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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.

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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**REPLY MEMORANDUM IN FURTHER SUPPORT**
**OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

BEW's opposition to AOL's motion for summary judgment, and its half-hearted cross-motion for partial summary judgment, are meritless. From a factual standpoint, BEW has not controverted any of the detailed evidence that AOL has submitted to support its claim of statutory immunity. Instead, BEW simultaneously contends: (1) that there are no genuine issues of fact relating to the immunity issue and that BEW is entitled to partial summary judgment based entirely on selected facts that AOL has adduced, (2) that even though BEW has produced no evidence of its own there are genuine issues of material fact relating to the immunity issue that preclude summary judgment in favor of AOL, and (3) that BEW has "no knowledge" of the facts relevant to the immunity issue and is entitled to a continuance to conduct discovery. From a legal standpoint, BEW relies entirely on flawed arguments that fundamentally misconstrue the plain meaning and scope of 47 U.S.C. § 230 and that other courts have already rejected.

This Reply Memorandum refutes all of the arguments that BEW offers on the merits of the immunity issue. AOL's separate Opposition to BEW's Rule 56(f) Motion demonstrates that BEW's claim that discovery is needed is also without merit.[1/]

## AOL'S REPLY TO BEW'S RESPONSE TO AOL'S STATEMENT OF UNDISPUTED MATERIAL FACTS

AOL's opening memorandum set forth in painstaking detail, with full citations to the evidentiary record, all of the undisputed material facts on which its motion for summary judgment is based. (AOL Mem. at 2-5.) BEW's "Response to AOL's Statement of Undisputed Facts" (BEW Opp. at 1-6) does not even purport to dispute any of these facts. Instead, with one trivial exception, BEW has in every instance either conceded outright that AOL's facts are undisputed (id. at 2 (¶¶ 1-2)) or else asserted that "BEW has insufficient facts to respond adequately" to AOL's statement (id. at 2-6 (¶¶ 3-12)).

The only exception is that BEW purports to "dispute[]" what it erroneously claims is a "legal conclusion" in the last paragraph of AOL's Statement of Undisputed Material Facts. (BEW Opp. at 6 (¶ 13).) In that paragraph, AOL stated:

> 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

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[1/] Under this Court's "package rule" for filing memoranda in support of and in opposition to motions, AOL's Opposition to BEW's Cross-Motion for Partial Summary Judgment and its Opposition to BEW's Rule 56(f) Motion ("AOL Rule 56(f) Opp."), which are being served on BEW's counsel simultaneously with this reply, will not be filed until BEW completes its own reply memoranda on those motions. Due to the close relationship of those oppositions to the issues discussed herein, AOL is including copies of them in the accompanying Supplemental Appendix.

> 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.)

(AOL Mem. at 5 (¶ 13).) BEW does not identify the "legal conclusion" that it sees lurking in this paragraph, and AOL submits that there is none. In any event, as for the facts set forth in this paragraph, BEW again says only that it "has insufficient facts to respond adequately." (BEW Opp. at 6 (¶ 13).)

BEW's complete failure to controvert any of the facts on which AOL's motion is grounded, coupled with its similarly complete failure to demonstrate a right to take discovery (see AOL Rule 56(f) Opp.), requires that AOL's motion for summary judgment be granted. On this point, Rule 56 could not be clearer:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e) (emphasis added); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986).

## ARGUMENT

In its opening brief, AOL established that Section 230 bars BEW's claims against AOL because holding AOL liable would impermissibly treat a "provider . . . of an interactive computer service . . . as the publisher or speaker of . . . information provided by another information content provider." 47 U.S.C. § 230(c)(1). In particular, AOL demonstrated that: (1) AOL is a provider of an "interactive computer service" (AOL Mem. at 22); (2) holding AOL liable would treat it as the "publisher or speaker" of the stock quote information (id. at 27-31); and (3) the stock quote information at issue was "information provided by another information content provider," namely ComStock and Townsend (id. at 22-27).

BEW readily concedes that all of these elements of immunity are present. It admits that AOL is a provider of an interactive computer service (BEW Opp. at 2) and does not even attempt to contest AOL's showing that holding AOL liable here would treat it as the publisher of the stock quote information. Moreover, BEW "assume[s]" that ComStock and Townsend were "information content providers" of the information at issue. (Id. at 9 n.3). These concessions should be sufficient to end the inquiry. But BEW seeks to avoid AOL's immunity defense on the basis of four arguments, all of which are meritless and two of which are so far afield that BEW concedes they would require further amendments to its pleadings.

### I. THE UNDISPUTED FACTS ESTABLISH THAT AOL HAD NO ROLE IN THE "DEVELOPMENT" OF THE ALLEGEDLY ERRONEOUS STOCK QUOTE INFORMATION.

BEW's front-line argument is that AOL played "an active role in developing" the allegedly erroneous information at issue in this case. (BEW Opp. at 7-13.) BEW never

explicitly explains why, even if this were true, AOL would not still be immune from liability.

Apparently BEW has the following unstated syllogism in mind:

(1) An interactive service provider that would otherwise be immune from liability under Section 230(c)(1) should forfeit that immunity if it was one of a group of two or more "information content providers" with respect to the particular information at issue.

(2) AOL's alleged "active role" relating to the stock quote information provided by ComStock and Townsend was somehow sufficient to make AOL "responsible, . . . in part, for the . . . development" of the information at issue in this case, placing it within the definition of the term "information content provider" set out in Section 230(e)(3).[2/]

(3) Therefore, even though the information at issue in this case indisputably originated with third parties, AOL is not immune.

Even assuming that the first premise of this syllogism were correct -- which AOL does not concede[3/] -- BEW's entire argument would fail because its second premise is simply false.

The undisputed facts overwhelmingly establish that AOL was not an "information content provider" with respect to the allegedly erroneous stock quote information because AOL was not "responsible, in whole or in part, for the creation or development" of that information. 47 U.S.C. § 230(e)(3). In particular, the undisputed evidence shows that the information at issue

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[2/] Section 230(e)(3) defines "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."

