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

U.S. DISTRICT COURT  
DISTRICT OF NEW MEXICO

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*Robert M. Marshall*

No. CIV 97-0485LH/LFG

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

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

BEW's Supplemental Memorandum in Opposition to AOL's motion for summary judgment has utterly failed to raise any dispute regarding the facts that are material to AOL's statutory immunity from BEW's claims. Even after discovery under Fed. R. Civ. P. 56(f), BEW has not produced any evidence that contradicts the facts that AOL set forth in support of its motion. In particular, BEW has not presented any evidence that contradicts the key fact at the heart of AOL's motion -- the fact that all of the allegedly erroneous information concerning BEW's stock was provided entirely by two parties other than AOL, namely S&P ComStock and Townsend. Accordingly, 47 U.S.C. § 230 bars BEW's claims against AOL, and AOL's motion for summary judgment should be granted.

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

AOL's opening memorandum included a statement of all of the undisputed material facts on which its motion for summary judgment is based. (AOL Mem. at 2-5.) With the exceptions of paragraphs 3 and 7 of AOL's statement, BEW's Supplemental Opposition does not even purport to dispute any of AOL's facts. (BEW Supp. Opp. at 3-11.) Instead, BEW either (1) concedes that AOL's facts are undisputed and then merely asserts AOL was an information content provider based on its responses to paragraphs 3 and 7 (*id.* at 3 (¶¶ 1-2), 8 (¶ 4), 9 (¶¶ 5-6, 8), 10 (¶¶ 9-10)), or (2) does not dispute the AOL facts but claims they are immaterial (*id.* 10-11 (¶¶ 10-13)). Of course, neither of these responses meets BEW's burden to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

BEW does attempt to show a dispute about paragraphs 3 and 7 of AOL's statement of material facts, but its attempt plainly fails. Paragraph 3 of AOL's statement of material facts stated:

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.)

(AOL Mem. at 3 (emphasis added).) BEW now purports to dispute this fact by asserting that "AOL, ComStock and Townsend work closely and collectively to get the financial data from the source (the stock exchanges) to AOL's customer," and by reciting a "roughly chronological"

string of “facts” that it claims show that AOL joined with ComStock and Townsend in “providing” the allegedly erroneous stock quote information at issue in this case. (BEW Supp. Opp. at 3-8.) But, as AOL explains in Section II of this memoranda, the supposed “facts” on which BEW relies (even accepting all of them at face value) do not even begin to show that AOL provided any of the stock price and trading volume data that was available through the AOL service. (See infra at 9-22.)

BEW fares no better in attempting to dispute paragraph 7 of AOL’s statement of material facts, which stated:

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.)

(AOL Mem. at 4 (emphasis added).) BEW now claims to dispute this fact by alleging that AOL “made alterations to the ComStock/Townsend Database by deleting ticker symbols from the ComStock/Townsend Database in an effort to correct errors in the reporting of OTC stocks.” (BEW Supp. Opp. at 9 (¶ 7) (emphasis added).) Contrary to BEW’s suggestion, AOL’s occasional deletion of ticker symbols from the database -- which indisputably had only the effect of rendering all information about the stock in question unavailable to AOL subscribers until ComStock provided new data (Hsu Decl. ¶ 16) -- is entirely consistent with AOL’s proposition that the values for price and trading volume available through the AOL service were the same as those contained in the ComStock/Townsend Database. At bottom, BEW has simply made a bad and illogical argument -- that “providing” information is equivalent to its opposite, “deleting”

information. Moreover, as discussed below (see infra at 16-17), any rule that would deprive AOL of the protections of Section 230 on the basis of its decision to delete third-party information believed to be inaccurate would be totally contrary to the statute's most basic purpose.<sup>1/</sup>

### ARGUMENT

In its prior briefs, AOL has established that Section 230 bars all claims that seek to treat (1) an "interactive service provider" as (2) a "publisher or speaker" of (3) "information provided by another information content provider." (See AOL Mem. at 22-31.) BEW has conceded that each of these elements of Section 230 immunity is present here. It admits that AOL is an "interactive service provider" (BEW Opp. at 2; BEW Supp. Opp. at 3) and has never contested AOL's showing that BEW's claims seek to treat AOL as a "publisher" of the allegedly erroneous price and volume information concerning BEW's stock. BEW has also conceded that two parties other than AOL, namely ComStock and Townsend, were "information content

