NO. 02-55658

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTIANNE CARAFANO, an Individual, Appellant, v. METROSPLASH.COM, INC., a Delaware corporation, LYCOS, INC., a Delaware corporation; MATCHMAKER.COM, INC., a Texas corporation, BRADLEY R. TYER, an Individual; and DOES 1 through 20, Inclusive, Appellees.	D.C. No. CV-01-00018-DT (CWx) Central California

On Appeal from the U.S. District Court for the Central District of California

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1332 on the basis of diversity of citizenship between Appellant Christianne Carafano, a resident of California, and Appellees Metrosplash.Com, Inc., a Delaware corporation, Lycos, Inc., a Delaware corporation and Matchmaker.Com, Inc., a Texas corporation (collectively referred to herein as "Matchmaker").

This Court has jurisdiction over this appeal under 28 U.S.C. §1291 from the final Judgment entered March 29, 2002. Excerpt of Record ("ER"), Tab 99, p.1. A timely Notice of Appeal was filed on April 11, 2002. ER Tab 101, p.1.

II. STATEMENT OF ISSUES

Did the District Court err in holding that (a) the publication of Appellant's home address was "newsworthy;" (b) there was no evidence Matchmaker acted with "reckless disregard;" (c) Appellant was a general all-purpose public figure; (d) Matchmaker did not act with "actual malice;" (e) the publication of Appellant's photograph to dues-paying members was not "commercial" speech and (g) Appellant's negligence claim could not be sustained for the same reasons her defamation claim failed.

III. STATEMENT OF THE CASE

Appellant filed her original complaint on October 27, 2000, which at Matchmaker's request, was removed to U.S. District Court on January 2, 2001. Appellant asserted claims for invasion of privacy, misappropriation of the right of publicity, defamation and negligence.

On February 8, 2001, the District Court denied Matchmaker's Motion to Dismiss and the parties proceeded to conduct extensive discovery. On January 30, 2002, Matchmaker filed a Motion for Summary Judgment, which was heard on March 11, 2002 and granted in its entirety. The District Court's Opinion is reported at *Carafano v. Metrosplash.Com, Inc., etc. et al.*, 2002 U.S. Dist. LEXIS 10614, 30 Media L.Rep. 1577 (CD CA. 2002).

IV. STANDARD OF REVIEW

An order granting summary judgment generally is reviewed *de novo*. *Alfrey v. United States*, 276 F3d 557, 561 (9th Cir. 2002). On appeal, the court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the District Court correctly applied the relevant substantive law. 276 F3d at 561; *Robi v. Reed*, 173 F3d 736, 739 (9th Cir. 1999).[1/]

V. STATEMENT OF FACTS

A. Introduction. In October, 1999, Carafano was victimized in a way that few of us can truly imagine and hopefully none of us will ever experience. Her identity was stolen, and private information about her, including her name, photograph, home address, telephone number, and perhaps most private of all, the fact that she is a single mother living with her young son, was disclosed through a commercial Internet dating service without her knowledge or consent. And if that

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1/ Initially, it is the moving party's burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c); *British Airways Board v. Boeing Co.* 585 F2d 946, 951 (9th Cir. 1978). Because summary judgment is a "drastic device," cutting off a party's right to present her case to the jury, the moving party bears a "heavy burden" of demonstrating the absence of any material issues of fact. *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc.*, 182 F3d 157, 160 (2nd Cir. 1999) . The test is whether the opposing party "has come forward with sufficiently 'specific' facts from which to draw reasonable inferences about other material facts that are necessary elements of the [opposing party's] claim." *Triton Energy Corp. v. Square D Co.*, 68 F3d 1216, 1222 (9th Cir. 1995). Inferences drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992). A factual dispute is "genuine" where "the evidence is such that a *reasonable jury could return a verdict for the nonmoving party*." *Anderson v. Liberty Lobby, Inc.* , 477 U.S. 242 (1986) (emphasis added). The Court's function on a motion for summary judgment is *issue-finding, not issue-resolution*. *United States v. One Tintoretto Painting*, 691 F2d 602, 606 (2nd Cir. 1982) .

were not bad enough, she was falsely and cruelly portrayed as a promiscuous sex addict begging to be dominated by a man (or woman) for a "one-night stand," eager for someone "HARD AND DOMINANT IN MORE WAYS THAN ONE."

Carafano, known professionally as Chase Masterson, is an actress. She had a recurring role as "Leeta the D'abo girl" in the television series *Star Trek: Deep Space Nine* and she has appeared in several movies and as a guest star on a few television shows. She also makes a living appearing at *Star Trek* conventions and other fan events. Carafano is a single mother who lives alone with her young son.

B. The Matchmaker Websites. Matchmaker is a commercial Internet dating service which charges members to advertise themselves and to browse other members' profiles on the Matchmaker.com website. ER Tab 70, p. 4:13-22. Matchmaker has created a detailed questionnaire with both multiple-choice and essay questions that new members must complete in order to post a profile. Matchmaker describes itself as "a network of city-centric and lifestyle specific Web communities. By joining a particular Matchmaker community, you increase your chances of meeting someone with common interests and desirable qualities." ER Tab 70, p. 13. To enhance the market for the sale of its personal ads, Matchmaker tailors each questionnaire to a particular community. ER Tab 76 Ex 1-15, pp. 118:9-119:21. In doing so, *Matchmaker directly shapes the content of the profiles in each web community*. While the multiple choice questions may appear innocent, several of the optional answers *provided by Matchmaker* are sexually-charged and highly provocative: "Q: Your current living situation? A: Married and we swing; Q: What style of dress do you prefer? A: Nude; Q: Finally, why did you call? A: Seeking an occasional lover; A: Scouting out for swinging couples; A: Looking for a one-night-stand." ER Tab 70, p. 21, 34-36.

To post a personal ad, a new member fills out an application, which requires an e-mail address. ER Tab 76 Ex. 1-15, pp.113:22-114:9. Upon completion, Matchmaker sends an automatic "welcome e-mail" to the new member's e-mail

address. ER Tab 76 Ex. 1-15, pp. 104:22-105:21.

C. Matchmaker's Policies and Procedures. Matchmaker's Terms and Conditions provide as follows: "As a member, you acknowledge and agree as follows: You will not include in your profile any of the following items: 1. Telephone numbers; 2. Street addresses; 3. Last names; 4. URLs; 5. E-mail addresses; 6. Offensive anatomical or sexual references; 7. Offensive sexually suggestive or connotative language; and 8. Any information that is solicitous of any type of product or service. You will not post any photos containing nudity or personal information." ER Tab 70, p. 54-59. In accordance with these terms and conditions, Matchmaker screens all photographs for compliance before they are posted in one of the personal ads. ER Tab 70, p.7:12-8:2. Members are encouraged to post as many as ten photographs. ER Tab 76 Ex. 1-15, pp. 76:24-77:9; ER Tab 70, p.5:3-7. By contrast, *Matchmaker does not pre-screen text before a profile is posted.* ER Tab 70, p.7:4-11; ER Tab 76 Ex. 1-15, pp.135:11-14, 139:24-140:19.