[3/] In fact, the first premise of the syllogism results from a misreading of Section 230(c)(1). As AOL noted in its Opening Memorandum, even if AOL had been (along with ComStock and Townsend) one of several "information content providers" of the allegedly erroneous stock quote information, the statutory test for immunity would still be satisfied because the information would still have been "provided by another information content provider." (See AOL Mem. at 26 n. 11.) The Court need not reach this issue, however, because, as shown in this Reply, the undisputed facts establish that AOL was not an "information content provider" with respect to the allegedly erroneous stock quote information.

was exclusively the product of a stream of data transmitted by ComStock and software provided by Townsend. (Shenk Decl. ¶¶ 15-16; Hsu Decl. ¶¶ 8-14.) It is also undisputed that the AOL-created software and other processes that AOL itself necessarily used to make this third-party information available to its subscribers did not change the substance or meaning of the information. (Hsu Decl. ¶ 8.H.) Indeed, the written contract between AOL and ComStock affirmatively barred AOL from any such role, expressly providing that "AOL may not modify, revise, or change" the stock quote information provided under the agreement. (Shenk Decl. ¶ 16.) In this case, therefore, it is undisputed that AOL acted as nothing more than a transparent conduit of other parties' information, a role that plainly entailed neither "creation [n]or development" of the information.

### A. BEW's Argument Rests on a Fundamental Misreading of the Phrase "Development of Information."

BEW's argument that AOL was itself an "information content provider" with respect to the stock quote information at issue in this case rests entirely on an erroneous construction of the phrase "development of information" as used in Section 230(e)(3). BEW's reading of this phrase is so broad and unbounded that, if it were accepted, interactive service providers could never be immune from liability for third-party content in any situation, including the situations presented in every previous case in which courts have held AOL to be immune.

Relying solely on its highly selective paraphrasing of a definition of the word "develop" in a decades-old dictionary, BEW asserts that an interactive service provider is responsible for "development" of information -- and by BEW's lights deprived of its immunity --

whenever it "make[s] [the information] actually available." (BEW Opp. at 10.[4/]) But under this construction, interactive service providers would lose their immunity simply by performing their most quintessential function, which is to make information -- including third-party content -- "actually available" to subscribers. Accordingly, this construction would defeat immunity in virtually all cases, a result that Congress obviously did not intend and that must be rejected. See, e.g., Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 514 (1990) ("We decline to adopt an interpretation of [a federal statute] that would render it a dead letter.").

Contrary to BEW's strained argument, in defining "information content provider" to include those who are "responsible, in whole or in part, for the . . . development of information," Congress obviously sought to encompass only those parties who play a role that actually adds to or otherwise changes the actual substance and meaning of the information. Of the various meanings that the word "development" may have depending on the particular context in which it is used, this is the meaning that most naturally applies in the context of "development of information." See American Heritage College Dictionary 380 (3d ed. 1993) (defining "development" to mean "[a] significant event, occurrence, or change") (emphasis added); Webster's Third New International Dictionary 618 (1971) (defining "development" to mean

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[4/] Citing Webster's Third New International Dictionary, BEW asserts that "'develop' means to cause to become more completely unfolded; to cause to increase or improve; to make actually available or usable." (BEW Opp. at 10.) BEW plucked these phrases out from among more than twenty different definitions of "develop" in that dictionary. Ironically, it ignored that same dictionary's definition of the word actually used in the statute -- "development" -- including the definition that works most naturally when juxtaposed with "information": "gradual advance or growth through progressive changes." Id. at 618 (emphasis added).

"gradual advance or growth through progressive changes") (emphasis added).[5/] Moreover, this is also the meaning that most logically complements the statute's closely related term "creation . . . of information," because one who "creates" information is by definition directly involved in shaping its substance and meaning. Thus, in accordance with the time-honored canons that words in a statute should be given their ordinary meanings, see, e.g., Moskal v. United States, 498 U.S. 103, 108 (1990), and that any uncertainties in the meaning of a particular word should be resolved by reference to the surrounding words, see, e.g., Jarecki v. Searle, 367 U.S. 303, 307 (1961), there can be little doubt that, contrary to BEW's position, the phrase "development of information" in Section 230(e)(3) must be construed to require, at a minimum, actions that amount to adding to or changing the substance or meaning of information.

Despite its conclusory claims to the contrary (BEW Opp. at 10-11), BEW's constructions of the terms "development of information" and "information content provider" are irreconcilable with the unbroken line of prior cases holding AOL to be immune from liability for third-party content carried on its service. In each of those cases, no less than the present case, the allegedly harmful information necessarily had been "made available" to AOL subscribers through computers and software owned and operated by AOL that comprise the basic transmission and delivery mechanisms of the AOL service. For example, the third-party messages at issue in Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998), became available to AOL subscribers only by being transmitted to, and

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5/ See also Compact Edition of the Oxford English Dictionary 281 (1971) (defining "development" to mean "gradual advancement through progressive stages"); Random House Dictionary of the English Language 543 (2d ed. 1987) (defining "develop" to mean "to cause to grow or expand" or "to elaborate or expand in detail").

processed by, AOL's elaborate proprietary message board system. Id. at 329. Likewise, the statements of an AOL subscriber that were at issue in Doe v. America Online, Inc., No. CIV. CL 97-631 AE, 1997 WL 374223 (Fla. Cir. Ct. June 26, 1997), were made available to other AOL subscribers only by being transmitted to, and processed by, AOL's computer network and chat room system. Id. at *1. BEW concedes that Section 230 properly immunized AOL in those cases. (BEW Opp. at 11.) But it simply fails to recognize that under its interpretation of Section 230 (and particularly its tortured attempt to equate "making [information] actually available" with "development of information"), Section 230 would not have applied in Zeran, Doe, or any other similar case.