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<sup>1/</sup> In the argument section of its supplemental brief, BEW erroneously attempts to create the illusion of factual disputes, not by adducing evidence, but by misrepresenting what AOL has previously said about the facts supporting its motion. (BEW Supp. Opp. at 14-15.) For example, BEW falsely asserts that AOL has claimed that it "had virtually no contact with Townsend, or with Townsend personnel, other than the installation of Townsend Software." (Id.) To the contrary, AOL has consistently maintained that, when it learns of potentially erroneous stock information, it "typically contacts ComStock and/or Townsend to request that they look into the situation." (AOL Mem. at 13 (emphasis added).) Similarly, BEW's claim that AOL's asserted its "only role was to develop its own software to allow AOL customers link to the ComStock Data Stream as delivered through the Townsend Software" (BEW Supp. Opp. at 14 (emphasis added)) is simply false. Although AOL has maintained (and the undisputed evidence establishes) that "AOL has never had any role in the creation or development of the stock quotation information" (AOL Mem. at 10), AOL has articulated from the outset a number of other roles it did have, such as informing ComStock and/or Townsend of alleged errors (AOL Mem. at 13) and installing Townsend Software (id. at 11).

providers” of the information at issue -- i.e., that ComStock and Townsend were “responsible, in whole or in part, for the creation or development” of the stock quote information. (BEW Opp. at 9 n.3; BEW Supp. Opp. at 9-10.) Moreover, BEW has now abandoned two of the arguments on which it heavily relied in its initial opposition to AOL’s summary judgment motion: it no longer asserts that Townsend was an agent of AOL (see BEW Opp. at 18-21) or that AOL may be held liable under a claim for “negligent entrustment” (id. at 21-24). Indeed, although BEW admitted in its initial opposition that both its agency and negligent entrustment theories would require further amendments to its complaint (id. at 21 n.5), BEW’s subsequent motion for leave to amend conspicuously lacked any reference to either of these theories.<sup>2/</sup>

Having conceded the presence of the elements of Section 230 immunity and simply abandoned two of its earlier arguments, BEW is now left with only a single theory. BEW now contends (1) that AOL is not entitled to “absolute immunity” under Section 230 if AOL was, in addition to ComStock and Townsend, an “information content provider” of the allegedly erroneous information about BEW’s stock (BEW Supp. Opp. at 11-13); and (2) that AOL was in fact an “information content provider” of the information about BEW’s stock because it was “responsible, . . . in part, for the creation or development” of that information (id. at 13-17 (quoting 47 U.S.C. § 230(e)(3))). Although AOL disagrees with the first prong of BEW’s

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<sup>2/</sup> On January 12, 1999, after AOL answered BEW’s numerous interrogatories, BEW filed a motion for leave to file a second amended complaint together with an accompanying proposed Second Amended Complaint. That proposed pleading named ComStock and Townsend as additional defendants, but made no changes in the theories under which BEW sued AOL.

argument,<sup>3/</sup> the Court need not reach that issue because the second prong is so plainly contrary to the undisputed facts before the Court. Absolutely no evidence indicates that AOL was “responsible” -- even “in part” -- “for the creation or development” of the price and volume information concerning BEW’s stock.

**I. AOL WAS NOT “RESPONSIBLE, IN WHOLE OR IN PART, FOR THE CREATION OR DEVELOPMENT” OF THE ALLEGEDLY ERRONEOUS INFORMATION CONCERNING BEW’S STOCK.**

The undisputed facts overwhelmingly establish that AOL was not an “information content provider” with respect to the allegedly erroneous BEW 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). The undisputed sworn testimony of the AOL declarants on this point could not be clearer. Mr. Shenk stated that

[t]hroughout the period in which the ComStock Agreement has been effective, AOL has had no role whatsoever in the creation or development of the stock quotation information reflecting the values for price and daily trading volume of particular securities that was available through the Quotes & Portfolios area of the AOL service.