D. The "Chase529" Profile. On October 23, 1999, an unknown individual posted a profile under the name "Chase529" in the Los Angeles metro community. ER Tab 70, pp.9:13-24, 66-69. The Profile included personal facts about Carafano, including her home address and the fact that she lived alone with her son.[2/] It also included four photographs of her along with a partial listing of her film credits. ER Tab 70, p.68-74. *Carafano never gave permission to Matchmaker or anyone else to use these photographs or to publish any information about her in the Profile.* ER Tab 78, p.3:1-3. The Profile contained a battery of false, salacious and provocative statements about Carafano, indicating that *she was extremely promiscuous and wanted to have sex with anyone who responded, male or female*:

"Q: Have you had, or would you consider having a homosexual experience? A: I might be persuaded to have a homosexual experience. *** Q: What is your

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2/ "Single living with kid(s)." ER Tab 71 A-X, p. 11.

main source for current events? A: Playboy/Playgirl. *** Q: Finally, why did you call [Matchmaker.com]? A: Looking for a one-night stand." ER Tab 78, pp.11-13; ER Tab 70, pp.28, 34, 35-36.

The essay portion of the Profile contained the following: "Q: Try to describe the type of person you might be interested in meeting? A: HARD AND DOMINANT IN MORE WAYS THAN ONE. MUST HAVE STRONG SEXUAL APPETITE. Q: Describe your personality type? What type are you attracted to? A: I LIKE SORT OF BEING CONTROLLED BY A MAN IN AND OUT OF BED. Q: What's the first thing others notice about you? A: MY BEAUTY. Q: What is sexy? A: A STRONG MAN WITH A DOMINATING ATTITUDE WITH A YET CONTROLLING TOUCH." (Emphasis in original, ER Tab 70, pp.68-69.)

The Profile also included an e-mail address, *cmla2000@Yahoo.com,* to permit others to correspond with Chase529. *Id.* Anyone sending a message to that address received the following automatic reply: **"You think you are the right one? Proof it!! [Appellant's home address *and home telephone*]"** ER Tab 71 A-X, pp.14-16.

Because the individual who set up the Profile provided Matchmaker with the *cmla2000@Yahoo.com* e-mail address upon signing up, Matchmaker received the "You think you're the one . . ." automatic reply to Matchmaker's automatic "welcome" e-mail. ER Tab 76 Ex 1-15, pp.111:17-23, 113:22-114:9; ER Tab 76 Ex 16-21, pp.3:2-4:6, 8:20-10:22; ER Tab 71 A-X, pp.14-16. *Therefore, from the moment the Profile was posted, Matchmaker was on notice that the Profile was questionable and violated its own terms and conditions.*

E. The Resulting Threats and Harassment From the Profile. While away on business, Carafano checked her home voicemail on approximately October 31, 1999, and heard two obscene telephone messages with disturbing music. ER Tab 78, p.3:5-11. After returning from her trip on approximately November 4, 1999, Carafano found the following facsimile transmission on her home fax machine:

"CHASE, GOOD NEWS HORNY BITCH! I WILL GIVE YOU THE FUCK

OF YOUR LIFE! BUT FIRST I WILL ELIMINATE YOUR CHILD THAT GETS YOUR WET PUSSY IN HEAT. I KNOW WHERE YOU ARE. I'LL FIND YOU. IF YOU TRY TO ESCAPE. A PERSON LIKE YOU IS EASY PREY FOR ME. TODAY, TOMORROW OR SOME DAY SOON I'M ABLE TO WAIT FOR THE RIGHT MOMENT AND PLACE. IT'S HUNT SEASON! BITCH FUCKER"

(Emphasis in original, ER Tab 78, p.15.) Carafano subsequently received a barrage of voicemail messages from men she did not know, stating they had seen her "listing" or "profile" on the Matchmaker website. ER Tab 78, p.3:17-19.

Carafano received other correspondence and e-mail from total strangers, some of whom immediately recognized the danger of the information contained in the Profile and warned Carafano about it. ER Tab 78, pp. 16-17; ER Tab 71 A-X, pp.17-18; ER Tab 76 Ex 16-21, pp.5:2-7:1. One man in particular wrote to Carafano at her home. Although his initial concern for her safety appeared altruistic, it did not take long for him to show his true intentions. ER Tab 78, pp. 16-17. Another man named "Jeff" felt the Profile was a hoax "because the wording was more like that of a call girl." ER Tab 71 A-X, pp. 23-24.

Carafano continued to receive obscene and threatening telephone calls even after the Profile was removed. ER Tab 78, p.3:17-19. This situation proved to be terrifying and utterly intolerable. Carafano and her son were forced to leave their home and to stay in hotels and with friends; they eventually left the Los Angeles area entirely for a period of time. ER Tab 78, p.5:13-16. The consequences of the Profile caused Carafano severe emotional distress and resulted in her working less frequently than she otherwise would have but for the Profile. ER Tab 78 p.5:18-26.

F. Matchmaker Deliberately Delays Removal of the Profile. By the time Carafano first saw the Profile in early November 1999, it had already received 737 "hits" from members. ER Tab 78, p.9; ER Tab 76 Ex 1-15, pp.66:3-8, 68:22-25. Carafano took immediate action to halt the public dissemination of the private information about her and her son. After receiving an e-mail "Jeff" on November 6, 1999, Carafano's web consultant Siouxan Perry notified a Matchmaker representative that the Profile was a sham and demanded that it be removed

immediately. ER Tab 76 Ex 16-21, pp.18:2-19:21. The Matchmaker representative responded that, *according to company policy, the Profile could not immediately be removed without further investigation in order to protect the rights of the person who posted the profile.* ER Tab 76 Ex. 16-21, pp.18:22-19:13. Independent of Perry's efforts to get the Profile removed,"Jeff" also left three separate messages with Matchmaker beginning on November 6 alerting them to the bogus profile but, again, received no response. ER Tab 71 A-X, pp.23-24.

According to Matchmaker's own records, the Profile was "modified" (i.e., made inaccessible) on November 8, 1999 *at "19:39" (7:39 p.m.)* and was deleted on November 9, 1999 at 4:00 a.m. ER Tab 70, pp.9:13-24, 10:16-20, 66-67. *Thus, after Matchmaker was put on actual notice, the false and salacious Profile was still accessible to all Matchmaker members for the remainder of Saturday, November 6, all day Sunday, November 7, and until the end of the day on Monday, November 8.* All told, the Profile was posted and accessible to other members for a total of sixteen days from October 23, 1999 until the end of November 8, 1999 and eventually received 860 "hits" before it was finally removed. ER Tab 76 Ex. 1-15, p.112-11-13. *Significantly, 123 of those "hits" came between the time Matchmaker was told to remove the bogus Profile and when it was finally made inaccessible.*

VI. SUMMARY OF ARGUMENT

Appellant presented sufficient evidence in the District Court to go to trial on her invasion of privacy, defamation, misappropriation of the right of publicity and negligence claims and in any event raised triable issues of material fact precluding summary judgment

VII. SECTION 230 OF THE CDA DOES NOT PROVIDE IMMUNITY FOR MATCHMAKER

The District Court correctly held that Matchmaker is not an Information Content Provider and is thus not entitled to immunity under Section 230 of the Communications Decency Act of 1996, 47 U.S.C. 230 *et seq.* ("CDA").