BEW is no more successful in seeking to distinguish Blumenthal v. Drudge & America Online, Inc., 992 F. Supp. 44 (D.D.C. 1998). Indeed, BEW's own summary of that case demonstrates the fallacy of its position. BEW notes that, after Drudge wrote the content at issue in that case, he "transmitted new editions [of the content] by e-mailing them to AOL which then posted them on its service." (BEW Opp. at 11.) In other words, in Blumenthal -- as in every other case involving third-party content carried on an interactive computer service -- AOL had an unavoidable, active role in making the content available to its subscribers. Under the construction of Section 230 that BEW espouses, AOL's "active role" in making Drudge's content "actually available" to its subscribers should have rendered Section 230 automatically inapplicable. Of course, the Blumenthal court held just the opposite. The outcome should be no different here.

BEW further errs when it argues that its reading of the statute is supported by the canon that statutes "in derogation of common law[] should be strictly construed when it is not

clear Congress intended to invade the common law." (BEW Opp. at 13 (citing United States v. Texas, 507 U.S. 529, 534 (1993)).) In enacting Section 230, Congress made it clear that it intended to abrogate State common law by prohibiting any cause of action "under any State . . . law that is inconsistent with this section." 47 U.S.C. § 230(d)(3); see Texas, 507 U.S. at 534; Zeran, 129 F.3d at 334. Reliance on this canon here to overcome AOL's claim of immunity therefore would impermissibly "defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (quotation omitted); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (canon does not govern "when a statutory purpose to the contrary is evident" (quotation omitted)). Interpreting the term "development" as BEW suggests would render Section 230 a dead letter and thus "lessen the scope plainly intended to be given to the measure."[6/]

### B. BEW Has Failed to Refute AOL's Showing that It Was Wholly Uninvolved in the "Development" of the Information At Issue.

Once BEW's nonsensical interpretation of the statutory phrase "creation or development of information" is cast aside, it becomes readily apparent that BEW has not come even close to identifying any fact that would support its claim that AOL had a role in the "development" of the allegedly erroneous information at issue in this case. Indeed, a review of

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[6/] BEW suggests that AOL advocates an "extreme interpretation" of the statute that would make AOL immune in every case, "even if AOL is the creator or developer of that information." (BEW Opp. at 12.) This is nonsense. AOL concedes that Section 230(c)(1) does not immunize it from liability for any information that AOL creates itself, and it has supported its motion for summary judgment with undisputed facts establishing that it was neither the "creator nor developer" of the allegedly erroneous information at issue in this case.

the "facts" that BEW offers on this point quickly exposes them as nothing more than a hodgepodge of distortion, conjecture, and irrelevancies.

First, BEW misleads when it repeatedly contends that AOL's opening brief contained a statement "imply[ing] that there is some alteration between the [Townsend] database and the [information available to subscribers in the] Quotes & Portfolio service area." (BEW Opp. at 5, 8-9 (citing AOL's Statement of Undisputed Material Facts ¶ 7).) The statement in AOL's brief to which BEW cites, however, stated unequivocally that

> At all times relevant to the Amended Complaint, all of the values for price and trading volume for particular securities that were contained in the continuously updated stock quotation information available through the Quotes & Portfolio area of the AOL service were taken directly and without substantive alteration from the ComStock/Townsend Database.

(AOL Mem. at 4 (emphasis added).) To achieve a different meaning, BEW simply misquotes AOL's statement -- changing the word "substantive" to "substantial" -- and then falsely argues that AOL has implied that it actually changes the substance of the information provided by ComStock and Townsend. (See BEW Opp. at 5.)

Second, without any basis whatsoever, BEW repeatedly speculates that AOL may have had some role in "developing" the defamatory information because it "may very well own" the Townsend software. (Id. at 13; see also id. at 10.) Putting aside the legal point that mere ownership of software would have little or no bearing on the question of responsibility for "development" of information, BEW's guesswork on this point is simply wrong. As AOL's supplemental declarations establish, AOL does not own the Townsend software. (Shenk Supp. Decl. ¶ 11; Hsu Supp. Decl. ¶ 5.) In fact, AOL cannot even use the Townsend software without

obtaining a secret password that Townsend controls and changes every month. (Hsu. Supp. Decl. ¶ 5.)

Third, BEW fixates on a few facts concerning the technical operation of the AOL service that, while true, are entirely irrelevant to the question of whether AOL had a role in "development" of the allegedly erroneous information. Specifically, BEW repeatedly notes that AOL receives the stock quotation information on its premises (BEW Opp. at 9-10, 13), owns the machines on which the Townsend Software runs (id. at 8, 10, 13), and provides an "electronic interface" through which AOL subscribers can access the information (id. at 10). But these facts have no significance except under BEW's extreme and unsupportable definition of "development." Obviously, in virtually every instance that the AOL service carries third-party information, the information inevitably will in some form be delivered to AOL's premises and processed through AOL's computers. But, unless AOL acts to substantively alter the information -- which indisputably did not occur here -- there can be no claim that AOL was responsible for the "development" of the information.

Fourth, BEW erroneously argues that AOL's alleged "marketing and promotion of the Quotes & Portfolios service area" somehow demonstrates AOL's responsibility for "development" of the allegedly erroneous information at issue in this case. (Id. at 10, 13.) BEW does not offer any facts concerning the marketing or promotion to which it is referring. Nor does it even begin to explain how such marketing or promotion might mean that AOL is responsible for the "development" of the ever-changing stock quote information, any more than a bookstore hawking a particular book could be deemed to be responsible for the "development" of the book's contents. And BEW's claim that this alleged marketing "distinguishes this case from the

other CDA cases in which courts have found immunity" (id. at 10) is wrong. The court in Blumenthal specifically discussed evidence showing that AOL "affirmatively promoted" the third-party content at issue in that case and nonetheless held that Section 230 provided AOL with immunity. 992 F. Supp. at 51-52.