(Shenk Decl. ¶ 15 (emphasis added).) Instead, as Mr. Hsu explained,

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<sup>3/</sup> The first prong of BEW’s argument is wrong as a matter of law. (See AOL Mem. at 26 n.11; AOL Rep. Mem. at 5 n.3.) Contrary to BEW’s assertion that providing AOL “absolute immunity” for third-party content would “violate[] every tenant [sic] of statutory construction” (BEW Supp. Opp. at 12), AOL seeks no more than to give effect to the plain and literal meaning of Section 230. As AOL has previously demonstrated, even if AOL had been (along with ComStock and Townsend) an “information content provider” of the allegedly erroneous stock quote information, the statutory test for immunity would still be satisfied because the information still would have been “provided by another information content provider.” 47 U.S.C. § 230(c)(1). BEW’s reliance on the Blumenthal and Zeran cases (id. at 13), which both upheld AOL’s claims of statutory immunity, is obviously misplaced.

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.

(Hsu Decl. ¶ 14 (emphasis added).) And the price and daily volume 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.

(Id. ¶ 13 (emphasis added).) Even the contract between AOL and ComStock specifically provided that “AOL may not modify, revise, or change” the information provided by ComStock.

(Shenk Decl. ¶ 16; see also Deposition of Joseph E. Berg (“Berg Dep.”) at 109 (AOL “display[s] the information that is on [the Townsend Computers] and that’s all we do with it”).<sup>4/</sup>)

The absence of any AOL role in the creation or development of the price and daily volume information is confirmed by the undisputed evidence in the record demonstrating that, from the time decimal errors in the price information for some OTC stocks began to appear, ComStock and Townsend recognized that they -- as the joint providers of the stock quote information -- would have to fix any problem. After AOL informed ComStock of such errors, ComStock told Mr. Hsu by e-mail “[t]his appears to be a problem on our end” and promised to get back to AOL after further investigation. (AOLP-0002; Hsu Decl. ¶ 18.) ComStock

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<sup>4/</sup> This memorandum is accompanied by a Second Supplemental Appendix of Exhibits in Support of Its Motion for Summary Judgment that includes excerpts from the depositions of AOL technical employees Mr. Berg and Mr. Hsu (tabs 1 and 2); excerpts from the documents that AOL produced in response to one of BEW’s Rule 56(f) interrogatories, numbered using the prefix “AOLP” (tab 3); and excerpts from AOL’s textual response to certain other Rule 56(f) interrogatories (tab 4).

continued to take ownership of the problem in the ensuing weeks, saying it “should be corrected in our next software release” and promising that ComStock and/or Townsend were “scheduling a new fix to this fractional/decimal pricing problem . . . this week. I think this will finally end all the pricing problems for these OTC issues.” (AOLP-0040, 0080 (emphasis added).) Townsend similarly explained that the decimal problem affecting some OTC stocks would be fixed by Townsend “creating and providing to AOL a revised version of the Townsend Software that would respond appropriately to the unexpected variations in the format of the codes employed by ComStock to represent price values for some OTC stocks in the ComStock Data Stream.”<sup>5/</sup> (Hsu Decl. ¶ 21.)

Significantly, nothing in the record even suggests that anyone at AOL, ComStock, or Townsend ever thought that AOL could be responsible for the alleged errors. Indeed, Mr. Berg testified that it was “impossible” that these errors were caused by AOL. (Berg Dep. at 109.) The reason for this certainty is simple: all parties understood that AOL was not responsible, even in part, for the creation or development of the information in question and therefore could not be causing the errors.<sup>6/</sup> As Mr. Hsu testified,

Because the continuously updated price and volume values for OTC stocks available through the Quotes & Portfolios area of the

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<sup>5/</sup> ComStock and Townsend similarly recognized that they had to correct the alleged error in price information for certain OTC stocks that occurred in the summer of 1996. ComStock initially reported that “[i]t looks like the problem may be originating from the [ComStock] feed.” (AOLP-0106.) And, here again, the “fix” was a new version of the Townsend software. (See AOLP-0116.)

<sup>6/</sup> Indeed, even BEW itself is on record saying it is undisputed that “[p]roblems with Townsend’s software caused errors in both the price and volume of shares published through AOL’s Quotes and Portfolios service area . . . .” (BEW Opp. at 7.)



AOL service since mid-1996 have always been taken directly and without alteration from the ComStock/Townsend Database and have always been exclusively the product of data provided by ComStock and software provided by Townsend, all of the allegedly erroneous information concerning BEW's stock to which the First Amended Complaint refers was information provided by parties other than AOL.