VIII. APPELLANT'S PUBLIC DISCLOSURE OF PRIVATE FACTS CLAIM SHOULD GO TO TRIAL

Appellant identified at least three (3) items of information, the dissemination of which constituted an invasion of privacy through the publication of private facts: (a) her home address; (b) her personal telephone number; and (c) the fact that she lived alone with her young son. The publication of this personal information *directly linked to her stage name* made her a target for everyone from obsessed fans to dangerous individuals prone to target a young woman and single mother. This harm was compounded by the publication of all this private information in the context of a lewd and salacious advertisement seeking sex.

Inexplicably, in a footnote, and without any citation to the record, the District Court assumed that although Appellant's claim for invasion of privacy included Matchmaker's tortious disclosure of her telephone number and that she lived alone with her son, "it appears from the papers submitted that Plaintiff has abandoned her claim with respect to these facts." There is simply no basis to this suggestion. An examination of Appellant's opposition to the Motion for Summary Judgment reveals repeated reliance on Matchmaker's wrongful disclosure of her private telephone number and that she lived alone with her son.[3/]

3/ Appellant's Memorandum of Points and Authorities asserted at several points that Matchmaker's disclosure of her telephone number and that she lived alone with her son invaded her privacy. ER Tab 75, pp.6:12, 8:22-24; 10:21, 11:17, 23:24-26. Likewise, Appellant raised these issues in her Declaration dated February 14, 2002: "The Profile included personal details about me, including my home address **and the fact that I live alone with my son**. . . . This e-mail address contained an automatic response 'You think you are the right one? Proof it!!!' and included my home address and **telephone number**;" "I was terrified by the letter [Exh. No. 12] and the fact that strangers had my home address, **my telephone number** and my fax number;" An e-mail Appellant received referred to her **"business phone number;"** Another e-mail Appellant received referred to her **"phone number;"** "Because of the violation of my privacy and the threat to my safety and **my son's safety**, I contacted the Los Angeles Police Department. . .;" "Neither my home address nor **my telephone number** is published;" "To my knowledge, I have never disclosed in a public forum or media interviews that **I live alone with my son**;" ". . .my home address (and **telephone number**) had already been disclosed)." ER Tab 78, p.2:12-

(continued...)

By gutting critical portions of Appellant's invasion of privacy claim, the District Court conveniently excused itself from addressing the uncontested fact that Carafano's private telephone number and the fact that she lived alone with her young son are not "newsworthy" nor matters of "legitimate public interest," and that in all events these were genuine issues of material fact for a jury to decide. The District Court was entirely unjustified in eliminating important portions of Appellant's invasion of privacy claim and accordingly the summary judgment must be reversed.

A Publication of Appellant's Home Address in the Masterson Profile Was Highly Offensive

As far as Appellant's home address is concerned, California law recognizes a substantial privacy interest in this private information. *Planned Parenthood Golden Gate v. Superior Court*, (2000) 83 Cal.App.4th 347, 363 ("particularly strong" privacy interest in avoiding disclosure of residential addresses), *review denied* (Cal. Nov. 29, 2000).

The strength of an individual's interest in keeping personal information private depends in large part on the consequences of disclosure. Courts look to "human experience" to determine the likely effect of such a disclosure. 83 Cal.App.4th at 360. Here, Carafano's privacy interest is particularly strong because the consequences of the disclosure of her home address (not to mention her telephone number and living arrangements) included "unique and very real threats not just to [her] privacy, but to [her] safety and well-being" and that of her son.

California is particularly attuned to the fact that entertainers of varying degrees of celebrity are particularly vulnerable to stalking and other forms of harassment from obsessed fans. This fact was sadly illustrated by the tragic murder of actress Rebecca Schaeffer at her apartment in Los Angeles by a deranged devotee

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(...continued)
25; p.3:13-15; p.3:26-27; p.4:11-14; p.4:23-25; p.5:78; p.6:3-4; p.7:4-5; Carafano Decl. ¶18. Finally, Appellant's Statement of Genuine Issues included several references to these claims: ER Tab 78, p.2:12-25. ER Tab 79, pp.12:15-18, 27:14-18, 31:18-21, 31:23-25.

who had obtained her home address from her DMV records.[4/] Moreover, personal information such as a home address is also expressly exempted from disclosure under various provisions of the California Public Records Act.[5/]

Carafano herself took extra steps to protect the privacy of her home address and telephone number. For example, she uses her legal name "Christianne Carafano" rather than her stage name "Chase Masterson" for all of her personal business. Neither her home address nor her telephone number is published. ER Tab 78, p.5:4-11.

B Appellant's Home Address Is Not "Newsworthy" nor A Matter of "Legitimate Public Concern"

The District Court erred in finding that because Carafano is an "entertainment celebrity," therefore, as a matter of law, her home address is automatically "newsworthy." The Court offered a dangerously broad definition of "newsworthy" that would include any fact in which the public might entertain any curiosity, morbid or otherwise. This interpretation finds no support in California law.

4/ As a result of this tragedy, the California legislature strengthened the protections afforded its citizens to prohibit the DMV from disseminating home addresses to third parties. *See* Cal. Vehicle Code § 1808.21. Vehicle Code section 1808.21(a) provides, in relevant part, as follows: "Any residence address in any record of the department is confidential and shall not be disclosed to any person, except a court, law enforcement agency, or other government agency." *See also* Maureen Maginnis, *Maintaining the Privacy of Personal Information. The DPPA and the Right of Privacy*, 51 S.C.L. Rev. 807, 809 (Summer 2000) Schaeffer's murder was the impetus for DPPA which both mandates and restricts the disclosure of personal information contained in DMV records); 79 Op. Atty. Gen. 76, June 10, 1996 (California law *generally more restrictive* than DPPA concerning release of addresses in motor vehicle records).

5/ *See* Cal. Gov. Code § 6254.4 (home addresses of registered voters); §6254.16 (home addresses of utility customers); §6254.1 (residence or mailing addresses in DMV records).

The paramount test of newsworthiness is whether the matter is of "legitimate public interest." *Sipple v. Chronicle Publishing Co.*, (1984) 154 Cal.App.3d 1040, 1048:

> "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a *morbid and sensational prying into private lives for its own sake*, with which a reasonable member of the public, with decent standards, would say they had no concern."

Id. at 1049 (*quoting Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975) (emphasis added)).[6/] The cases relied upon by Matchmaker are all easily distinguished because they involve either information obtained from public records or newsworthy events, such as crime, political activity, and administrative proceedings.[7/]

Here, the disclosure of Carafano's home address, telephone number and living arrangements in the context of a promiscuous sexual solicitation served no public purpose other than the kind of "morbid and sensational prying" into her private life that was rejected in *Sipple*. Under California law, this is not a "legitimate" purpose. Indeed, other than the fact that Appellant tries to make her living as an actress, neither the Court nor Matchmaker articulated any reason why Carafano's home address (let alone the other private information) was "newsworthy."[8/] While certain aspects of her career may be of interest to her fans, it does not follow that they, let

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6/ Accord *Schulman v. Group W Productions*, (1998) 18 Cal. 4th 200, 223.

