License Agreement” that ComStock and AOL executed in February 1996.<sup>4/</sup> Under this contract, AOL pays ComStock a

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<sup>4/</sup> Shenk Decl. ¶ 9. AOL has not submitted a copy of this Agreement as an exhibit to this motion because it contains a provision requiring that it be kept confidential. AOL is prepared to provide a copy of this Agreement to the Court and counsel for BEW upon entry of a mutually satisfactory protective order restricting further disclosure and use of the Agreement.

fee in return for ComStock permitting AOL subscribers to access the stock quote information that ComStock provides. (Id.) This agreement was in effect at all times relevant to the Amended Complaint. (Id.)

The stock quote information provided by ComStock is made available through the Quotes & Portfolios area of the AOL service through the following steps:

- A. During periods of stock market trading, ComStock continuously collects from various sources of its choosing securities price, volume, and other data from various sources such as the major national and international stock exchanges and stock markets. (Shenk Decl. ¶ 10; see also Am. Comp. ¶ 10.)
- B. ComStock continuously transmits the information it has collected to AOL's premises in the form of an electronic stream of encoded data (the "ComStock Data Stream") that purports to reflect, among other things, each purchase and sale of the securities being tracked by ComStock. (Hsu Decl. ¶ 8.A; see also Am. Comp. ¶ 15.)
- C. The ComStock Data Stream is initially received on AOL's premises in Virginia by machines owned by ComStock that are designed to delay the availability to AOL of the information contained in the ComStock Data Stream for a specified period (e.g., approximately fifteen or twenty minutes for domestic securities). (Hsu Decl. ¶ 8.B; Shenk Decl. ¶ 22.)
- D. The ComStock Data Stream is then forwarded to a set of interconnected personal computers (the "Townsend Computers") owned by AOL that are

dedicated to handling, indexing, tabulating, and holding the data contained within the ComStock Data Stream. These computers run software (the "Townsend Software") that Townsend provides. (Hsu Decl. ¶ 8.C.)

E. The Townsend Software collects, decodes, indexes, tabulates, and formats the data contained in the ComStock Data Stream into an electronic table -- or database -- of price, volume and other information organized on a security-by-security basis (the "ComStock/Townsend Database"). This Database is stored on each of the Townsend Computers and continuously updated. (Id. ¶ 8.D.)

F. Among other things, the Townsend Software translates the incoming coded data, which for each reported securities transaction consists of a series of alpha and numeric characters without any decimal points, into uncoded numeric price and volume figures that may include decimal points. Thus, for example, if the ComStock Data Stream represents the per-share price of a particular security in a coded form that includes the number "1435," the Townsend Software determines whether the price should be presented as \$1.435, \$14.35, \$143.5, or \$1435. (Id. ¶ 8.E.)

G. AOL subscribers may access any of the information in the ComStock/Townsend Database by going to the Quotes & Portfolios area of the AOL service and either (a) typing the standard ticker symbol for any given security or (b) activating the area's "portfolios" feature, which enables a subscriber automatically to access information on a

predesignated set of securities. Either action causes AOL's information system to send an electronic query to the Townsend Computers. (Id. ¶ 8.F.)

- H. In response to each subscriber-generated electronic query, the Townsend Computers transmit an electronic response setting forth the data that is then stored in the ComStock/Townsend Database for the particular security or portfolio that was the subject of the query. (Id. ¶ 8.G.)
- I. Separate software created by AOL provides an electronic interface between the Quotes & Portfolios area and the ComStock/Townsend Database. (Id. ¶ 8.H.) This software processes individual subscribers' queries for information concerning specific stocks, obtains the requested information from the ComStock/Townsend Database, and displays it to the querying subscriber. (Id.) This software does not alter or change in any way the price or daily volume values from the values reflected in the ComStock/Townsend Database. (Id.)

AOL has never had any role in the creation or development of the stock quotation information that is available through the Quotes & Portfolios area. (Shenk Decl. ¶¶ 15-16; Hsu Decl. ¶¶ 5-6, 8-14.) In fact, AOL is contractually barred from having such a role. The written agreement between AOL and ComStock expressly provides that "AOL may not modify, revise, or change" the stock quote information provided under the agreement. (Shenk Decl. ¶ 16.) At no time during the term of the AOL-ComStock agreement has AOL made any alteration to the content of the price and daily volume information provided by ComStock. (Shenk Decl. ¶¶ 15-

16; Hsu Decl. ¶¶ 8-16.) Consistent with these facts, the screens on which continuously updated stock quotation information has been available to AOL subscribers through the Quotes & Portfolios area have included legends (such as “Standard & Poor’s ComStock” or “Data provided by: S&P ComStock”) indicating that the source of this information is ComStock. (Shenk Decl. ¶ 17.)

Likewise, AOL has never had any role in determining or altering the manner in which the Townsend Software manipulates the ComStock Data Stream. Townsend creates, develops, provides, and from time to time modifies that software pursuant to an arrangement between ComStock and Townsend. (Shenk Decl. ¶ 13; Hsu Decl. ¶¶ 8.D-E, 11.) In fact, it is technically infeasible (if not impossible) for AOL to alter the functioning (or any malfunctioning) of the Townsend Software, except by installing new versions of that software onto the Townsend Computers as they are provided to AOL from time to time by Townsend. (Hsu Decl. ¶ 11.) Accordingly, the quality and accuracy of the stock quotation information that is available through the Quotes & Portfolios area of the AOL service is entirely dependent on ComStock, Townsend, and the ultimate sources of the information from which ComStock formulates the ComStock Data Stream.