(Hsu Decl. ¶ 28 (emphasis added).)

**II. BEW HAS FAILED TO CREATE ANY GENUINE ISSUE AS TO WHETHER AOL HAD ANY ROLE IN THE "CREATION OR DEVELOPMENT" OF THE ALLEGEDLY ERRONEOUS INFORMATION CONCERNING BEW'S STOCK.**

BEW claims in its supplemental opposition that it has uncovered evidence that AOL was responsible, at least in part, for the creation or development of the allegedly erroneous stock quote information that allegedly appeared on the AOL service, and it strings together an assortment of "facts" that supposedly support this proposition. (BEW Supp. Opp. at 15-17.) But none of the supposed facts is even relevant to -- much less supportive of -- BEW's assertion that AOL played any role in the "creation or development" of the allegedly erroneous stock quote information. A point-by-point analysis of BEW's "facts" reveals that they prove nothing.

Involvement of AOL Hardware and Software

BEW makes much of the fact that the process of delivering stock quote information from its source to AOL's subscribers involved, in addition to many non-AOL elements, (a) some computer equipment that was owned or leased by AOL and located on AOL's premises (BEW Supp. Opp. at 4, 15) and (b) some computer software created by AOL that performed the functions of retrieving information from the ComStock/Townsend Database (the database created through the interaction of the ComStock Data Stream and the Townsend

Software) and displaying it to subscribers (id. at 5-6, 16-17). But the mere involvement of AOL hardware and software in the delivery process does not even suggest -- much less prove -- that AOL played a role in the creation or development of the information that was delivered.

BEW's argument could have force only if, contrary to the undisputed record here, there were evidence that the involvement of AOL's hardware or software in the delivery process had caused changes in the content of the delivered information.<sup>7/</sup> On that point, however, BEW has not presented a shred of evidence to rebut AOL's undisputed showing that the AOL hardware and software that were involved here simply stored, retrieved, and displayed stock prices and daily volume values without making any alteration to the values that were contained in the ComStock/Townsend Database. As AOL has already established through evidence that BEW has not disputed:

- The AOL-created software merely "obtains the requested information from the ComStock/Townsend Database, and displays it to the querying subscriber." (Hsu Decl. ¶ 8.H; see also Deposition of Michael C. Hsu ("Hsu Dep.") at 61-62.) This software "does not alter or change in any way the price or daily trading volume values from the values reflected in the ComStock/Townsend Database." (Hsu Decl. ¶¶ 8.H, 9.)

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<sup>7/</sup> BEW erroneously pretends that the question whether AOL was responsible for the "creation or development" of the allegedly erroneous stock quote information is unrelated to whether AOL "changed the values" of the information provided by ComStock and Townsend. (BEW Supp. Opp. at 9-10.) As AOL has already demonstrated, however, one cannot be responsible for the "creation or development" of information received from another if one does not play a role in changing that information. (See AOL Reply at 6-8.)

- Likewise, the AOL-leased or owned hardware on which BEW most fixates -- namely, the "Townsend Computers" that received the ComStock Data Stream and ran the software provided by Townsend in order to create the ComStock/Townsend Database -- played no role in altering any of the information in question. As AOL represented in its verified answer to a BEW interrogatory, "[n]o problem with the Townsend Computers themselves (as distinct from either the ComStock Data Stream they received and the Townsend Software they ran) caused the alleged errors in the information about BEW's stock that was available through AOL's service." (AOL Answer to Interrogatory No. 5.)

As a matter of law, mere involvement of an interactive service provider's hardware or software in the multi-step process of "making . . . data available to its subscribers" (BEW Supp. Opp. at 21) can never supply a basis for depriving a service provider of immunity from liability under Section 230. Because interactive service providers are fundamentally computer networks -- i.e., conglomerations of computer hardware running computer software -- it would be impossible for them to serve as conduits of third-party content without utilizing computer hardware and software that they own, control, and/or maintain on their own premises. In fact, as AOL explained in its Reply Memorandum, in all of the cases that have found AOL immune from liability for third-party content under Section 230, the content at issue had been made available to AOL subscribers through computers and software controlled and operated by

AOL.<sup>8/</sup> If BEW's argument were accepted, no interactive service provider could ever be immune from liability for carriage of third-party content. This would defeat immunity in all cases and render Section 230 "a dead letter," a result that must be rejected. See, e.g., Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 514 (1990).