Simply put, an interactive service does not become "responsible," even in part, for the "development" of information generated by a third party merely by announcing and promoting the fact that a particular type of content from the third party will be available on the service. BEW's argument on this point actually runs directly counter to the policies of Section 230. Congress enacted Section 230 to promote interactive services as a "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity." 47 U.S.C. § 230(a)(3). The capacity for services to play this role would be significantly diminished if service providers were inhibited from informing users about the sources and types of information that are available on their services. This is especially true given the huge, and often undifferentiated, amounts of ever-changing information that are available in cyberspace.

Fifth, and finally, BEW obliquely suggests that AOL is responsible for the "development" of the allegedly erroneous information because it does some monitoring of the stock quote information and has personnel whose duties include responding to complaints about alleged errors in the stock quote information. (BEW Opp. at 9.) But again BEW never explains how AOL's non-systematic, non-comprehensive monitoring for accuracy somehow renders AOL responsible for the "development" of the information. And here again, BEW's argument is contrary to prior Section 230 decisions. The court in Blumenthal specifically rejected the

suggestion that AOL's contractual right to review and require changes to content supplied by a third party deprived AOL of Section 230 immunity. 992 F. Supp. at 51-52. Likewise, in Zeran, the fact that AOL had employed personnel who had fielded complaints about the defamatory messages did not make Section 230 inapplicable. Zeran, 129 F.3d at 329, 333.

In fact, depriving AOL of immunity because it endeavors to perform limited monitoring of the accuracy of the stock quote information provided by ComStock and Townsend would directly contravene one of the most basic purposes of Section 230, which was to remove any disincentives to such self-regulation. The Conference Report on Section 230 explicitly states that the statute was designed to overrule Stratton Oakmont Inc. v. Prodigy Servs. Co., No. 31063194, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which had held an interactive service subject to liability for third-party content precisely because it had sought to retain and exercise editorial control over such content. (See AOL Mem. at 33-35.) As the Fourth Circuit explained in Zeran, "Congress enacted § 230 to remove . . . disincentives to self[-]regulation" and expressly sought to avoid a regime in which "computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability." 129 F.3d at 331. Thus, BEW's argument that AOL should lose its immunity because it has engaged in some monitoring in an effort to increase the accuracy of the stock quote information turns Section 230 on its head.[7/]

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[7/] Section 230's separate Good Samaritan provision, 47 U.S.C. § 230(c)(2), which explicitly bars holding interactive service providers liable for any voluntary action to restrict access to objectionable material, further confirms that AOL may not be held liable in this case on account of its own monitoring efforts.

In sum, BEW's attempt to negate AOL's statutory immunity on the ground that AOL allegedly "takes an active role in developing the stock quote information" must be rejected because it rests entirely on a nonsensical construction of the statute and a series of irrelevant facts and conjectures.

## II. THE PURPOSES OF SECTION 230, FAR FROM SUPPORTING BEW'S CRAMPED READING OF THE STATUTE, CLEARLY CONFIRM THAT AOL IS IMMUNE FROM SUIT.

In its opening brief, AOL demonstrated that the overall purposes of Section 230, as evident in both the statute's extensive preamble and its legislative history, strongly support the conclusion that the statute bars BEW's suit. (AOL Mem. at 31-38.) As AOL explained and as every case to have considered Section 230 in the context of tort suits has found, holding AOL liable for third-party content would both undercut Congress's intent to promote freedom of speech in this new and important medium and undermine Congress's objective of eliminating disincentives to self-regulation of objectionable third-party content.

Notwithstanding the obvious breadth and scope of Section 230's policy objectives, BEW now contends that the "overriding purpose and objective" of Section 230 was to protect minors from pornographic material on the Internet, erroneously implying that Section 230 should not shield AOL from liability in defamation cases. (BEW Opp. at 14-16.) BEW apparently forgets its own acknowledgment only a few pages earlier that cases such as Zeran, Blumenthal, and Aquino v. Electriciti, Inc. -- which all involved allegedly defamatory content, not content harmful to children -- represent "the kind of situation that Congress intended its immunity provision to cover." (Id. at 11.) In any event, BEW's proposed limitation on the reach

of Section 230 is foreclosed by the statute's language, its legislative history, and cases interpreting Section 230.

In Section 230's preamble, Congress articulated several sweeping rationales for the immunities conferred by the statute. Congress enacted the immunity provision in Section 230(c)(1) because it recognized that permitting lawsuits against interactive service providers based on third-party content would threaten to halt the "continued development of the Internet and other interactive computer services and other interactive media," 47 U.S.C. § 230(b)(1), which Congress thought would be better served if kept "unfettered by Federal or State regulation," id. § 230(b)(2). Thus, while Congress indeed sought to encourage interactive service providers to take advantage of blocking and filtering technologies that empower parents to restrict their children's access to objectionable online material, see id. §§ 230(b)(3), (4), that objective was but one part of a broader policy of protecting the vibrancy of interactive media by shielding service providers from potentially crippling lawsuits. See Zeran, 129 F.3d at 330-31.

The futility of BEW's attempt to limit Section 230 only to cases involving the availability of material harmful to children is further demonstrated by Section 230's legislative history. As BEW admits (BEW Opp. at 11, 16), Congress expressly stated that one of its goals in enacting the statute was to overrule the Stratton Oakmont case. See H.R. Conf. Rep. No. 104-458, at 194 (1996). But the content at issue in Stratton Oakmont was not pornographic or otherwise harmful to children. Instead, Stratton Oakmont was a case in which a service provider was held potentially liable for allegedly defamatory content provided by a third party and concerning a small business -- precisely the same situation as in this case.

In light of the unequivocal statutory language and legislative history, it is hardly surprising that every court to have considered the applicability of Section 230 to a case involving an interactive service provider's potential liability for allegedly defamatory material unhesitatingly has found Section 230 applicable. In Blumenthal, for example, the court expressly rejected any suggestion that Section 230 was limited to cases involving obscene or violent material. 992 F. Supp. at 52 n.13. The Fourth Circuit in Zeran -- which also involved allegedly defamatory material -- explained that, "[t]he purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." 129 F.3d at 330. Accordingly, "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries" for third-party content. Id. at 330-31.