#### Occasional Errors In the “Quotes & Portfolios” Information

Because the stock quote information that ComStock and Townsend jointly provide through the AOL service encompasses thousands of securities and is constantly changing, and because AOL itself has no independent means for quickly verifying whether any particular value provided by ComStock and Townsend accurately represents what has actually



transpired in the stock market, AOL cannot monitor the accuracy of the information in any comprehensive manner. (Shenk Decl. ¶ 18.) AOL occasionally receives inquiries or complaints from its subscribers or others suggesting or claiming that particular information that has been made available through the Quotes & Portfolios area is inaccurate. (Id. ¶ 19.) Based on the relative infrequency of such inquiries and complaints, AOL believes that materially erroneous information represents an extremely small proportion of the huge quantity of information available through the service. (Id.)

In recognition of the ever-present possibility of errors, however, the Quotes & Portfolios area has at all times relevant to this case displayed one or more warning notices urging subscribers not to rely solely on information available through AOL's service in making investment decisions. (Id. ¶ 20.) As of March 1997, for example, the Quotes & Portfolios area contained the following notice:

All the information within the Quotes & Portfolios service is believed to be reliable. However, because of the volume of information, and the frequency with which it changes, it can only be provided on a best efforts basis for the convenience of the member. Neither America Online, nor any of its information providers, including the exchanges, are liable for any investment decision made using the information.

(Id.)

Any error observed in the stock quotation information available through the Quotes & Portfolios area is, by definition, an error that was present in the ComStock/Townsend Database -- the informational end-product provided jointly by ComStock and its designee

Townsend. AOL lacks any means to correct such errors.<sup>5/</sup> Accordingly, when AOL receives complaints or notices suggesting that errors have occurred or are occurring, AOL typically contacts ComStock and/or Townsend to request that they look into the situation and, if appropriate, take prompt corrective action. (Hsu Decl. ¶ 15.) Depending on the circumstances, AOL also sometimes posts notices in the Quotes & Portfolios area alerting subscribers to a particular known or suspected problem. (Id.)

#### Recurrent Errors in Quotes & Portfolios Area in Late 1996 and Early 1997

In December 1996 and early 1997, AOL received sporadic reports from some of its subscribers suggesting that erroneous information concerning the trading prices for a few over-the-counter (“OTC”) stocks had been present in the ComStock/Townsend Database and available through the Quotes & Portfolios area. (Hsu Decl. ¶ 17.) The apparent errors seemed to involve prices for particular OTC stocks being understated by either a factor of 10 (e.g., a price that should have been reflected as \$12.50 was instead reflected as \$1.25) or a factor of 10,000 (e.g., a price that should have been reflected as \$5.00 was instead reflected as \$0.0005). (Id.) The apparent errors that AOL noticed at this time did not involve BEW’s stock. (Id.)

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<sup>5/</sup> Aside from prodding ComStock and/or Townsend to rectify any suspected errors that are brought to AOL’s attention, the only actions that AOL can take to prevent erroneous stock quote information from being available through the Quotes & Portfolios area is to shut down that area entirely or to delete temporarily all data in the ComStock/Townsend Database for a particular security. The former action deprives AOL subscribers of information for all stocks; the latter renders information for the particular stock unavailable, but only temporarily, because the database automatically repopulates itself with new information for a security each time that the ComStock Data Stream reports a new transaction involving the security. (Hsu Decl. ¶ 16.)

Starting on approximately December 10, 1996, AOL repeatedly complained to ComStock about these apparent errors. (Id. ¶ 18.) On December 13, 1996, ComStock told AOL in writing that “[t]his appears to be a problem on our end,” but said it did not know the cause of the problem and would get back to AOL following further investigation. (Id.) Because observations of apparent price errors continued despite AOL’s entreaties to ComStock, AOL also directly contacted Townsend to seek its assistance in resolving the problem. (Id. ¶ 19.)

On February 5, 1997, Townsend told AOL that the apparently erroneous price information that was being observed at that time was the result of unanticipated variation in the format of the codes employed by ComStock to represent price values for OTC stocks in the ComStock Data Stream. (Id. ¶ 20.) Townsend explained that the version of its software then running on the Townsend Computers had been written on the assumption that the ComStock Data Stream would consistently use a particular set format for these price codes. (Id.) On February 6, 1997, Townsend told AOL that Townsend would rectify the problem by creating and providing to AOL replacement software that would respond appropriately to the format variations. (Id. ¶ 21) On February 7 and 11, 1997, AOL sent urgent messages to ComStock asking that the problem be rectified even more quickly, but received no immediate response. (Id.)

In late February 1997, Townsend provided a revised version of the Townsend Software for AOL to install on the Townsend Computers in place of the old Townsend Software. (Id. ¶ 22.) Townsend informed AOL that this revised software would rectify the apparent price errors that had been observed. (Id.) On or about March 4, 1997, AOL completed the first phase of installing this software, and six of the twelve Townsend Computers supplying information to

the Quotes & Portfolios area began to operate using the revised version of the Townsend Software. (Id. ¶ 23.)

Before AOL completed the installation of the revised version of the Townsend Software on the other six Townsend Computers, AOL became aware that the ComStock/Townsend Database stored on the computers running the revised software appeared to erroneously overstate the daily trading volume of some OTC stocks. (Id. ¶ 24.) At approximately the same time, AOL began to receive reports suggesting that the pre-existing problem of apparently erroneous price information had begun to affect a few additional OTC stocks (including, for the first time, BEW's stock). (Id.)