#### AOL's Handling of Townsend Software

BEW also claims that AOL's handling of the Townsend Software -- consisting of (a) AOL's installation (or participation in the installation) of successive versions of the software provided by Townsend onto personal computers owned or leased by AOL and (b) AOL's occasional efforts to test whether the systems running the Townsend Software were producing accurate information -- is evidence that AOL was responsible for the "creation or development" of the allegedly erroneous stock quote information. (BEW Supp. Opp. at 4, 7, 15-16.) But such installation and testing have nothing to do with the "creation or development" of information in the absence of evidence that these activities affirmatively contributed to alterations in the actual content of the stock quote information that was available on AOL's service. No such evidence exists.

In fact, all of the evidence in the record concerning AOL's installation or testing of the Townsend software negates any notion that those activities played any role whatsoever in

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<sup>8/</sup> See AOL Reply Mem. at 8-9. BEW's attempts to distinguish cases such as Zeran, Blumenthal, and Doe on the grounds that they did not involve "specialized" data or "complex" processes (BEW Supp. Opp. at 19) are utterly groundless. AOL's processes for instantaneously disseminating millions of topical message board postings (as in Zeran), millions of chat room conversations (as in Doe), and millions of other pieces of third-party text (as in Blumenthal) were no less specialized, complex, or involved than the processes for disseminating the numeric data in this case.

contributing to errors or other alterations in the stock quote information that ComStock and Townsend jointly supplied. For example:

- The AOL employee who participated in installing successive versions of the Townsend Software on computers located on AOL's premises, Joe Berg, testified that the entire process for doing so on twelve interconnected computers took no more than twenty minutes and involved nothing more than "load[ing]" computer files from diskettes or other media onto the computers, in the same manner that any computer user might load any off-the-shelf computer software onto his or her own computer. (Berg Dep. at 59.) Mr. Berg stated unequivocally that there was never any indication that such installation was done improperly or otherwise caused any error. (Id. at 74.)
- AOL's so-called "testing" of Townsend Software consisted simply of occasionally making observations of the data in the ComStock/Townsend Database created by the Townsend Software through its interaction with the ComStock Data Stream. AOL did not -- and, indeed, could not -- make any alterations to the Townsend Software, either on the basis of such "testing" or otherwise. Indeed, it is undisputed that AOL never received a copy of the "source code" for any version of the Townsend Software and that without such source code it was technically infeasible (if not

impossible) for AOL to make any changes to the Townsend Software.<sup>2/</sup>

(See Hsu Decl. ¶ 11; Hsu Supp. Decl. ¶ 5.) Accordingly, AOL “has never had any role in determining or altering the manner in which the Townsend Software manipulates the ComStock Data Stream.” (Hsu Decl. ¶¶ 11-12.) Thus, the most that AOL’s testing could accomplish was to detect the presence of potential errors; any corrections for such errors (like the errors themselves) had to originate with Townsend and/or ComStock.

Depriving AOL of Section 230 immunity on the basis of evidence that it had performed some spot checking of the accuracy of stock quote information jointly provided by ComStock and Townsend would turn Section 230 on its head. One of the basic purposes of Section 230 was to “remove . . . disincentives to self-regulation” of third-party content by interactive service providers. Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997); H.R. Conf. Rep. No. 104-458, at 194 (1996). As the Court of Appeals explained in Zeran, Congress enacted § 230 in order to avoid a legal 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. Yet under BEW’s theory, AOL would be penalized for its testing or checking of the information provided by ComStock or Townsend. This theory would create an incentive for AOL and other interactive service providers to “eschew any

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<sup>2/</sup> “Source code” is a “set of instructions, written in a programming language, that must be translated to machine instructions before the program can be run on a computer.” Harry Newton, Newtons’s Telecom Dictionary 557 (11th ed.1996).

attempts at self-regulation” -- the very opposite of what Congress intended.<sup>10/</sup> Zeran, 129 F.3d at 333. For this reason as well, BEW’s attempt to cast AOL’s testing as a reason to deny AOL Section 230 immunity must fail.