BEW's remaining policy-oriented arguments similarly fail. Its claim that Section 230 provides immunity only for "postings made in chat rooms and on bulletin boards," not content that third-parties provide pursuant to licensing agreements (BEW Opp. at 17), is plainly wrong. Blumenthal explicitly held that Section 230's scope extends to content provided under a license agreement. 992 F. Supp. at 51-52. Moreover, it is fallacious to suggest, as BEW does (BEW Opp. at 17), that the "burden" to a service provider such as AOL of comprehensively and systematically monitoring the accuracy of constantly changing numeric data for tens of thousands of individual stocks would be somehow more bearable than the burden of monitoring the content of chat rooms and message boards. (See AOL Mem. at 36.) Clearly, if AOL were put to the choice of having to monitor comprehensively the accuracy of the stock quote

information or face liability for any errors that occur, it would have a very strong incentive to eliminate such information from its service altogether, or at least substantially limit its quantity and scope. This is precisely the sort of chilling effect Congress sought to eliminate by enacting Section 230.

BEW fares no better in arguing that imposition of liability in this particular case would not create a disincentive to self-regulation of interactive services. (BEW Opp. at 17.) BEW contends that no disincentive would arise here because AOL allegedly gained notice of the alleged errors not from self-screening, but from complaints received by AOL's "employees and contractors whose duties specifically include fielding such complaints:" (Id.) BEW ignores, however, that imposing liability on this basis would discourage AOL and every other interactive service provider from providing mechanisms and employing personnel to receive and respond to complaints from outsiders, creating precisely the sort of disincentive that Congress sought to eliminate. The decisions of the District Court and the Court of Appeals in Zeran, where it was alleged that AOL had known of the defamatory postings based on an outsider's complaints, resoundingly rejected the very argument that BEW now makes. See 129 F.3d at 333; Zeran v. America Online, Inc., 958 F. Supp. 1124, 1135 (E.D. Va. 1997) (finding that notice-based liability would discourage interactive service providers from maintaining a "hot-line" or other procedure for reporting objectionable content).

## III. THE UNDISPUTED FACTS ESTABLISH THAT TOWNSEND WAS NOT AOL'S AGENT.

BEW next erroneously argues that Section 230 is inapplicable in this case because, according to BEW, Townsend was AOL's "agent" and AOL is therefore "vicariously

liable" for Townsend's alleged "negligence." (BEW Opp. at 18-21.) This argument is fraught with numerous threshold and procedural problems, including that (1) the Amended Complaint does not plead this theory,[8] (2) BEW has not explained how Townsend was "negligent," and (3) BEW has not established that Section 230 does not immunize interactive service providers from vicarious liability for the negligence of "information content providers" who are their non-employee agents.[9] But there is no need to ponder these problems, for BEW's theory has an even more basic -- and incurable -- one: The undisputed facts firmly establish that Townsend was not AOL's agent.[10]

Agency is a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) Agency § 1 (1958); see also General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 393 (1982) ("At the core of agency is a

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[8] BEW concedes that its new "agency" theory would require further amendment of its Amended Complaint (BEW Opp. at 21 n.5), but has not yet even sought leave to file such a pleading. Of course, it would be improper to deny AOL's motion for summary judgment on the basis of a theory that has not even been pled. See Evans v. McDonald's Corp., 936 F.2d 1087, 1091 (10th Cir. 1991).

[9] BEW offers no authority or analysis to support its assumption that Section 230 would not bar a cause of action based on the negligence of a third-party agent. In fact, since a non-employee agent is by definition an "independent contractor" and a "third party," and since Section 230 has been held to prohibit "imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious" content, Zeran, 129 F.3d at 330-31, there is strong reason to believe that Section 230 does bar such agency liability.

[10] The sum total of the "facts" that BEW purports to adduce on the agency issue is set forth in a single paragraph of its brief that cites nothing but portions of BEW's "Statement of Undisputed Facts" that, in turn, cite only AOL's submissions. (See BEW Opp. at 20.) As set forth in greater detail in AOL's opposition to BEW's Rule 56(f) Motion, while BEW has expressed a desire to take discovery relating to this issue, it has failed to satisfy even the most basic requirement of showing that discovery probably would yield any evidence that would contradict AOL's declarations. (See AOL Rule 56(f) Opp. at 3-9.)

fiduciary relation arising from the consent by one person to another that the other shall act on his behalf and subject to his control.") (internal quotations omitted).[11/] Thus, for an agency relationship to exist, there must be, at a minimum, (1) consent by both parties to the creation of the rights and obligations of agency, (2) the principal's right to control, and (3) a fiduciary obligation on the part of the agent to act on behalf of the principal. Restatement (Second) Agency § 1; United Packinghouse Workers v. Maurer- Neuer, Inc., 272 F.2d 647, 648 (10th Cir.1959), cert. denied, 362 U.S. 904 (1960); Johnson v. Bechtel Assocs. Prof'l Corp., 717 F.2d 574 (D.C. Cir. 1983), rev'd on other grounds, 467 U.S. 925 (1984).[12/] Not one of these required elements is present in the AOL-Townsend relationship.

### A. AOL Did Not Consent to Have Townsend Act as Its Agent.

AOL has never consented to have Townsend act on its behalf. (Shenk Supp. Decl. ¶ 6; Hsu Supp. Decl. ¶ 3.) Indeed, the two companies have never had any written or oral contract or agreement of any sort, and AOL has never provided Townsend with any payment or

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11/ Courts interpreting federal statutes routinely rely on the "general common law of agency, rather than on the law of any particular State to give meaning" to concepts such as employment and agency, because "federal statutes are generally intended to have uniform nationwide application." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (quotation omitted) ("CCNV"); Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir. 1989). Reliance on federal law is "particularly appropriate" in construing a statute, such as Section 230, that preempts state law. CCNV, 490 U.S. at 740. Accordingly, this brief refers to the general common law of agency on which courts have relied in construing other federal statutes. In any case, the law of New Mexico, on which BEW relies, establishes essentially the same test for agency. See, e.g., Hansler v. Bass, 743 P.2d 1031, 1036 (N.M. Ct. App. 1987).