On March 4, 1997, in response to this latest set of problems in the ComStock/Townsend Database, AOL requested that Townsend immediately create and provide to AOL yet another revised version of the Townsend Software that would fix the price problems without introducing a volume problem. (Id. ¶ 25.) Townsend did so, sending AOL another revision of the Townsend Software on the morning of March 6, 1997. (Id. ¶ 26.) AOL promptly installed this software on the Townsend Computers before the ComStock Data Stream began providing information on new securities trades on the morning of March 6, 1997. (Id.) This software appeared to resolve all of the price and volume problems described above. (Id.)

#### Alleged Errors Concerning BEW's Stock

According to the Amended Complaint, the stock quotation information available through the AOL service contained errors relating to BEW's stock on the evening of March 4, 1997. (Am. Comp. ¶ 19.) These errors, according to the Amended Complaint, allegedly

involved an understatement of the price at which BEW's stock had traded that day (a reported closing price of \$0.17 as opposed to an actual closing price of \$1.84) and an overstatement of the volume of shares traded that day (a reported volume of 1.3 million as opposed to actual volume of 30,500). (Id.) The timing of these alleged errors coincides with the period described above in which there were observations of apparent errors in both the price and volume information available through the Quotes & Portfolios area for some OTC stocks.

The Amended Complaint alleges that there have been two subsequent errors involving information concerning BEW's stock. First, it alleges that on August 6, 1997, the price and volume information for BEW's stock that was available through AOL's service was erroneous for a brief period of time. (Am. Comp. ¶ 26.) Immediately after BEW reported this alleged error to AOL, AOL reported it to ComStock. (Hsu Decl. ¶ 27.) According to BEW, the alleged error was corrected "within a short period of time" on the same day. (See Am. Comp. ¶ 26.)

The Amended Complaint alleges that a similarly short-lived error occurred on April 23, 1998. (Id. ¶ 30.) On this occasion, BEW allegedly contacted AOL (through counsel) to assert that the "low" price for BEW's stock that was available through AOL's service was 7 cents when it should have been 14.5 cents. (Id. ¶¶ 30-31.) According to BEW, this alleged error also was eliminated within a matter of hours on the same day. (See id. ¶ 31.)

Because the price and volume values for OTC stocks that are available in the Quotes & Portfolios area of the AOL service are taken directly and without alteration from the ComStock/Townsend Database and are exclusively the product of data provided by ComStock and software provided by Townsend, all of the foregoing allegedly erroneous information

concerning BEW's stock was, by definition, information provided by parties other than AOL. (Hsu Decl. ¶ 28.)

#### BEW's Lawsuit

On March 11, 1997, BEW filed this suit against AOL in New Mexico State District Court, claiming that “[t]he publication by AOL of the false stock prices and trading volume harmed BEW’s reputation and business.” (Complaint ¶ 23.) The original Complaint did not explicitly identify the tort(s) being alleged, and concerned only the allegedly erroneous information that AOL had allegedly “published” earlier that month. AOL removed the case to this Court on April 10, 1997.<sup>6/</sup>

On June 15, 1998, BEW filed its First Amended Complaint. The Amended Complaint slightly recasts BEW’s allegations concerning the March 1997 events, and purports to state separate counts for “defamation,” “negligence,” and “injunctive relief.” The Amended Complaint also adds references to the allegedly erroneous information concerning BEW’s stock that was allegedly available through the AOL service on August 6, 1997 and April 23, 1998. (Am. Comp. ¶¶ 26, 30.) Unlike the original Complaint, the Amended Complaint also expressly acknowledges that ComStock, not AOL, was the source of the stock quote information. (*Id.* ¶ 9.) The Amended Complaint also makes the allegation -- which AOL’s declarations show to be

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<sup>6/</sup> Shortly after removal and before AOL’s time for answering the Complaint had run, litigation of the merits of the case was put on hold because BEW had filed the first of two motions seeking to disqualify AOL’s local, national, and in-house counsel. After briefing and argument, this Court denied BEW’s disqualification motion by order dated May 1, 1998.

indisputably false -- that “AOL takes the electronic information or data stream it receives from S&P and manipulates, alters or changes it using AOL software . . . .” (Am. Comp. ¶ 12.)

The Amended Complaint asserts claims that the alleged errors in information about BEW’s stock caused “erratic trading of BEW’s stock” and injured “BEW’s reputation in the business and financial community.” (Id. ¶¶ 24, 40.) The Amended Complaint’s only remotely specific allegation of damage concerns only the alleged errors on March 4, 1997: in that context, BEW alleges “[u]pon information and belief” that those errors somehow resulted in the cancellation or termination of “major financial transactions and investments involving BEW[] and its stock.” (Id. ¶ 24.)

On June 18, 1998, AOL filed its Answer to the Amended Complaint. The Answer asserts numerous affirmative defenses, including defenses under 47 U.S.C. § 230. AOL now moves for summary judgment on the ground that this statute provides a complete, threshold defense to all of BEW’s claims.

### **ARGUMENT**

Interactive computer services -- which enable people to communicate with one another with unprecedented speed and efficiency through the Internet and related electronic networks -- are rapidly revolutionizing how people and businesses share and receive information. “The Internet is a unique and wholly new medium of worldwide human communication.” Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334 (1997) (quotation omitted). Unlike traditional media such as television, radio, newspapers, and books, where content typically flows from a single, centralized “publisher,” information and content on interactive

computer services is created and disseminated by millions of different content providers ranging from private individuals to news organizations to specialized information clearinghouses. Interactive computer services, of which AOL is the world's largest, function as the conduits through which millions of subscribers throughout the world may instantaneously receive information from these myriad sources in a single online space.