7/ *Kapellas v. Kofman*, (1969) 1 Cal. 3d 20, 38, 81 Cal.Rptr. 360; *See*, *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. 1975); *Strutner v. Dispatch Printing Co.*, 42 N.E. 2d 129, 133 (Ohio App. Ct. 1982); *See, Sipple v. Chronicle Publishing Co.*, (1984) 154 Cal.App.3d 1040; and *See, NLRB v. British Auto Parts, Inc.*, 266 F.Supp. 368 (C.D. Cal. 1967).

8/ Significantly, the District Court never found that the disclosure of Carafano's telephone number or that as a single mother she lived alone with her son were "newsworthy.".

alone the members of a dating service she never joined, are entitled to any and all such information, no matter how private. *See Times-Mirror Co. v. Superior Court*, (1988) 198 Cal.App.3d at 1428.

The District Court based its finding that the publication of Appellant's home address was "newsworthy" in part, on the conclusion that the intrusion here is "minimal" given the fact that Appellant's address is "not a 'private matter' but rather is a matter of public record," citing a supplemental declaration of Matchmaker's trial counsel, Timothy L. Alger, Esq., which was filed March 4, 2002, seven (7) days before the hearing on the Motion, together with Appellees' Reply Memorandum of Points and Authorities. The only evidence relied on by the District Court was a fictitious business name certificate dated April 23, 1999, listing her home address. ER Tab 85, p.69.

However, as set forth in Carafano's responsive declaration, ER Tab 92, p.2, the d/b/a certificate is listed in her legal name, Christianne Carafano, not her stage name, Chase Masterson. Since Carafano has not authorized and is not aware of any publication that links her stage name with her legal name *(prior to the publication of the Profile)*, anyone looking for the home address of Chase Masterson could not find it, despite the fact that it is listed under her legal name. Consequently, the d/b/a/ certificate is of no moment since it does not establish that the home address of "Chase Masterson" was a "matter of public record."

Surprisingly, the District Court found that "the social value" of Appellant's home address could be "inferred" from the "myriad bus tours and maps offered of 'Stars Homes' throughout Los Angeles County." No evidence regarding any maps to "Stars Homes" was presented by Matchmaker and none is in the record. There is no evidence that Appellant's home address has ever been listed on any such maps. That some people may buy maps to "Stars Homes," bears no relationship to Matchmaker's disclosure of Carafano's home address, as well as her telephone number and private living arrangements, in the context of a grossly salacious sex ad.

The most recent discussion of the "newsworthiness" defense under California law is found in *Shulman v. Group W Productions*, (1998) 18 Cal.4th 200. The California Supreme Court listed several various facts and circumstances to be considered when determining whether the publication of private facts is "newsworthy." But, in the instant case, the required analysis of this critical issue was short-circuited by the District Court's singular reliance on maps to the "Stars Homes."

California courts have repeatedly recognized that newsworthiness, a question of fact, does not automatically flow from celebrity or public figure status. In *Diaz v. Oakland Tribune*, (1983) 139 Cal.App.3d 118, it was revealed that a candidate for college student body president had undergone a sex change operation. Despite the fact that this could be pieced together from public records, the court ruled that newsworthiness should be decided by a jury. See also *Times Mirror v. Superior Court*, (1988) 198 Cal.App.3d 1420, where the court held that the availability of information in a public record did not defeat an invasion of privacy claim; and *see Tylo v. Superior Court*, (1997) 55 Cal.App.4th where the court held that an actress did not waive all her privacy interests by virtue of her celebrity.[9/]

The Supreme Court has not ruled that publication of information found in a public record can never, as a matter of law, form the basis of an invasion of privacy claim. In *Cox Broadcasting Co. v. Cohn*, 420 U.W. 469 (1975), the journalist/defendant obtained the name of a rape victim from court records. The Court held that the defendant could not be prosecuted for publishing this information, given its source and the overriding importance of reporting on court proceedings. It is important to note that the one who published the information had previously obtained it from the public record – not defense counsel months later

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9/ The Ninth Circuit has followed a similar approach. *Virgil v. Time*, 527 F.2d 1122 (9th Cir. 1975); *Capia v. Thoroughbred Racing Association*, 787 F.2d 463 (9th Cir. 1986).

during the course of litigation.

C. The Decision Employs The Wrong Standard Of Care.

The District Court held that the publisher of private information must have acted with "reckless disregard" in order to be held liable, citing *Briscoe v. Readers Digest*, (1971) 4 Cal.3d 529. But *Briscoe* was referring to "reckless disregard for the fact that reasonable men would find the invasion highly offensive," 4 Cal.3d at 543, not "reckless disregard" of the truth as part of the constitutional "actual malice" standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). As confirmed by the most recent exposition of California law on invasion of privacy, *Shulman, supra*, "newsworthiness", not "actual malice," is the constitutional dimension of the tort of invasion of privacy.

At the outset of this case, in denying Matchmaker's Motion to Dismiss, the District Court held that the disclosure of Appellant's address "constitute[s] tortious disclosure of private facts." ER Tab 76 Ex. 1-15, pp.6-19; Order at 8:16-17. The Court found that "there is a strong interest in not disclosing an actor's address . . ." *Id.*, 9:34. In rejecting Matchmaker's newsworthy argument, the Court relied on *Times Mirror v. Superior Court*, 198 Cal.App.3d 1420 (1988) "which permitted a claim for invasion of privacy to proceed for the disclosure of one's name, arguably the most public aspect of the persona." *Id.*, 9:9-11.

The ruling denying the motion to dismiss based on *Times Mirror* applied the correct legal standard, while the ruling granting summary judgment, based on *Briscoe*, decided seventeen years *earlier*, applied the incorrect legal standard.

D. Assuming the "Actual Malice" Requirement Applies, Matchmaker Clearly Acted With "Reckless Disregard."

Unquestionably, Matchmaker was conscious of the potential danger of disclosing private information, such as a home address or telephone number, in member profiles because Matchmaker itself adopted a strict written policy prohibiting the publication of precisely this very information. ER Tab 76 Ex. 1-15,

pp. 137:24-138:15. Matchmaker admits it expects members to police the profiles for any text that violates their terms and conditions. ER Tab 70, p.8:3-10. Matchmaker also admits that prior to November 1999, they had received several complaints about other false profiles. ER Tab 76 1-15, p.124:4-22; ER Tab 76 Ex. 1-15, pp.161:18-162:23; 163:8-14. By failing to pre-screen the text of the profiles in light of these prior incidents, Matchmaker acted in utter disregard for the safety and well-being of Carafano and her son and others like them. Worse still, Matchmaker actively encouraged the publication of home addresses by including in their questionnaire an essay question asking, "*What part of the LA area do you live in? (be specific)*" ER Tab 70, pp.68-69. Indeed, it was in response to this very query that Carafano's home address was disclosed. *Id.*

E. The District Court Ignored Or Rejected Legitimate Evidence Of "Reckless Disregard."

1. Curiously, the District Court acknowledged that there was a triable issue of fact with respect to the issue of "reckless disregard" in that Matchmaker "violated the express terms and conditions of its membership agreement by disclosing [Appellant's] home address and e-mail address in the Profile," *were it not for Appellant's* "'celebrity status' and the 'undisputed fact' that she is a public figure." Of course, the District Court was quite correct that Matchmaker's violation of its own policy to prohibit the inclusion of a home address or e-mail address in a personal profile, was some evidence upon which a jury could find "reckless disregard." But the Court went seriously astray when it concluded that this relevant and probative evidence was somehow disqualified from being considered on the issue of "reckless disregard," because of the Court's finding of Appellant's "celebrity status" as a "public figure."[10/]

10/ For the reasons explained below, Appellant contends that she is not an "all purpose public figure" and that since the publication in question involves

(continued...)