12/ Some courts also have required a showing of the alleged agent's power to alter legal relations between the principal and third parties. See Everman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 219 (6th Cir. 1992); United States v. York, 890 F. Supp. 1117, 1133 (D.D.C. 1995), rev'd on other grounds, 112 F.3d 1218 (D.C. Cir. 1997); see also Restatement (Second) Agency § 12 (1958). Townsend had no such authority. (Shenk Supp. Decl. ¶ 7.)

other consideration. (Shenk Supp. Decl. ¶ 5.) Nor has AOL ever conferred to Townsend any authority to commit AOL to any business relationships with third parties. (Id. ¶ 7.)

The structure of the relationship between AOL and ComStock further demonstrates that AOL never consented to have Townsend act as its agent. Townsend was presented to AOL by ComStock as an entity with which ComStock had a "strategic alliance." (Id. ¶ 4.) While AOL does not know the details of the arrangement between ComStock and Townsend, it is AOL's understanding that ComStock compensates Townsend for providing the Townsend Software that transforms the stream of data that ComStock provides into a usable database. (Id. ¶ 10.) AOL has always understood that the Townsend Software is a subcomponent of a unitary informational service that ComStock provides pursuant to the written agreement between ComStock and AOL. (Id. ¶ 4; Hsu Supp. Decl. ¶ 3.) That agreement expressly provides that the relationship between AOL and ComStock is merely an independent contractor relationship, and that neither AOL nor ComStock consents to have one be the agent of the other. (Shenk Supp. Decl. ¶ 3.) Since any relationship between AOL and Townsend is subsidiary to, and even less direct than, the non-agent relationship between AOL and ComStock, Townsend a fortiori is not an agent of AOL.

### B. AOL Did Not Control the Manner of Townsend's Performance.

While BEW blithely asserts that the "facts known at this time suggest that . . . AOL had either the right to control or actually controlled Townsend's actions" (BEW Opp. at 20), all of the facts show just the opposite: that AOL did not possess or exercise the sort of control over Townsend that would be essential to create an agency relationship. This is especially clear because the only form of control that is relevant for purposes of establishing an

agency relationship is "control over the manner of performance" of the putative agent.[13/] By contrast, control over results that a contractor is supposed to produce -- as opposed to the manner of achieving those results -- does not create an agency relationship. See, e.g., Oberlin v. Marlin American Corp., 596 F.2d 1322, 1325-27 (7th Cir. 1979) (right of manufacturer to monitor and approve alleged agent's written work product did not give it "control over the day-to-day operations of [the alleged agent] beyond that necessary to ensure uniform quality of the product or service in question" and therefore was not evidence of an agency relationship).

The following undisputed facts prove that AOL never controlled, or had any right or opportunity to control, the manner in which Townsend operated:

- There is no contract or other instrument between Townsend and AOL, much less one that obligates, or purports to obligate, Townsend to obey any command or instruction from AOL. (Shenk Supp. Decl. ¶ 8.)

- AOL personnel have never sought to exercise any control over the manner in which Townsend produces its software. (Shenk Supp. Decl. ¶ 12; Hsu Supp. Decl. ¶ 4.)

- AOL personnel have always believed that, to the extent that any party outside of Townsend itself has the right or opportunity to control the manner in which Townsend creates or provides the software that operates on AOL's premises, that party is ComStock. (Shenk Supp. Decl. ¶ 9; Hsu Supp. Decl. ¶ 4.)

- Although BEW repeatedly speculates that AOL may own the Townsend software (BEW Opp. at 2, 4, 5, 8, 10, 18, 20), AOL in fact has no ownership interest whatsoever in the Townsend software. (Shenk Supp. Decl. ¶ 11; Hsu Supp. Decl. ¶ 5.) Indeed, AOL has not so much as ever been given a copy of the source code

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13/ See Restatement (Second) Agency § 14 cmt. b (1958) ("[T]he fact that it is understood that the person acting is not to be subject to the control of the other as to the manner of performance determines that the relation is not that of agency.") (emphasis added); International Longshoremen's Ass'n v. NLRB, 56 F.3d 205, 249 (D.C. Cir. 1995) ("It is a fundamental principle of hornbook agency law that an agency relationship arises only where the principal has the right to control the conduct of the agent with respect to matters entrusted to him.") (emphasis added).

(i.e., the programming instructions that tell the computer how to carry out the functions of the software). (Hsu Supp. Decl. ¶ 5.) Instead, AOL is provided only with the temporary ability to use an executable version of the software (an executable version is equivalent to the copy a consumer receives when it buys disks containing software such as Microsoft Word). (Id.)

- The copy of Townsend Software that AOL uses is protected by a secret password that Townsend resets every month. If AOL does not obtain that password, the Townsend Software is unusable. (Id.)

- AOL has repeatedly requested that Townsend change the operation of its software so as to eliminate the software's password security feature. Townsend has not complied with this request. (Id. ¶ 6.)

- When the initial version of the Townsend Software was first installed on computers on AOL's premises, the installation was performed entirely by employees of ComStock; no personnel of Townsend were present. (Id. ¶ 9.)

- AOL has no voice in selecting which Townsend employees work on producing or revising the Townsend Software that Townsend provides. (Id. ¶ 7.)

- AOL understands that the Townsend Software is not a product that has been custom-made for AOL. To the contrary, AOL understands that Townsend provides identical, or nearly identical, software to numerous other businesses. (Id. ¶ 8.)