One of the great challenges of the information revolution created by interactive computer services has been the need for legal rules to govern this new medium that recognize its fundamental differences from traditional media. In February 1996, Congress enacted 47 U.S.C.A. § 230 (West Supp. 1998) as a response to this challenge.<sup>27</sup>

Section 230 was designed to eliminate uncertainties in the law governing whether providers of interactive computer services, such as AOL, could be liable for harms resulting from the dissemination of defamatory or otherwise harmful information that other persons or entities create and make available through such services. Congress determined in Section 230 that interactive service providers such as AOL shall be immune from tort liability for harm caused by the dissemination of information provided by other parties. The broad immunity conferred by the statute has been decisively confirmed by every court that has construed the statute.

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<sup>27</sup> Section 230 was enacted as part of the Communications Decency Act of 1996 ("CDA"). Last year, the Supreme Court struck down on First Amendment grounds two provisions of the CDA, namely most of 47 U.S.C. § 223(a) and all of 47 U.S.C. § 223(d), that had criminalized certain online transmissions of "indecent" or "patently offensive" material. Reno, 117 S. Ct. at 2329-30. The invalidation of these other CDA sections did not affect the operation of Section 230. See 47 U.S.C. § 608 ("If any provision of this [Act] . . . is held invalid, the remainder of the [Act] . . . shall not be affected thereby."); Reno, 117 S. Ct. at 2350 (applying severability clause to hold that portion of Section 223 not implicated by First Amendment ruling remains intact).



Because BEW's lawsuit seeks to impose on AOL liability for allegedly erroneous information that indisputably was provided by two third parties -- namely ComStock and its designated software provider, Townsend -- Section 230 bars all of BEW's claims at the threshold.

**I. THE PLAIN TERMS OF SECTION 230 BAR ALL OF BEW'S CLAIMS.**

Section 230 expressly prohibits lawsuits, such as this one, that seek to hold the provider of an interactive computer service liable for information provided by third parties. It states:

No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). It further provides:

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.

Id. § 230(d)(3) (emphasis added).

Every court that has discussed the applicability of these provisions to tort claims has held, at the threshold, that they immunize providers of interactive computer services from tort liability for content that appears on their services but originates with third parties. In Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), for example, the plaintiff brought a claim of "negligence" against AOL for its alleged failure to block and promptly remove a series of allegedly defamatory messages that a user of the AOL service had created and posted on AOL's electronic bulletin boards. Id. at 329-30. The district court granted AOL's motion for judgment

on the pleadings, and the Fourth Circuit affirmed, holding that “Section 230 . . . plainly immunizes computer service providers like AOL from liability for information that originates with third parties.” *Id.* at 328. The Supreme Court recently denied Zeran’s petition for certiorari. No. 97-1488, 1998 WL 111522 (U.S. June 22, 1998).

AOL similarly prevailed at the threshold in *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). The plaintiffs in that case brought an action for defamation and invasion of privacy against AOL and Matt Drudge, claiming that they were jointly liable for allegedly false statements that Drudge had published in the Drudge Report, an electronic newsletter that Drudge wrote and posted on the AOL service in exchange for a royalty fee from AOL. *Id.* at 47-48. As in this case, AOL moved for summary judgment immediately after filing its answer. The district court granted the motion, concluding that, in Section 230, Congress “made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.” *Id.* at 49.

A similar result occurred in *Doe v. America Online, Inc.*, No. CIV. CL 97-631 AE, 1997 WL 374223 (Fla. Cir. Ct. June 26, 1997).<sup>8/</sup> In that case, the plaintiff alleged that AOL had negligently permitted one of its subscribers to disseminate through the AOL service certain allegedly harmful information relating to child pornography. The court granted AOL’s motion to dismiss based on Section 230, holding that the suit impermissibly sought to “treat AOL as the ‘publisher or speaker’ of” third-party content.” *Id.* at \*3. See also *Aquino v. Electriciti, Inc.*, 26 Media L. Rep. (BNA) 1032, 1032 (Cal. Super. Ct. Sept. 23, 1997) (holding that Section 230 bars

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<sup>8/</sup> A copy of the *Doe* decision is included in the accompanying Appendix at tab 3. This decision has been appealed to the Florida District Court of Appeals.

suit seeking to make interactive service provider liable for information originating with a third party).<sup>2/</sup>

As we now show, a straightforward application of Section 230 to the undisputed facts of this case compels the same result as in all of these earlier cases.

**A. AOL Is a “Provider of an Interactive Computer Service.”**

The first prerequisite for immunity under Section 230(c)(1) is that the defendant be a “provider . . . of an interactive computer service.” This prerequisite is easily satisfied here. The statute defines the term “interactive computer service” to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” 47 U.S.C. § 230(e)(2). The electronic information service that AOL provides indisputably meets this definition. (See *Shenk* Dec. ¶ 4.) Indeed, the Amended Complaint itself alleges that the AOL service “allows subscribers to connect their home and business computers to AOL’s on-line and Internet service by way of a modem device using normal telephone lines.” (Am. Comp. ¶ 4). Not surprisingly, every court to consider the issue has found that AOL satisfies this element of the test for immunity. See *Zeran*, 129 F.3d at 330 n.2; *Blumenthal*, 992 F. Supp. at 49-50; *Doe*, 1997 WL 374223, at \*2.