A moment's reflection reveals the fallacy in the District Court's reasoning: the issue of "reckless disregard" does not even arise unless a plaintiff is found to be a "public figure" (or "public official") in the first place. Consequently, it is purely tautological to ignore what the District Court itself conceded was some evidence of "reckless disregard," because Appellant was a public figure. Taken to its illogical conclusion, once deemed a "public figure" and thereby obliged to prove "reckless disregard," evidence of "reckless disregard" could be ignored because the plaintiff was a "public figure." This sort of circular thinking makes no sense and cannot stand.

2 There is another important respect in which the District Court's own findings support a reversal of summary judgment. In ruling in Carafano's favor on the question of whether Matchmaker is an Information Content Provider ("ICP"), as defined by 47 U.S.C. §230(c)(1), the District Court correctly rejected Matchmaker's argument that it was a mere passive "bulletin board" and found instead, based on uncontested evidence in the record, that Matchmaker, in the language of the statute, is an "entity that is responsible, . . in part, for the creation or development of information provided through the Internet or any other interactive computer service."[11/] In so doing, the District Court furthered the important public

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(...continued)
commercial speech, she is not required to prove "actual malice."

11/ In particular, the District Court found that "users of the Matchmaker website do not simply post whatever information they desire." Instead, the "profile for each user is created from questions asked by Matchmaker and the answers provided." Consequently, by choosing to design its business in this fashion, including 62 multiple-choice questions and a series of essay questions tailored for each community, the District Court correctly found that Matchmaker "does not just provide a site for people to post whatever information they choose." Rather, Matchmaker "contributes to the content of the profile by asking specific questions with multiple choice answers and specific essay questions." The District Court
(continued...)

policies adopted by Congress in enacting the CDA, which denied immunity to ICPs, such as Matchmaker.

Unfortunately, the District Court overlooked its own finding when it turned to the question of deciding Matchmaker's responsibility for publishing false information which invaded Appellant's privacy and placed her in a false light, resulting in real and substantial harm to her and her young son. The District Court's decision if allowed to stand, would seriously undermine these important Congressional policies by granting immunity to an I.C.P. which in fact contributes to the content of a website, contrary to 47 U.S.C. 230, *et seq.*

3. In attempting to dispose of other evidence presented by Carafano on the issue of "reckless disregard," the District Court also incorrectly found "no evidence that Matchmaker ever received the reply email in response to its welcome confirmation email." This conclusion runs directly contrary to the uncontested evidence in the record, which at a minimum created a triable issue of fact.

Because the creator of the Profile provided Matchmaker with the cmla200@yahoo.com e-mail address upon signing up, Matchmaker automatically received the "You think you're the one. Proof it. [Appellant's home address and home telephone]" reply to Matchmaker's "weclome" e-mail. ER Tab 76 Ex. 1-15, pp.111:17-23, 113:22-114:9; ER Tab 76 Ex. 16-21, pp.3:2-4:6; ER Tab 76 Ex. 1-15, p.165:15-23. Therefore, from the moment the Profile was posted, contrary to the District Court's unfounded conclusion, Matchmaker was on actual notice that the Profile was highly questionable and violated its own rules.

4. Likewise, the District Court improperly ignored the uncontested evidence that despite the fact that Appellant's web consultant notified Matchmaker

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(...continued)
rejected Matchmaker's claim that it "simply acts as a conduit of the information" posted by a member, but rather "takes an active role in developing the information that gets posted."

on November 6, 1999 that the Profile was a hoax and should be removed immediately, Matchmaker refused to do so and instead left it posted for the remainder of that day, all day November 7 and until 7:39 p.m. on November 8 (a period of 2 ½ days during which there were 123 additional "hits").

In its Opinion, in the midst of a discussion of "actual malice," the District Court suddenly states: "For this same reason, Plaintiff's argument that Defendants were aware of the Profile's probable falsity when Plaintiff's assistant demanded that the Profile be removed fails." What "reason"? The Court offers no reason why the uncontested evidence that Matchmaker was put on actual notice of the falsity and illegitimacy of the Profile and yet took no action for 2 ½ days, should be ignored in analyzing the "actual malice" issue. Once again, faced with additional relevant, uncontested evidence which alone or in combination with other evidence raised a triable issue on "actual malice," the District Court simply cast it aside for no good reason.

5. The District Court also concluded that because "Matchmaker does not review the text of profiles before they are posted by members on its data base," it "could not have had knowledge that the Profile was false or a high degree of awareness the Profile was probably false when it was posted."

In the first place, once Matchmaker received actual notice on November 6 that the Profile was unauthorized, the Court's conclusion disappears.

Secondly, as noted above, from the very moment the Profile was posted with the cmla2000@yahoo.com e-mail address and Matchmaker received the "You think you're the one. . ." automatic reply to its "welcome" e-mail, a reasonable jury could draw an inference that Matchmaker had either actual knowledge of falsity or a high degree of awareness the Profile was probably false when it was posted.

6. Finally, given that Matchmaker reviews each photograph posted by members, and given Matchmaker's established policies of prohibiting the disclosure of private information and keeping confidential private information

belonging to paying members, Matchmaker exhibited a subjective awareness of the harm resulting from the disclosure of such information, rendering the failure to review the text of the profiles as evidence of "reckless disregard" of the truth.

All of this evidence, alone or taken in combination with the other evidence cited by Appellant, was more than sufficient to raise a triable issue of fact over "actual malice," thereby precluding summary judgment.

F. Actual Malice May Be Established By Accumulation of Evidence And Inferences Reasonably Drawn From That Evidence.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Supreme Court held that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." Id at 731.

In *Harte-Hankes Communications, Inc. v. Connaughton*, 491 U.S. 657, 658 (1989), the Court held that while a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers cannot alone support a verdict in favor of a public figure plaintiff in a libel action," (emphasis added) a newspaper's choice not to interview the one witness who was most likely to confirm the instigator's account of events is evidence that the paper had serious doubts about the accusations because that one witness' denial of the statements would end the story." *Id.* at 683. "Although failure to investigate will not alone support a finding of malice, St. Amant, the purposeful avoidance of the truth is in a different category." *Id.* at 692. Here, Matchmaker turned a blind eye to the text of the profiles it was publishing, despite its subjective awareness of the harm resulting from the publication of one's home address. Such *"purposeful avoidance"* is clearly some evidence of reckless disregard.