#### AOL’s Deletion of Data for Particular Stocks

BEW also erroneously claims that AOL was responsible for the “creation or development” of the allegedly erroneous data because AOL on occasion allegedly “went into the ComStock Data Stream itself in order to attempt to fix the price problem” with certain OTC stocks. (BEW Supp. Opp. at 16.) BEW’s point is based exclusively on evidence indicating that AOL sometimes responded to the presence of a known price error in the ComStock/Townsend Database by executing a computer command to delete all data for the affected security from the database.<sup>11/</sup> (Id. at 9, 16.) In so arguing, BEW has mistaken one concept -- “deletion” of information -- with its very antithesis -- “creation or development” of information.<sup>12/</sup>

The undisputed evidence establishes that AOL’s occasional deletion of all data for a particular security merely rendered information for the security temporarily unavailable to

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<sup>10/</sup> Section 230’s separate Good Samaritan provision, 47 U.S.C. § 230(c)(2), bars holding interactive service providers liable for any voluntary action to restrict access to objectionable material. This provision further confirms that AOL may not be held liable in this case on account of its own testing or deletion of content provided by others.

<sup>11/</sup> In fact, contrary to BEW’s assertion, no evidence indicates that AOL ever “went into the ComStock Data Stream” to do anything. The evidence that BEW presumably has in mind pertains solely to occasional deletion of data from the ComStock/Townsend Database (not the ComStock Data Stream).

<sup>12/</sup> BEW is also mistaken in suggesting that the facts concerning AOL’s temporary deletion of erroneous data were hidden until AOL produced copies of certain e-mails to BEW. (BEW Supp. Opp. at 16.) In fact, AOL described these very facts when it first moved for summary judgment. (See AOL Mem. at 12 n.5; Hsu Decl. ¶ 16.)

AOL subscribers until the ComStock/Townsend Database “repopulated” itself with new information for the security once the ComStock Data Stream reported a new transaction involving that security. (Hsu Decl. ¶ 16.) For example, if AOL were to delete the stock quote information for the security “IBM,” stock quote information for IBM would be unavailable through the Quotes and Portfolio Area of the AOL service until the ComStock Data Stream reported the next market transaction involving IBM, at which time the Townsend Software would fill in the new stock quote information for IBM into the ComStock/Townsend Database. Such temporary, post hoc deletion of information concerning a particular security cannot be equated with responsibility for the creation or development of information under any reasonable interpretation of those terms.

Here again, the express objectives of Section 230 reinforce this common sense conclusion. Finding that AOL was not entitled to immunity based on its efforts to remove inaccurate data would contravene the statute’s most fundamental purpose by discouraging service providers from engaging in self-regulation such as removal of erroneous third-party information even though Congress clearly sought to eliminate such disincentives. Indeed, BEW’s argument that AOL’s removal of particular content renders it an “information content provider” was specifically rejected in Blumenthal as being directly contrary to one of the central objectives of Section 230. In Blumenthal, the plaintiffs specifically argued that AOL was not entitled to Section 230 immunity because AOL had the right to remove any content that violated AOL standards. Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998). The court, however, disagreed, finding, like the court in Zeran, that “§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self[-]regulatory functions.” Id.



at 52 (quoting Zeran, 129 F.3d at 331). Similarly, Section 230 prohibits any attempt by BEW to use AOL's deletion or removal of erroneous data as a basis for depriving AOL of the statutory immunity.

#### Interaction Between AOL and ComStock and Townsend

BEW also points to the interaction between AOL and Townsend and ComStock, such as the “[o]ver 80 e-mails” they exchanged over a period of nine months, as alleged evidence that AOL must have been involved in the “creation or development” of the price and daily volume stock information. (BEW Supp. Opp. at 15-16.) Yet none of these communications in any way support a finding that AOL created or developed any stock quote information, much less the allegedly erroneous information concerning BEW's stock. To the contrary, all of the communications on which BEW relies involve (1) AOL informing ComStock and/or Townsend about apparent errors and requesting that they be fixed (see, e.g., AOLP-0002, AOLP-0004, AOLP-0005); (2) AOL providing ComStock and/or Townsend with other information that might help them in determining the cause of the errors (see, e.g., AOLP-0068, AOLP-0108); (3) ComStock and/or Townsend requesting further information from AOL and providing reports on what they have determined (see, e.g., AOLP-0040, AOLP-0068); and/or (4) communications concerning the status of fixes provided by ComStock and/or Townsend (see, e.g., AOLP-0053, AOLP-0112, AOLP-0125). None of these communications even remotely suggests that AOL

played any role in “creating or developing” any stock quote information.<sup>13/</sup>