- While ComStock personnel introduced AOL personnel to Townsend personnel at one or more meetings before the stock quotation information provided by ComStock first became available through the AOL service, AOL personnel involved with the Personal Finance Channel have not met with ComStock personnel since that time. (Shenk Supp. Decl. ¶ 13; Hsu Supp. Decl. ¶ 10.)

- The AOL personnel responsible for the Quotes & Portfolios area are aware of no occasions since the stock quotation information provided by ComStock first became available through the AOL service when personnel from Townsend have visited AOL's premises or personnel from AOL have visited Townsend's premises. (Shenk Supp. Decl. ¶ 14; Hsu Supp. Decl. ¶ 11.)

In the face of these overwhelming undisputed facts, the only factor to which BEW points as alleged evidence of AOL's supposed control over Townsend is that "[i]f there is a problem with the stock information, AOL expects Townsend to rectify the problem immediately

. . . [and] Townsend attempts to respond accordingly." (BEW Opp. at 20.) In support of this "fact," BEW cites (indirectly) only statements in AOL's own declaration describing the requests that AOL made, first to ComStock and then to Townsend, that something be done to rectify alleged errors that had been noticed in the ComStock/Townsend Database in late 1996 and early 1997. At most, this evidence establishes that AOL sought (with mixed success[14/]) to control the quality of the end product -- or result -- that it was entitled to receive pursuant to its contract with ComStock. As already noted, however, control over the results of a contractual or other relationship, as opposed to control over the means and manner by which the putative agent attains the results, is not even relevant to the question of whether an agency relationship exists.[15/]

The Blumenthal decision confirms that AOL's ability to request or demand that the end-product of its contractual arrangement with ComStock -- that is, the stock quote information contained in the ComStock/Townsend Database -- be reasonably accurate is not evidence of any agency relationship between AOL and Townsend. Indeed, in Blumenthal AOL

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14/ Indeed, far from supporting BEW's argument, the fact that it took many weeks for Townsend to provide new software in response to AOL's repeated (and urgent) requests for help actually confirms the absence of the sort of control that would characterize an agency relationship.

15/ Moreover, Section 230's separate "Good Samaritan" provision, 47 U.S.C. § 230(c)(2), affirmatively precludes the imposition of liability -- vicarious or otherwise -- on AOL on the basis of the requests or demands it communicated to Townsend in an effort to eliminate or curtail the appearance of erroneous information in the Quotes & Portfolios area of its service. That provision explicitly states that

> [n]o provider . . . of an interactive computer service shall be held liable on account of -- any action voluntarily taken in good faith to restrict . . . availability of material that the provider . . . considers to be . . . objectionable.

47 U.S.C. § 230(c)(2).

had more than just a de facto ability to make such requests or demands; it had a contract with Drudge that explicitly established standards for accuracy and authorized AOL to "require reasonable changes" in Drudge's content. 992 F. Supp. at 51. Despite these contractual rights for AOL to control the results of its relationship with Drudge, the court in Blumenthal squarely held that "there is no evidence to support the view . . . that Drudge is or was an . . . agent of AOL." Id. at 50 (emphasis added). Here, where AOL and Townsend had no contract, the result is even clearer.

Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), a case whose facts are strikingly similar to this one, provides further support for the conclusion that AOL lacked the requisite control over Townsend that is essential to an agency relationship. In Cubby, the plaintiff alleged that CompuServe, another interactive computer service, was vicariously liable for a defamatory statement posted by a third-party.[16/] In that case, CompuServe had a contract with one third-party, CCI (similar to AOL's contract with ComStock), which, among other things, required that the content provided by CCI meet certain standards. CCI, in turn, had a relationship with another party (DFA), that helped provide the content CCI was making available to CompuServe (much as ComStock has an arrangement with Townsend). CompuServe had no contractual relationship with DFA, just as AOL has no contract with Townsend. Id. at 143. The plaintiff in Cubby claimed that CompuServe should be liable because either or both CCI and DFA were agents of CompuServe. Id. at 142-43.

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16/ The Cubby case predated enactment of Section 230, so the court decided the case based on general common law and First Amendment principles.

The court granted summary judgment in favor of CompuServe. The court held that CompuServe had no agency relationship with CCI because CompuServe's contractual right to ensure that the content met certain standards "merely constitute[d] control over the result" of CCI's work, not the manner of CCI's performance. 776 F. Supp. at 143. As for DFA, the court, noting the lack of any contractual relationship between CompuServe and DFA, found that "the tenuous relationship between DFA and CompuServe is, at most, that of an independent contractor of an independent contractor. The parties cannot be seen as standing in any sort of agency relationship with one another." Id. The AOL-Townsend relationship is no different.

### C. Townsend Had No Fiduciary Duty to Act Primarily for AOL's Benefit.

Finally, the undisputed facts also show that any relationship between AOL and Townsend lacked the essential element of agency that the hired party have a fiduciary duty "to act primarily for the benefit of [the alleged principal] in matters connected with his undertaking." Restatement (Second) Agency § 13 cmt. a (1958). Contrary to BEW's unsupported assertion (BEW Opp. at 20), Townsend does not develop its software "for AOL." To the contrary, Townsend was presented to AOL as a third-party software provider having a "strategic alliance" with ComStock. (Shenk Supp. Decl. ¶ 4.) AOL understood from the outset that ComStock and Townsend had teamed to provide stock quote information to other online services. (Shenk Supp. Decl. ¶ 4; Hsu Supp. Decl. ¶ 8.) Far from writing its software primarily for AOL's benefit, Townsend had already written the software now used on AOL's computers before AOL signed any contract with ComStock. (Hsu Supp. Decl. ¶8.) In other words, Townsend was simply providing "off-the-shelf" software it had developed for parties other than AOL. (Id.)