In *Antonovich v. Superior Court of Los Angeles County*, 234 Cal.App.3d 1041,

1047, 1049 (1991), the court denied summary judgment and held that a trier of fact could draw an inference of actual malice from the fact that there was circumstantial evidence alerting defendant to the probable falsity of his statements against plaintiff placing him on inquiry notice after the initial statement was made, and by the fact that defendant thereafter continued publication without ascertaining the truth of the matter. Here, given the automatic response to its "welcome" email, Matchmaker was alerted to the probable falsity of the Profile and worse yet when actually told by Appellant's web consultant that the Profile was bogus, Matchmaker failed and refused for 2 ½ more days to remove it, exposing Appellant to the danger of further embarrassment, harassment or worse.[12/]

In the leading case of *Tavoulareas v. Piro v. The Washington Post Company*, 759 F.2d 90, 105 (D.C. Cir. 1985), the court noted that since credibility plays a critical role in assessing mental state, proof of actual malice does not readily lend itself to summary disposition. The court quoted *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189 (1st Cir.1982), to the effect that "The subjective determination of whether a defendant in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts ... A court typically will infer actual malice from objective facts ... These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." Consequently, the *Tavoulareas* court held that a "Plaintiff may clearly and convincingly prove actual malice by cumulation of many pieces of evidence, no one of which, by itself, is clear and convincing." Id. at 105.

12/ *Reader's Digest Assn., Inc. v. The Superior Court of Marin County*, (1984) 37 Cal.3d 244, 252, the court noted that "As *St. Amant's, supra*, at 727, 732, examples suggest, actual malice can be proved by circumstantial evidence of negligence, of motive and of intent [which] may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." Id at 257.

Awareness that information would have a serious impact on a plaintiff's reputation and knowledge of the harm likely to follow publication of a false story is relevant to whether it was published with actual malice. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Here, by its own prohibition on the publication of home addresses and telephone numbers and the fact that it kept such information about its members confidential, shows that Matchmaker was well aware that the disclosure of such information would have a serious and harmful impact on its members.

Under certain circumstances, evidence of a refusal to retract a statement after it has been demonstrated to be false is relevant in showing recklessness at the time the statement was published. *Tavoulareas*, 759 F2d at 112.[13/] Here, there is undisputed evidence that after Appellant's web consultant alerted Matchmaker to the bogus Profile and demanded that it be removed, Matchmaker failed and refused to do so for 2 ½ critical days while another 123 "hits" accessed the shockingly embarrassing material in the Profile.

Plainly, the District Court exceeded its circumscribed role on a motion for summary judgment by going from *issue-finding* to *issue-resolution*. *United States v. One Tintoretto Painting*, supra. Once Appellant presented admissible evidence from which a reasonable jury could infer "reckless disregard," it was not up to the Court to

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13/ See also *Goldwater v. Ginzburg*, 414 F.2d 324, 329(2nd Cir. 1969), (the court found that circumstantial evidence of actual malice existed thereby precluding summary judgment); *Schiavone Construction Co. v. Time Inc.*, 847 F.2d 1069, 1073 (3rd Cir. 1988) (the court noted that the determination of falsity depends in large part on the "sting" of the article, which is a question for the jury) *Westmoreland v. CBS Inc.*, 596 F.Supp. 1170 (S.D.N.Y. 1984) (genuine issues of material fact existed with respect to whether evidence was knowingly or recklessly misstated, thereby precluding summary judgment on issue of actual malice. "Whether the broadcast conveys a false message and if so whether the false presentation was either deliberate or reckless are questions appropriately submitted to a jury.") *Id.* at 1177.

weigh that evidence against Matchmaker's denials and choose sides.[14/]

IX. APPELLANT'S NEGLIGENCE CLAIM SHOULD GO TO TRIAL

Matchmaker's "handling" of the Profile was a disaster from start to finish. There are four separate omissions on its part that separately (and certainly collectively) constituted negligence and in all events created triable issues of fact for the jury.

First, because Matchmaker automatically received the "You think you are the right one. Proof it" e-mail in response to its automatic "welcome" e-mail (which included Appellant's home address and telephone number[15/] in direct violation of Matchmaker's policy), the company was on actual notice from the first minute of the first day (October 23, 1999) that the Profile was highly questionable, probably not legitimate and clearly in violation of its own terms and conditions. By viewing the Profile, Matchmaker would reasonably have discovered that it violated its own terms and conditions by including (1) Carafano's street address, (2) an e-mail address that also disclosed her telephone number, and (3) offensive, sexually suggestive language. It would have taken only seconds to spot these violations. ER Tab 76 Ex. 1-15, p.69:9-25; ER Tab 76 Ex. 1-15, p.47:1-13. Given that at least three total strangers – Bradley Tyer, M. K. Stratton and "Jeff" – contacted Carafano to express concern about the Profile, couldn't a reasonable jury conclude that a Matchmaker system operator likewise realized that the Profile was not legitimate?

14/ "As we have yet to see a defendant who admits to entertaining serious subjective doubts about the authenticity of an article it published, we must be guided by circumstantial evidence." *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249, 1253 (9th Cir. 1997). See *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) ("The editors' statements of their subjective intention are matters of credibility for a jury.").

15/ Matchmaker has admitted the heightened risk of harassment posed by the disclosure of telephone numbers. ER Tab 76 Ex. 1-15, pp.48:18-19:21; French Depo. 114:18-115:21, Exh. 5.

Second, Matchmaker acted negligently by failing to pre-screen the text of the profiles to detect violations of its own policies. Matchmaker claims that it does not do so because "the monitoring of text would be necessarily subjective and would place Matchmaker in the role of editor, censor and arbiter of good taste." ER Tab 70, 7:20-8:2. This explanation simply does not hold water because (a) the evaluation of photographs (which Matchmaker does do) also necessarily involves subjective evaluation[16]; (b) in response to a complaint about "inappropriate content posted by others," the system operator, "if appropriate, edits or removes the offending profile" (¶ 22), and thereby voluntarily plays the role of "editor, censor and arbiter"; and (c) most importantly, *Matchmaker could readily enforce at least the prohibition against home and e-mail addresses and telephone numbers in profiles without any "subjective" judgments, by using software that detects numerals.*

Matchmaker also claims that it would be impractical to pre-screen the text of new profiles due to the tens of thousands of new profiles and the amount of text in the essay answers. But the Profile was posted only on the Los Angeles website[17], which had only 6,000-8,000 members in 1999 in total. ER Tab 76 Ex. 1-15, p.158:16-20; ER Tab 70, pp.51-53. Given that these members joined over an extended time period, the Los Angeles membership was not so large as to reasonably preclude Matchmaker's system operators from pre-screening the text as part of their normal duties.[18] Furthermore, Matchmaker could easily program its system to search for numbers in order to locate home addresses and telephone numerals, and to

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16/ Indeed, the company's written photo policy requires system operators to make judgments about the "appropriateness" of the photographs. ER Tab 76 Ex. 1-15, pp.128:4-16; 129:17-130:3.

17/ For this reason, the nationwide numbers provided by Matchmaker are not relevant. ER Tab 70, pp.4:13-22, 7:4-11, 7:20-27.