BEW points in particular to an e-mail from AOL concerning “3k stripping” as an example of AOL’s interaction with ComStock and Townsend that somehow renders AOL responsible for the creation or development of the stock quote information at issue. (BEW Supp. Opp. at 16.) But the records shows that this e-mail had nothing to do with the creation or development of any information by AOL. As Mr. Hsu explained in his deposition, “3k” is a designation that appears in the ComStock Data Stream at the beginning of quotation information for any OTC stock. (See Hsu Dep. at 101.) The Townsend Software was set so as to strip this 3k designation before information for an OTC stock was stored in the ComStock/Townsend Database. (See *id.* at 121.) In the e-mail quoted by BEW, Mr. Hsu was merely suggesting to Townsend that the “3k stripping” done by the Townsend Software might be a cause of the decimal problem with the prices of certain OTC stocks, a hypothesis that (according to the undisputed evidence) turned out to be incorrect.<sup>14/</sup> (See *id.* at 118-19.) In any case, however, even assuming that stripping the 3k designation had something to do with the creation or development of OTC stock information (which it did not), the stripping was performed, not by

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<sup>13/</sup> BEW falsely insinuates that AOL has withheld other e-mail documents that BEW has requested in discovery and that relate to BEW. (BEW Supp. Opp. at 6 n.5.) In fact, AOL has properly and fully responded to all of BEW’s discovery requests, including by producing a substantial number of documents pursuant to Fed. R. Civ. P. 33(d) in response to one of BEW’s many interrogatories. BEW did not file any motion to compel or otherwise contest the completeness of AOL’s discovery responses.

<sup>14/</sup> According to Mr. Hsu’s uncontroverted testimony, Townsend “did find the actual cause of the problem and [3k stripping] had absolutely nothing to do with it.” (Hsu Dep. at 119.)

AOL, but by the Townsend Software. Accordingly, “3k stripping” simply does not create any issue about whether AOL created or developed OTC stock quote information.<sup>15/</sup>

In this context too, depriving AOL of immunity on the basis of facts such as these would penalize AOL for attempting to ensure the accuracy of information provided through its service. BEW’s theory would once again create disincentives to self-regulation, this time by discouraging service providers from communicating with a third party when the service provider has reason to believe that content the party is providing may be erroneous or objectionable. The court in Blumenthal confronted a similar situation when a contractual provision gave AOL the right to direct the third party to remove or alter content, and it concluded that AOL was still entitled to Section 230 immunity. See 992 F. Supp. at 51-52. The same conclusion applies here.

Alleged Difference Between Stock Quote Information Available Through AOL and at ComStock’s Site

Lastly, BEW suggests that, because on one occasion apparent errors in stock quote information available for particular securities through the AOL service were not replicated on a computer on ComStock’s premises, AOL must have been an information content provider of the information available through its service. (BEW Supp. Opp. at 16.) Apparently, BEW is suggesting that, since the errors were not apparent at the ComStock site on this particular occasion, AOL must have been manipulating the information in some way that caused the errors

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<sup>15/</sup> BEW also quotes a fragment of an e-mail in which Mr. Hsu tells Townsend that he has “captured the log,” again as purported “evidence” of AOL’s involvement in the creation or development of OTC price and trading volume information. (BEW Supp. Opp. at 16.) Yet, as the entire e-mail and the reply from Townsend make clear, Mr. Hsu was merely providing Townsend with additional data to help Townsend diagnose the cause of the decimal errors occurring with certain OTC stocks. (See AOLP-0057-0060.)

on its service, and that this manipulation means AOL was generally involved in creating or developing stock quote information. As the undisputed record before the Court establishes, however, this argument fails on a number of levels. First, BEW's theory is undermined by the fact that, on more than one occasion, decimal errors for prices of OTC stock information available through AOL's service also appeared on systems operated by ComStock or other recipients of ComStock's data. (See AOLP-0002; AOLP-0073; Hsu Dep. at 97-98.) This undisputed fact severs BEW's attenuated chain of argument -- if the same error appeared on computers on ComStock's premises, then AOL by definition could not have been manipulating the information in a way that caused the error.