**B. The Stock Quote Information Available Through AOL’s Service Is “Information Provided by Another Information Content Provider.”**

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<sup>2/</sup> A copy of the *Aquino* decision is included in the accompanying Appendix at tab 4.

The second prerequisite for Section 230 immunity -- that the content at issue be “information provided by another information content provider” -- is also easily satisfied in this case. AOL’s uncontroverted declarations establish that the allegedly erroneous information concerning BEW’s stock did not originate with AOL, but instead was an end-product of the interaction between the stream of data supplied by ComStock and the computer software provided by Townsend. It could not be clearer that this information was “provided by another information content provider” within the meaning of the statute.

First, ComStock indisputably is an “information content provider” within the meaning of the statute. Section 230 defines the term “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.” 47 U.S.C. § 230(e)(3). As AOL’s declarations demonstrate, and as BEW itself now concedes in its Amended Complaint, ComStock is the source of the stock quotation information available through the AOL service. (See Hsu Decl. ¶¶ 8.A-B; Shenk Decl. ¶ 10; Am. Comp. ¶ 9.) In the words of the Amended Complaint, ComStock collects “financial data from more than 125 sources and exchanges worldwide” and then “provide[s] [it] to people and businesses all over the world.” (*Id.* ¶ 10.) By supplying the coded data stream from which the ComStock/Townsend Database is derived, ComStock plainly is “responsible” at least “in part” for “the creation or development” of the stock quote information that is “provided through the . . . [AOL] interactive computer service.” 47 U.S.C. § 230(e)(3).

Second, to the extent that the Townsend Software produced price or volume values in the Townsend/ComStock database that were different from the values represented in

the ComStock Data Stream, then Townsend also was an “information content provider” within the meaning of the statute. In all such cases, Townsend was, by definition, “responsible” at least “in part” for “the creation or development” of the differing information.

Third, both ComStock and Townsend (to the extent it was an “information content provider”) indisputably were each “another information content provider” for purposes of Section 230. The plain meaning of the word “another” in the statute is “different or distinct.” Webster’s Collegiate Dictionary 48 (10th ed. 1994). Thus, the import of “another” as used in Section 230(c)(1) is to confine the statute’s immunity to circumstances where the information at issue was provided by an “information content provider” who is “different or distinct” from the party claiming immunity. ComStock and Townsend unquestionably meet this test. Each of them is an independent corporate entity that runs its own separate business. (Shenk Dec. ¶ 14.) Indeed, according to the Amended Complaint, AOL is merely one of at least 150 different online information providers who purchase data and information from ComStock.<sup>10/</sup> (Am. Comp. ¶ 11.) And Townsend is simply the company designated by ComStock to provide the computer software needed to render the ComStock Data Stream into a form that is suitable for provision through the AOL service. (Shenk Dec. ¶ 13.) Obviously, therefore, both ComStock and Townsend are “different” and “distinct” from AOL.

Fourth, the information for which BEW seeks to make AOL liable -- the allegedly erroneous price and volume information concerning BEW’s stock that was available in the

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<sup>10/</sup> The fact that AOL has a contractual relationship with ComStock does not alter ComStock’s status as “another information content provider.” See Blumenthal, 992 F. Supp. at 50-52 (holding that Section 230 applies to information provided by third party in exchange for royalty payments pursuant to a contract with AOL).

Quotes & Portfolios area of the AOL service -- was indisputably “provided” by ComStock and Townsend. Michael Hsu, an AOL employee who has detailed first-hand knowledge of the technical operation of the Quotes & Portfolios area of the AOL service, avers unequivocally that the stock quote information in the ComStock/Townsend Database has been derived at all times exclusively from the interaction between the ComStock Data Stream and the Townsend Software. (Hsu Decl. ¶ 13.) Hsu further avers that the continuously updated price and daily volume values that have been available to AOL subscribers through the Quotes & Portfolios area of the AOL service -- including all price and daily volume values for BEW’s stock -- have always been taken directly from, and have always been identical to, the corresponding values in the ComStock/Townsend Database. (Id. ¶ 14.) In sum, the allegedly erroneous price and volume information at issue in this suit was derived directly and without alteration from the ComStock/Townsend Database, which was “provided” entirely by ComStock and Townsend.

Apparently cognizant of the controlling impact of Section 230 on this case, BEW has added a new allegation in the Amended Complaint that appears calculated to confuse the issue of whether the stock quote information at issue in this case was in fact “provided” by another party. Specifically, BEW now alleges, for the first time, that “AOL takes the electronic information or data stream it receives from S&P [ComStock] and manipulates, alters or changes it using AOL software . . . .” (Am. Comp. ¶ 12.) Even assuming for the sake of argument that

this allegation, if true, would render Section 230(c)(1) inapplicable,<sup>11/</sup> the allegation is demonstrably and indisputably false.