18/ On average, Matchmaker would have to review only about 20 new profiles a day.

search for "@" symbol to locate e-mail addresses.

Third, Matchmaker acted negligently by failing to block access to the Profile immediately pending an investigation of the complaint made on behalf of Carafano. Indeed, *to this day, nobody at Matchmaker knows who took Perry's call, or what, if anything, it did with respect to the Profile between November 6 and the end of the day on November 8.* ER Tab 76 Ex. 1-15, pp.70:18-25, 71:14-21;ER Tab 76 Ex. 1-15, pp.25:24-26:3, 50:21-51:13; ER Tab 76 Ex. 1-15, pp.154:25-155:2; ER Tab 76 Ex. 1-15, pp. 106:17-107:3, 109:7-9.

Matchmaker should have immediately blocked access to the Profile at the very latest on November 6, 1999. Beyond the text of the Profile itself which raised serious questions about its legitimacy, Matchmaker could have simply checked the IP address which would have immediately revealed that the Profile was posted from an internet café in Berlin, not a single mother living in Los Angeles. On this record, a jury could reasonably conclude that Matchmaker acted negligently by failing to block access to the Profile immediately upon learning that it was false and illegitimate.[19/]

Fourth, Matchmaker acted negligently by failing to adequately train its website system operators. Matchmaker did not have a written policy and procedures manual until the summer of 1999. ER Tab 76 Ex. 1-15, pp.22:6-23:1; ER Tab 76 Ex. 1-15, p.60:22-24. There was no systematic training program for system operators. ER Tab 76 EX. 1-15, p.23:7-20. They merely received "one or two afternoons" of instruction. ER Tab 76 Ex. 1-15, p.24:1-9. The Los Angeles service operator in

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19/ In response to a complaint about a false profile, Matchmaker has the ability to block access (code "7") to the profile until it investigates the claim. ER Tab 76 Ex. 1-15, pp.126:12-127:13. Thus, Matchmaker does not face the dilemma of deciding on the spot whether to delete the allegedly false profile entirely or to leave it posted for all members to view pending its investigation. Remarkably, in 1999, it did not have a standard policy of blocking access immediately upon receipt of a complaint about a false profile. ER Tab 76 Ex. 1-15, pp.72:6-73:4.

November 1999 did not know if Matchmaker even had a policy as to how to handle complaints.[20] ER Tab 76 Ex. 1-15, p.164:4-22.

The District Court erred in holding that the negligence claim must stand or fall with the defamation claim. The facts giving rise to the negligence claim consisted of "far more than defamatory words." *See Flynn v. Higham*, 149 Cal.App.3d 677, 682, 197 Cal.Rptr. 145 (1983). Matchmaker's liability for defamation is based on the publication of the Profile. In contrast, liability for negligence is based on four of Matchmaker's numerous omissions and failures in its actual operations.[21] No grounds existed to deny Appellant a trial on her negligence claim and the summary judgment on this claim should be reversed.

X. THE DEFAMATION AND FALSE LIGHT CLAIMS SHOULD GO TO TRIAL

A. Carafano's Defamation Claim Does Not Relate To Her Status As A Limited Purpose Public Figure.

Appellant has not achieved such pervasive fame or notoriety in society so as to transform her into a public figure for all purposes and in all contexts.[22] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974) (All-purpose public figurehead will not be lightly assumed; in order for a plaintiff to be deemed an all-purpose

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20/ After Lycos purchased Matchmaker in July 2000, it adopted a one or two week customer training program – which includes handling complaints – and adopted a written escalation policy for handling complaints, including the problem of false profiles. ER Tab 76 Ex. 1-15, pp.120:10-121:14, 136:7-137:15; ER Tab 76 Ex. 16-21, pp. 22-25.

21/ The fact that some of the same acts which constitute negligence also support a separate finding of "actual malice" does not alter the fact that the underlying defamation claim is based solely on the publication of the Profile.

22/ Whether, and for what purposes, a person is deemed to be a "public figure" is a mixed question of law and fact, not generally amenable to the application of mechanical rules. *See, e.g., Rosanova v. Playboy Enterprises*, 411 F.Supp. 440, 443 (5th Cir. 1978) ("[d]efining public figure is much like trying to nail a jellyfish to the wall").

public figure, there must be "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society . . ."). Though as a budding actress she might wish otherwise, as far as her fledgling career is concerned, Appellant is hardly a "household name."[23] Carafano is what can best be described as a "working actress," whose primary notoriety came from her recurring role on the television series *Deep Space Nine* which ran until spring 1999, months before the events in question. By the time the Profile was posted in October 1999, the bulk of her work consisted of personal appearances at Star Trek-related conventions that draw a highly narrow fragment of society. Appellant is a "public figure," if at all, for only a limited range of issues, primarily among "Trekkies."[24] As a limited public figure, Appellant must establish "actual malice" only to the extent that the defamatory communications "relate[] to [her] role in a public controversy." *Reader's Digest Ass'n v. Superior Court*, (1984) 37 Cal.3d 244, 253.[25]

Matchmaker contends that the Profile was "directly related" to her activities as

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23/ "Household names" such as Johnny Carson, Carol Burnett, William F. Buckley and Jerry Falwell have all been held to be all-purpose public figures in defamation actions. See *1 Alexander Lindley and Michael Landau, Lindley on Entertainment, Publishing and the Arts* (2nd ed. 2000) §LD.03[1][b][iv]. While Matchmaker's attempt to lump Appellant with such pervasively recognizable figures is flattering, it is hardly accurate and is not supported by anything in the record except Matchmaker's wishful thinking.

24/ Indeed, Matchmaker itself did not recognize Carafano from the four photographs posted as part of the Profile. ER Tab 76 Ex. 1-15, pp. 156:6-157:17. Otherwise, it would have rejected the photographs in accordance with the written policy against posting pictures of celebrities. ER Tab 76 Ex. 1-15, pp.146-149.

25/ *See also Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.D.C. 1980) (defamation must have been germane to plaintiff's participation in controversy); *James v. Gannett Co., Inc.*, 353 N.E.2d 834, 40 N.Y.2d 415, 423 (N.Y. 1976) ("public figures may invite publicity only with respect to a narrow area of interest, and publications, which unreasonably extend the scope of their reports, may be confronted with a lesser standard of proof").

"a celebrity" because she "believes" it was posted by a Star Trek fan. (Mot. at 18:3-9.) But there is no evidence of who actually posted the Profile. ER Tab 70, p.9:13-24. Moreover, Appellant's subjective speculation about who that might be has nothing to do with the objective question of whether the publication is related to her role on *Deep Space Nine*.[26] In any event, the identity of this individual is a question of fact that cannot be resolved at this time on this record.[27]

Because the posting of the Profile did not relate to Appellant's status as a limited public figure, the actual malice standard does not apply to any of her claims.

B. In Any Event, There Is A Genuine Issue Of Material Fact That Matchmaker Acted With Actual Malice

Actual malice requires that the statements were made with a "reckless disregard for the truth," *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251 (9th Cir. 1997), or that a defendant entertained serious doubts as to the truth of the publication. As noted extensively above, from day one, based on all the evidence, a jury could reasonably find that Matchmaker had knowledge of falsity and/or "entertained serious doubt as to the truth of [the Profile]." *Id.*

On this record, a jury could readily find that Matchmaker acted with "actual malice." The defamation and false light claims deserve to be heard by a jury.