Second, BEW's argument is based on an unspoken -- and unsubstantiated -- premise: namely, that the ComStock Data Stream and Townsend Software used to provide information to AOL at the times in question were identical to the data stream and software simultaneously in use at ComStock's own site. But nothing in the record remotely supports this premise. In fact, much evidence in the record -- all uncontroverted -- indicates that many different versions of both the ComStock Data Stream and the Townsend Software could have been in use at any given time or site. For example:

- AOL's Mr. Hsu testified that, based on his experience dealing with ComStock and Townsend, the configuration of the Townsend Software that Townsend provided to AOL "is a configuration that S&P or Townsend, on their machines, might not have had." (Hsu Dep. at 121.)
- ComStock provided its data feed at varying speeds (e.g., 19.2 kilobytes per second vs. 56 kilobytes per second) and through different delivery formats

(e.g., satellite vs. telephone line). (AOL Interrogatory Answer No. 7; AOLP-0110, 0112, 0118.) No evidence indicates that the same speed and format of feed were simultaneously in place and in use at both AOL and ComStock's site.

- ComStock switched back and forth between multiple different internal systems for generating its data feed. (AOLP-0106.) The timing of these switches relative to the content of the feed could itself cause errors in "decimal precision." (Id.)
- There were many different versions of the Townsend Software -- at one point the version Townsend provided for use at AOL was designated version 6.1.0.11 -- and Townsend from time to time provided AOL with new or replacement versions of some or all of the software. (AOLP-0074 to 0077; Hsu Decl. ¶¶ 11, 21-22, 25-26; Hsu Supp. Decl. ¶ 8.) Moreover, Townsend designed different versions of its software to be used with different speeds of the ComStock data feed. (AOLP-0104, 0110, 0112, 0118.) No evidence indicates that Townsend simultaneously supplied both AOL and ComStock's site with identical versions of the software.

In sum, there is every reason to believe that any differences between stock quote information available through the AOL service and stock quote information available through computers on ComStock's site were differences for which ComStock and Townsend were solely responsible -- and no evidence supports a contrary conclusion.

Finally, the argument that the decimal problem for OTC stocks was unique to AOL and that AOL therefore must have had some role in causing the error (and accordingly must be an information content provider) is belied by the undisputed evidence that the decimal errors were fixed by the installation of revised versions of the Townsend Software supplied by Townsend, not by any change to any AOL software or hardware. (See, e.g., Hsu Decl. ¶¶ 21-26; Hsu Dep. at 83-84; Berg Dep. at 102; AOLP-0077, 0116.) Plainly, if the cause of the errors was some manipulation or alteration for which AOL was responsible, revised software from Townsend could not have solved the problem.

\* \* \*

In sum, none of the facts on which BEW relies even begin to create a genuine issue as to whether AOL had any role in creating or developing the allegedly erroneous price and volume information concerning BEW's stock. Instead, the record unequivocally demonstrates that AOL had no such role and therefore was not an "information content provider" of the information at issue in this case. The facts on which BEW relies show, at most, that AOL temporarily deleted some erroneous data and attempted to get ComStock and Townsend to diagnose and fix the problems, the very type of self-regulation Section 230 was meant to encourage. Section 230 applies "even where the interactive service provider has an active, even aggressive role in making available content prepared by others." Blumenthal, 992 F. Supp. at 52. AOL's involvement here does not even rise to that level. Accordingly, AOL clearly is entitled to immunity under Section 230 for all of BEW's claims.

**CONCLUSION**

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

Respectfully submitted,

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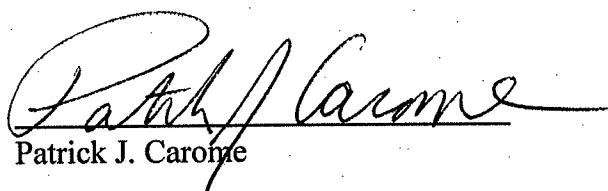
**CERTIFICATE OF SERVICE**

I hereby certify that copies of Defendant's Supplemental Memorandum in Further Support of its Motion for Summary Judgment and the accompanying Second Supplemental Appendix of Exhibits in Support of Its Motion for Summary Judgment were served on February 18, 1999, by first-class mail, postage pre-paid, and by Federal Express overnight delivery, on the following counsel:

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