The Hsu Declaration unequivocally establishes that, contrary to the Amended Complaint, AOL has never “manipulate[d], alter[ed] or change[d]” the data stream it receives from ComStock using AOL software. (Hsu Dec. ¶ 9.) Indeed, the contract between ComStock and AOL unequivocally prohibits AOL from playing such a role, expressly providing that “AOL may not modify, revise, or change” the information provided by ComStock prior to its distribution over AOL’s service. (Shenk Decl. ¶ 16.) In fact, at all times relevant to this case, the only software that manipulated, altered or changed the ComStock Data Stream was the Townsend Software, which, as already established, was created and provided by a third party designated by ComStock. (Hsu Dec. ¶¶ 6, 10.) Moreover, while AOL uses its own software to help perform the simple function of permitting AOL subscribers to access particular data in the ComStock/Townsend Database, that software has never altered or changed the price or daily volume values from those that were then reflected in the Database. (Id. ¶ 8.H.) AOL’s declarant

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<sup>11/</sup> In fact, even if an interactive service provider plays a role in modifying information supplied by third parties, the information so modified may still be “provided by another information content provider.” 47 U.S.C. § 230(c)(1). Giving these quoted words their plain meaning, the statutory test for immunity is satisfied whenever the information at issue was (1) “provided” by a person (2) who was, in relation to the interactive service provider, “another” person, and (3) this other person was an “information content provider.” Each of these elements would be satisfied here even if, contrary to the undisputed facts, AOL software had altered the information provided by ComStock: the information would still have been “provided” by ComStock, ComStock would still be an entity distinct from AOL (i.e., “another”), and ComStock would still be “responsible, . . . in part, for the creation or development” of information available through the interactive computer services (i.e., an “information content provider”).

Hsu designed and created this AOL software and oversaw its use, and his sworn averments on this point are dispositive.<sup>12/</sup> (Id.)

In sum, uncontroverted evidence establishes that the allegedly erroneous information at issue was “information provided by another information content provider” within the meaning of Section 230(c)(1). “AOL was nothing more than a provider of an interactive computer service on which the [information at issue] was carried, and Congress has said quite clearly that such a provider shall not be treated as a ‘publisher or speaker’ and therefore may not be held liable in tort.” See Blumenthal, 992 F. Supp. at 50.

**C. Imposing Liability on AOL Would “Treat [AOL] as the Publisher or Speaker” of the Stock Quote Information Provided by ComStock.**

Finally, imposing liability on AOL for the allegedly defamatory stock quote information provided by ComStock would impermissibly “treat” AOL as the “publisher or speaker” of that information within the meaning of Section 230. This is apparent from the face of the Amended Complaint, which is replete with allegations that AOL should be held liable for having “published” the allegedly erroneous information concerning BEW’s stock. (See, e.g., Am. Comp. ¶¶ 8, 13-14, 16, 34, 36-37, 40, 45, 48.) The Amended Complaint’s repeated attribution to AOL of a publisher role is not surprising. As the Zeran, Blumenthal, and Doe

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<sup>12/</sup> Of course, BEW’s conclusory, unsubstantiated allegation in the Amended Complaint that AOL used its own software to alter the ComStock Data Stream (Am. Comp. ¶ 12) is insufficient to raise a genuine issue of material fact that would defeat AOL’s motion for summary judgment. A party seeking to oppose a motion for summary judgment may not rest on the allegations in its pleadings, but rather must come forward with competent evidence to substantiate its allegation. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In this instance, no evidence supports BEW’s allegation.



courts all have held, a lawsuit that seeks to impose liability on an interactive service based on allegedly tortious third-party content “treats” the service as “the publisher or speaker” of that content. See Zeran, 129 F.3d at 332-33; Blumenthal, 992 F. Supp. at 52; Doe, 1997 WL 374223, at \*3. This is evident from at least three critical perspectives.

First, under well-settled common law principles, liability for harm flowing from the dissemination of defamatory or otherwise tortious material may be imposed only on a party who is deemed to have “published” the material.<sup>13/</sup> By definition, a claim for defamation, such as that set out in Count I of the Amended Complaint, treats the defendant as the “publisher” of allegedly false and defamatory material. “Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability.” Zeran, 129 F.3d at 332; see Blumenthal, 992 F. Supp. at 50-51; Restatement (Second) of Torts §§ 558(b)-(c) (1977) (essential elements of any defamation action include both “an unprivileged publication to a third party” and “fault amounting to at least negligence on the part of the publisher” (emphasis added)).<sup>14/</sup>

Likewise, a claim for negligence in the dissemination of allegedly harmful information, such as that set out in Count II of the Amended Complaint, treats the defendant as

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<sup>13/</sup> Of course, courts routinely rely on the common law as a guide to interpreting the meaning of a statutory term. See generally Gilbert v. United States, 370 U.S. 650, 655 (1962).

<sup>14/</sup> See also Restatement § 577(2) (“One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.” (emphasis added)); W. Page Keeton et al., Prosser and Keeton on the Law of Torts 803 (5th ed. 1984) (“Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the . . . information available to others as to be regarded as publishers.”).

the publisher of that information. Indeed, BEW's negligence count expressly seeks to impose liability on AOL for its alleged failure to correct, or adequately warn subscribers about, purportedly incorrect information that AOL allegedly was "publishing." (Am. Comp. ¶ 45.) The court in Zeran squarely held that a plaintiff cannot escape the bar of Section 230 by pleading a "negligence claim" that, at bottom, is nothing more than a defamation claim in recast form: "Although [plaintiff] attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action." Zeran, 129 F.3d at 332. More generally, courts have routinely rejected attempts by creative plaintiffs to evade the many protections that the law affords to defamation defendants by merely repackaging defamation claims in the guise of other torts. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988) (plaintiff cannot circumvent First Amendment defenses to defamation action by pleading a claim for another tort); Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1420 (C.D. Cal. 1987) ("Without such a rule, virtually any defective defamation claim . . . could be revived by pleading it as one for [another tort]."), aff'd, 867 F.2d 1188, cert. denied, 493 U.S. 812 (1989).<sup>15/</sup>