Since the start of the AOL-ComStock contractual relationship, Townsend has made changes to its software that were not in response to any particular request or need that was specific to the AOL-ComStock arrangement, but presumably were done for the benefit of either ComStock or customers of ComStock or Townsend. (Id.) Thus, in no way can Townsend be said to act "primarily for the benefit of" AOL. Indeed, by providing software to other parties who also make stock quote information available, Townsend effectively aids AOL's competitors -- the very opposite of acting as a fiduciary. Restatement (Second) Agency § 13 cmt. a (1958) (fiduciary duty of agent includes duty "not to compete with the principal . . . in matters relating to the subject matter of the agency").

In essence, the contract between AOL and ComStock requires not that ComStock or Townsend perform a service "on behalf of" AOL, but that ComStock deliver stock quote information to AOL, so that such material may be made available to AOL subscribers. ComStock has simply designated and arranged for Townsend to provide certain software to aid in the delivery of the stock quote information. But "[a] person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor." Id. § 14N cmt. b.

* * *

Thus, far from being an agent of AOL, Townsend does not possess even one of the multiple attributes courts have found to be inherent and essential to a person being another's agent. Accordingly, BEW's attempt to circumvent the protections of Section 230 by conclusorily asserting that Townsend is an agent of AOL must fail.

## IV. BEW'S NEW CLAIM OF "NEGLIGENT ENTRUSTMENT" SHOULD BE REJECTED AS AN IMPERMISSIBLE ATTEMPT TO EVADE THE PROTECTIONS OF SECTION 230.

In a final gambit, BEW resorts to another new claim that was not included in its Amended Complaint -- that allowing Townsend to provide the software used in connection with the provision of stock quotation information constituted "negligent entrustment." (BEW Opp. at 21-24.) Again, the fact that this claim has not even been pled is reason enough to reject it as a basis for denying AOL's summary judgment motion. (See supra at 19 n.8.) More fundamentally, allowing BEW to proceed with this claim -- which New Mexico courts have applied on only a few occasions and primarily in the context of the negligent entrustment of automobiles to incompetent drivers, see Gabaldon v. Erisa Mortgage Co., 949 P.2d 1193, 1202 (N.M. Ct. App.), cert. granted, 949 P.2d 292 (N.M. 1997) -- would be futile because it is nothing more than an impermissible attempt to make an end run around Section 230.

Without any analysis, BEW baldly claims that Section 230 does not apply to its new negligent entrustment theory. (BEW Opp. at 24.) But that is simply wrong. By definition, a negligent entrustment claim holds a defendant liable for the negligence of another person. See, e.g., Gabaldon, 949 P.2d at 1202. Accordingly, seeking to hold an interactive computer service liable for allegedly harmful online information under a theory of negligent entrustment goes to the core situation to which Section 230 applies -- when information is "provided by another information content provider."

Moreover, BEW's negligent entrustment claims would treat AOL as the "publisher or speaker" of this third-party content. Under Section 230, all "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." Zeran, 129 F.3d at 330. Choosing which parties will contribute content to a publication (i.e., who can publish) clearly is a "traditional editorial function" in which publishers engage. Because BEW's negligent entrustment claim seeks to hold AOL liable for allegedly choosing Townsend as a content provider of the stock quotation information, it necessarily "treats" AOL as a "publisher" of this third-party content in contravention of Section 230. See id. at 332 ("Those who are in the business of making their facilities available to disseminate the [content of] others may also be . . . regarded as publishers.").

More generally, BEW's theory of "negligent entrustment" is essentially a particular species of a more general negligence claim. See, e.g., McCarson v. Foreman, 692 P.2d 537, 541-42 (N.M. Ct. App. 1984) (applying "general principles" of negligence to analyze claim). And, as AOL established in its opening brief (AOL Mem. at 28-29) and BEW does not even attempt to challenge, a plaintiff may not evade the legal requirements of defamation and related torts by resorting to negligence claims. See, e.g., Zeran, 129 F.3d at 332; cf. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988) (plaintiff cannot circumvent First Amendment defenses to defamation action by pleading claim for another tort).

As courts have recognized, "[w]ithout such a rule [prohibiting evasion of restrictions on defamation suits], virtually any defective defamation claim . . . could be revived by pleading it as one for" another tort. Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1420 (C.D. Cal. 1987), aff'd, 867 F.2d 1188, cert. denied, 493 U.S. 812 (1989). That problem is clearly true of BEW's negligent entrustment claim. Under BEW's theory, an interactive computer service such as AOL could always be charged with "negligent entrustment" whenever

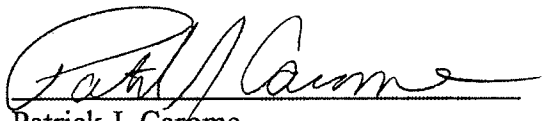
it allowed a third party to engage in the activity of providing content and the content turned out to be defamatory or otherwise tortious. In Blumenthal, for example, the plaintiff could have, under BEW's proposed theory, evaded the bar of Section 230 by pleading that AOL was negligent in "entrusting" the third party Drudge with the opportunity to post content available on AOL's subscribers. Congress clearly did not intend to allow the immunity it granted in Section 230 to be rendered meaningless by allowing plaintiffs to systematically bypass its protection through creative pleading. Accordingly, BEW's new "negligent entrustment" claim is utterly futile.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in AOL's opening memorandum, AOL's motion for summary judgment should be granted.

Respectfully submitted,

WILMER, CUTLER & PICKERING

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment and the accompanying Supplemental Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment were served on August 7, 1998 by first-class mail, postage pre-paid, on the following counsel:

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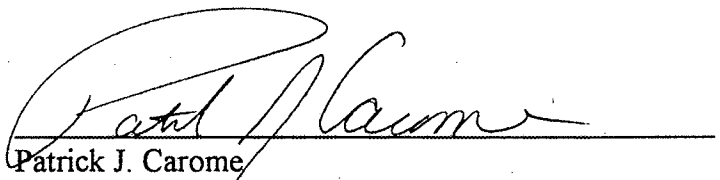

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