XI. APPELLANT'S MISAPPROPRIATION OF RIGHT OF PRIVACY SHOULD GO TO TRIAL

Matchmaker's only challenge to the misappropriation of the right of publicity claim and the only ground on which the District Court granted summary judgment, is that Appellant is subject to the "actual malice" standard and cannot prove actual malice, *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001).

26/ The "sting" of the defamation arising from the false and sexually provocative statements attributed to Appellant which have nothing to do with the fact that she is an actress. Eliminate what she does for a living and the defamation remains.

27/ Indeed, the person who Carafano believed had posted the Profile has denied that he did so. ER Tab 71 Y-UU, p.247:3-24; ER Tab 71 Y-UU, pp. 208-298.

In the first place, as just established with respect to Carafano's other claims, there is ample evidence establishing triable questions of fact on the issue of "actual malice," precluding summary judgment. In addition, as *Hoffman* makes clear, the actual malice standard does not apply to commercial speech. *Id.* at 1185. Matchmaker's business is dependent on enticing trial members to become paying members through access to profiles for a certain period. ER Tab 76 Ex. 1-15, pp.39:25-40:16. Matchmaker sells memberships to customers to stay in business. ER Tab 76 Ex. 1-15, p.131:5-13. Matchmaker's use of the Profile was far more akin to the unauthorized use of the Hawaiian surfer photographs in Abercrombie & Fitch's catalog than to *Los Angeles Magazine*'s use of Dustin Hoffman's image. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 102 N.2 (9th Cir. 2001) (in overturning summary judgment against plaintiff, court finds "use more commercial in nature" than in *Hoffman* where magazine "was unconnected to and received no consideration from the [gown] designer").[28/]

The District Court found "no comparison" between the publication of the Hawaiian surfer photos to promote the sale of Abercrombie & Fitch clothing and the publication of Carafano's photographs to promote the sale of Matchmaker memberships. The only reason the Court gives for this conclusion is that "the profiles posted on Matchmaker . . .contain information posted by members about themselves." But Carafano did not base her misappropriation of the right of publicity claim on the publication of any information contained in the Profile, she based it on the publication of her likeness in the photographs, as the District Court itself acknowledged.[29/]

28/ See also *KNB Enterprises v. Matthews*, (2000) 78 Cal.App.4th 362, 367, N.5. ("direct connection between the use and the commercial purpose" no longer element of Civil Code §3344 claim)

29/ "In her second cause of action, Plaintiff alleges that the use of her photographs (continued...)

Nothing in *Downing* suggests that the unauthorized use of one's likeness in photographs for commercial purposes is somehow insulated from liability merely because the publication is also accompanied by some text. By publishing four photographs of Carafano, Matchmaker was enticing trial members to become paying members and was adding to the gallery. Paraphrasing what this Court said in *Downing*, Appellant's photographs were essentially "window-dressing" to advance Matchmaker's commercial dating service.[30/] Clearly, the publication of the photographs advanced Matchmaker's commercial interests, just like the publication of the Hawaiian surfers' photographs in *Downing* advanced Abercrombie & Fitch's commercial interests. The District Court's attempt to distinguish *Downing* on the grounds that that case involved "a catalog to promote [Abercrombie & Fitch] clothing," while here the Matchmaker profiles "contain information posted about themselves," is entirely unavailing once one actually reviews the facts in *Downing*.[31/]

(...continued)
in the Profile constitute an appropriation of her likeness.".

30/ That's precisely why Matchmaker encourages its members to post up to ten photographs, thereby enhancing the value of a membership and attracting new members. Matchmaker does none of this as a charity; it's a business. If the time and expense of posting the photographs (and having employees pre-screen them) did not make the dating service more commercially successful, it would be discontinued.

31/ *Downing* involved far more than a mere commercial catalog selling clothing. The "Abercrombie and Fitch Quarterly" is designed to "build brand awareness and increase sales" by exploring a different theme in each issue such as "collegiate lifestyle, back to school, or winter wear." *Downing*, 265 F3d at 999. In addition to photographs, "approximately one-quarter of each issue is devoted to stories, news and other editorial pieces." *Id.* The issue in question, entitled "Spring Fever," contained articles entitled "Surf Nekkid" (on the history of surfing); "Your Beach Should Be This Cool" (on the history of Old Man's Beach at San Onofre, California); "When the Wild Things Are" (on various surfer "types"), and an interview with Nat Young, former world surfing champion. There is no question that
(continued...)

A fortiori, the four unauthorized photographs of Appellant published by Matchmaker do not qualify for the First Amendment defense, given the limited amount of information contained in the accompanying profiles, all of which constitute personal advertisements for the members, which are bought and paid for by the members, rendering the entire Matchmaker website a commercial enterprise with nothing approaching the extent of stories, news, interviews and other editorial content found in the "Abercrombie & Fitch Quarterly," which was itself insufficient to clothe the unauthorized photographs in *Downing* within the First Amendment defense.

Finally, the District Court overlooked the fact that the entire First Amendment defense is premised on the protection of "matters of public interest." *Downing*, 265 F3d at 1002; *New York Times v. Sullivan*, supra. The use of four (4) unauthorized photographs of Appellant to illustrate the false, misleading, salacious and bogus Profile in this case hardly constitutes a "matter of public interest" worthy of the First Amendment. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (false and misleading commercial speech is not constitutionally protected).

XII. CONCLUSION

For each of the foregoing reasons, the summary judgment dismissing Appellant's case should be reversed in its entirety.

DATED: October 15, 2002

Respectfully submitted,
ROHDE & VICTOROFF
STEPHEN F. ROHDE
MICHELE M. BERENCSI

By: _____
STEPHEN F. ROHDE, ESQ.

(...continued)
the catalog in *Downing* contained far more editorial content and information than the Matchmaker profiles, yet the unauthorized use of the plaintiffs' photographs to advance the commercial purposes of Abercrombie & Fitch precluded the First Amendment defense in that case, as it does here.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1880 Century Park East, Suite 811, Los Angeles, California 90067.

On October 15, 2002, I served the foregoing document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action by placing true copies thereof in sealed envelopes addressed as follows:

Timothy L. Alger, Esq.
Quinn Emanuel Urquhart Oliver & Hedges, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543

___ BY MAIL: I deposited such envelope in the mail box at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

___ BY PERSONAL SERVICE: I delivered such envelope by hand to the residence/office of the addressee.

___ BY FACSIMILE: I personally sent the documents via facsimile machine to the addressee(s)'s facsimile number(s) designated above.

_X_ BY FEDERAL EXPRESS: In accordance with F.R.A.P 25(c), I deposited the documents with the above address in such Federal Express envelope in the Federal Express pick up box at Los Angeles, California. The envelope was FedEx'd per our Customer Account payment system.

___ **STATE Court:**

_X_ **FEDERAL Court:**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 15, 2002 at Los Angeles, California.

PATRICIA ANN LEWIS