Second, Plaintiff's suit seeks to impose on AOL, as a matter of law, a standard of care that would require AOL to monitor and screen the millions of reports of individual stock

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<sup>15/</sup> Similarly, as the Amended Complaint itself makes clear, plaintiff's claim for injunctive relief (Count III of the Amended Complaint) also plainly seeks to treat AOL as the "publisher or speaker" of third-party content. This count is entirely derivative of the counts for defamation and negligence, which, as already shown, treat AOL as a "speaker or publisher." Moreover, the alleged harm that plaintiff seeks to alleviate is the purported threat that "AOL will continue to publish incorrect information regarding BEW's stock" and the very relief plaintiff seeks is enjoining AOL from "publishing false and erroneous information about BEW to its subscribers." (Am. Comp. ¶¶ 50-51 (emphasis added).)

transactions that ComStock provides each and every day through its continuous data stream and to correct and warn subscribers about all errors reflected in such reports. (See, e.g., Am. Comp. ¶ 45; Shenk Decl. ¶ 10.) These are the quintessential duties in which traditional publishers -- such as newspapers and magazines -- engage with respect to their own content and content supplied by third parties. But, as the court of appeals ruled in Zeran, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred” under Section 230. 129 F.3d at 330. Adoption of a legal standard that would require AOL to perform these functions with respect to third-party content would “impose liability on AOL for assuming the role for which § 230 specifically proscribes liability -- the publisher role.” Id. at 332-33; see also Doe, 1997 WL 374223, at \*3 (holding AOL liable for injury caused by third-party content “would impose on AOL, as a matter of law, a standard of care that would require AOL to monitor, screen and censor the great volumes of information transmitted over its system by third parties, which are the quintessential activities in which traditional publishers must engage” (emphasis added)).

Third, imposing liability on AOL in this case would “cast [AOL] in the same position as the party who originally” published the allegedly erroneous information, thereby treating AOL as the information’s “publisher or speaker.” Zeran, 129 F.3d at 333. By seeking from AOL precisely the same legal relief that could be sought from the original speaker or publisher, the Amended Complaint “treats” AOL as a “speaker or publisher” of the allegedly harmful statements in violation of Section 230. The Fourth Circuit’s decision in Zeran relied on

this same reasoning in holding that Section 230 bars claims that aim to make AOL liable for online content provided by a third party:

According to Zeran's logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original [creator of the content] would be found liable. If the original party is considered a publisher of the [content], Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the [content].

*Id.*; *Doe*, 1997 WL 374223, at \*3 (making AOL liable would impermissibly “[su]bject AOL to precisely the same legal treatment” as “the actual ‘publisher or speaker’ of the statements at issue”).

In sum, imposing liability on AOL in this suit would “treat” AOL as the “publisher” of allegedly erroneous information provided by “another information content provider” -- precisely the treatment of an interactive computer service provider that Section 230 proscribes. Because the statute expressly prohibits the bringing of any cause of action “under any State or local law that is inconsistent with this section,” 47 U.S.C. § 230(d)(3) (emphasis added), it bars all of BEW's claims against AOL.

**II. THE OVERALL PURPOSES OF SECTION 230, AS EXPRESSED IN BOTH THE STATUTE AND ITS LEGISLATIVE HISTORY, CONFIRM THAT AOL MAY NOT BE HELD LIABLE FOR THE ALLEGEDLY ERRONEOUS INFORMATION.**

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Section 230's preamble and legislative history strongly support the conclusion that the statute bars BEW's suit. Both the preamble and legislative history demonstrate that Congress enacted Section 230 to foster robust and vibrant discourse over interactive computer services by ensuring that the intermediaries of such discourse -- namely service providers such as

AOL -- would not be liable for harms caused by third-party content. Imposing liability on AOL in this case would flout Congress's intentions.

**A. Congress Enacted Section 230 to Promote the Development of Online Services and to Free Them from the Burdens of Liability for Third-Party Content.**

The most significant evidence of Congress's goals in enacting Section 230 is set forth in the "findings" and "policy" statement that comprise the statute's preamble. 47 U.S.C. §§ 230(a)-(b). The preamble includes a "finding" that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and that these services have "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. §§ 230(a)(3)-(4) (emphasis added). The preamble also declares that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2) (emphasis added).

These declarations reflect Congress's judgment that a legal regime under which interactive computer service providers could face tort liability for dissemination of content produced by others inevitably would impair the development of an emerging medium that holds great promise for the Nation. As the Court of Appeals stated recently in Zeran:

The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. 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.

129 F.3d at 330.

The legislative history of Section 230 further confirms Congress's intent to immunize interactive computer services from liability for dissemination of third parties' tortious online speech. Debate on the bill on the House floor revealed a congressional understanding that interactive service providers should not be responsible for defamatory or otherwise harmful third-party content because the nature of the medium makes it impossible for them systematically to review and edit all third-party content:

There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. [Section 230] will cure that problem . . . .

141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte)<sup>16/</sup>; see also Doe, 1997 WL 374223, at \*4.

Congress's intention to immunize interactive service providers from liability for third-party content is further demonstrated by the statute's conference report, which states that one of the purposes of Section 230 was to overrule the only reported case in which an interactive service provider had ever been found potentially liable for tortious third-party content. In Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at \*1, \*5, 23 Media L. Rep.

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<sup>16/</sup> A copy of the pertinent legislative debate is included in the accompanying Appendix at tab 5.

(BNA) 1794 (N.Y. Sup. Ct. May 24, 1995),<sup>17/</sup> a state trial court had concluded that Prodigy, which is another interactive service provider, could be liable for allegedly defamatory content posted by an unidentified bulletin board user. The court decided to treat Prodigy as a publisher of the information because Prodigy had held itself out to the public as a family-oriented service and attempted to exercise editorial control over third-party content. See id. at \*\*3-4. As the Conference Report stated:

One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy 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. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

H.R. Conf. Rep. No. 104-458, at 194 (1996).<sup>18/</sup>

Ultimately, then, Section 230 represents a policy decision by Congress to immunize interactive service providers from liability for harmful third-party content not only to promote and preserve the development of the new electronic medium, but also out of a recognition that the threat of such liability actually represents a disincentive to responsible self-regulation. As one legislator put it, Section 230 was designed to give interactive service

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<sup>17/</sup> A copy of the Stratton-Oakmont decision is included in the accompanying Appendix at tab 6.

<sup>18/</sup> A copy of the relevant portion of the Conference Report is included in the accompanying Appendix at tab 7.

providers “a reasonable way to . . . help them self-regulate themselves without penalty of law.”

141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Barton) (emphasis added); see also Zeran, 129 F.3d at 331 (Section 230 was designed “to encourage service providers to self-regulate the dissemination of offensive material over their services.”).

**B. Holding AOL Liable Here Would Defeat Congress’s Objectives.**

A ruling that AOL is not immune from BEW’s claims would contravene Section 230’s core policy objectives. First, as a practical matter, such a ruling would impose an enormous burden on AOL, frustrating Congress’s expressed purpose to promote “freedom of speech in the new and burgeoning Internet medium” by eliminating the “threat [of] tort-based lawsuits” against interactive services for injury caused by “the communications of others.” Id. at 330. As the Zeran court stated:

The amount of information communicated via interactive computer services is . . . 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 331; see also Blumenthal, 992 F. Supp. at 49 (“In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations . . .”).



The burden that would result from imposing liability on AOL in a case such as this would be crushing. Under the legal regime that BEW envisions, AOL would have to assure the accuracy of each individual item of information concerning each of the more than 20,000 securities for which ComStock supplies stock quotes. (Shenk Decl. ¶ 10.) This burden would be simply impossible to bear for several reasons, including the sheer volume of information to be verified, the fact that it changes constantly and with lightning speed, and the fact that AOL itself lacks any objective benchmark on which to rely in determining whether any particular price or volume datum is accurate. The impossibility of such monitoring, coupled with the risk of liability for all erroneous information, would create a strong incentive for AOL not to provide, or sharply limit, the quantity and scope of financial information available through its service. This is precisely the sort of “chilling effect” that Congress sought to eliminate by enacting Section 230.

Imposing liability on AOL in these circumstances also would undermine Congress’s second core objective of eliminating disincentives to self-regulation of objectionable third-party content. The claims in the First Amended Complaint apparently are based on a theory that AOL should be liable because it allegedly knew or should have known about the allegedly erroneous stock quote information.<sup>19/</sup> As the Fourth Circuit recognized in Zeran, however, any

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<sup>19/</sup> See, e.g., Am. Comp. ¶¶ 39, 45. It is not surprising that BEW has attempted to plead that AOL was somehow “on notice” of the supposedly erroneous information at issue in this case. The First Amendment to the United States Constitution prohibits imposition of liability on a distributor of information, such as an interactive computer service, unless the defendant knew or should have known of the existence and tortious nature of the particular content at issue in the case. See Smith v. California, 361 U.S. 147, 152-53 (1959); Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 139-41 (S.D.N.Y. 1991).

regime that would impose liability based on whether the service provider “knew or should have known” of the harmful third-party content would “reinforce[] service providers’ incentives to . . . abstain from self-regulation.” 129 F.3d at 333. Under such a regime,

[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially [harmful] material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

Id.

In the context of this case, a notice-based liability regime would create a strong incentive for AOL not to do things that it has done in the past to detect and help rectify apparent errors in the stock quote information available through its service, such as having employees or contractors whose duties or services include fielding complaints and inquiries from subscribers about suspected errors and communicating directly with ComStock and/or Townsend concerning suspected errors that come to AOL’s attention. (See Shenk Decl. ¶ 21; Hsu Decl. ¶¶ 18-22.) Under a notice-based liability regime, AOL would have an incentive to maintain complete ignorance concerning the content and workings of the Quotes & Portfolios area, since that state of mind would offer it the greatest protection from liability. This is precisely the sort of disincentive to responsible self-regulation that Congress sought to eliminate when it enacted Section 230.

Ultimately, the task for this Court is to construe Section 230 in a manner that both accords with the plain meaning of its terms and also advances the purposes of the statute as expressed in its enacted findings and statements of policy and legislative history. See, e.g.,

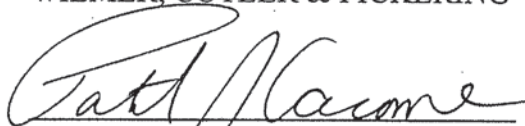
Crandon v. United States, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”). Here, the only way to meet these twin objectives is to conclude that Section 230’s “publisher or speaker” prohibition immunizes AOL from BEW’s effort to make it liable for allegedly harmful content provided by third parties.

CONCLUSION

For the foregoing reasons, BEW's suit impermissibly seeks to "treat[]" AOL as the "publisher or speaker" of "information provided by another information content provider," in direct contravention of Section 230(c)(1). Accordingly, AOL is entitled to summary judgment in its favor on all of BEW's claims.

Respectfully submitted,

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