IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 02-55658

CHRISTIANNE CARAFANO,
Plaintiff and Appellant,

v.

METROSPLASH.COM, INC.; LYCOS, INC.;
and MATCHMAKER.COM, INC.,
Defendants and Appellees.

Appeal from the United States District Court
for the Central District of California

The Honorable Dickran Tevrizian
United States District Judge, Presiding
Case No. CV- 01-00018-DT (CWx)

BRIEF OF APPELLEE LYCOS, INC.

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Lycos, Inc. is a wholly-owned subsidiary of Terra Networks, S.A., a publicly held company which trades on NASDAQ and the Madrid Stock Exchange. Lycos, Inc. is the owner of the assets and liabilities of defendant Metrosplash.com, Inc., which was dissolved on May 31, 2001. Matchmaker.com, Inc., also named as a defendant below, is the former name of Metrosplash.com, Inc.

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STATEMENT OF JURISDICTION

Defendant-appellee Lycos, Inc. ("Lycos") concurs with the Statement of Jurisdiction in Appellant's Opening Brief.

STATEMENT OF ISSUES

Plaintiff-appellant Christianne Carafano ("Carafano") appeals from summary judgment dismissing all of her claims for relief against Lycos and its former subsidiary, Metrosplash.com, Inc. ("Metrosplash"). Carafano, a television celebrity, was the subject of a hoax profile on Matchmaker, an Internet dating service operated by Lycos and, formerly, by Metrosplash.

While the District Court reached the correct *result* in this case, it published a decision that profoundly misinterpreted and dangerously limited an important federal statute, the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA"). *See* Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002). The CDA immunizes interactive computer services from liability as publishers of content that is posted by third parties. This immunity has allowed the Internet to flourish as a forum for free speech -- transforming the way that our society communicates and shares information. While the District Court correctly found that Carafano had failed to raise a triable issue as to her individual claims for relief, and

granted summary judgment on that ground, the District Court mistakenly declined to hold that defendants were immune under the CDA.

The Court should affirm summary judgment because Carafano, a public figure, has not raised a triable issue as to the existence of constitutional actual malice, and because Carafano cannot meet the requirements for a disclosure of private facts claim. But the Court also should reject the notion that an interactive computer service creates and becomes legally responsible for content whenever it uses a questionnaire to collect information that is then made available on the Internet without alteration. Summary judgment should be affirmed as to all of Carafano's claims under the CDA, as well.

Specifically, Carafano contends in this appeal that the District Court erred in holding that:

1. The publication of Carafano's home address was "newsworthy" and therefore cannot give rise to a claim for invasion of privacy by disclosure of private facts;

2. Carafano failed to present evidence that the publication of Carafano's home address was made with reckless disregard for its offensiveness, and therefore cannot maintain a claim for invasion of privacy by disclosure of private facts;

3. Carafano is a public figure under the First Amendment, and is therefore required to present clear and convincing evidence of constitutional actual malice to avoid summary judgment on her claims for defamation, false light, "negligence," and appropriation of the right of publicity;

4. Matchmaker did not act with constitutional actual malice by publishing the Chase529 profile;

5. The Chase529 profile was not commercial speech, and Carafano's claim for appropriation of the right of publicity fails because Matchmaker did not act with constitutional actual malice; and

6. Carafano's claim for "negligence" duplicates her defamation claim and fails because Carafano was required to, but could not, raise a triable issue as to the existence of constitutional actual malice.

Lycos contends on appeal that the District Court did not err as to any of the foregoing, and summary judgment was properly granted as to all of Carafano's claims for relief. Lycos further contends that:

1. Summary judgment should be affirmed as to all of Carafano's claims on the additional ground that they are absolutely barred by the CDA;

2. Summary judgment should be affirmed as to Carafano's claim for invasion of privacy by disclosure of private facts on the additional ground that the disclosure complained of by Carafano was not highly offensive as a matter of law.

STATEMENT OF THE CASE

On October 27, 2000, plaintiff Christianne Carafano ("Carafano") sued Metrosplash.com, Inc., Lycos, Inc., Matchmaker.com, Inc. (collectively "Lycos"),[1] and Bradley R. Tyer in California state court for invasion of privacy, appropriation of the right of publicity, defamation, and negligence.[2]

Carafano contended in her Complaint that Tyer, an attorney living in Los Angeles, posted a hoax profile on the Matchmaker website that suggested that

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[1] Lycos, Inc. acquired Metrosplash.com, Inc. after the events at issue. Metrosplash.com, Inc. has been dissolved and the Matchmaker service is now part of the Lycos Network, a group of web-based services operated by Lycos, Inc. Matchmaker.com, Inc. is the former name of Metrosplash.com, Inc.

[2] ER 1:8-13 (Comp. ¶¶ 35-68). "ER" refers to the Excerpts of Record. References to the ER are to the Tab where the document is found, and then, following a colon, to particular pages in the ER. For example, a document in the ER located at Tab 1, page 8, is referred to as "ER 1:8." References to Tab 71, which spans three volumes, also include the volume number. For example, a document located at Tab 71, volume 2, page 100 is referred to as ER 71:[2]100.

Carafano was promiscuous and disclosed her home address.[3] Tyer was voluntarily dismissed after Lycos produced records to Carafano showing that the profile was posted by an unknown person at a "cyber cafe" in Berlin, Germany. Carafano now believes that the profile was posted by a former European fan club leader with whom she had a confrontation during a Star Trek cruise.[4]

Lycos removed the action on January 2, 2001, and on January 9, 2001 moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[5] The motion was denied on February 8, 2001.[6] On February 23, 2001, Lycos answered the Complaint.[7] The parties engaged in extensive discovery.

On January 30, 2002, Lycos filed a Motion for Summary Judgment.[8] On March 12, 2002, the District Court, the Honorable Dickran Tevrizian presiding,

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[3] ER 1:7-9, 11 (Complaint ¶¶ 31-33, 36-38, 43, 55-59).

[4] ER 70:[2]215-216, 217-218 (Alger Decl. Exh. UU (Carafano deposition transcript ("Carafano Tr.") 69:14-70:8, 71:4-72:19)).

[5] SER 5:1-33. "SER" refers to Appellee's Supplemental Excerpts of Record.

[6] SER 13:1-14 (Order).

[7] SER 14:1-13 (Answer).

[8] ER 69:1-36 (Motion for Summary Judgment).

granted Defendants' Motion for Summary Judgment as to all of Carafano's claims.[9] On March 29, 2002, a Judgment was entered dismissing Carafano's action in its entirety.[10]

STATEMENT OF FACTS

In granting summary judgment to Lycos, the District Court found that Carafano was a general purpose public figure under the First Amendment to the United States Constitution, and that she had failed to present clear and convincing evidence of constitutional actual malice. The District Court also found that Carafano's home address was "newsworthy" and its publication was not made with reckless disregard.

These determinations were based on *undisputed facts*. Carafano does not challenge the District Court's factual findings; rather, she argues on appeal that she deserves *greater* privacy rights than the average individual because she is a celebrity, while simultaneously arguing that she is not famous enough to be a public figure under the First Amendment. The undisputed evidence before the District Court established that Carafano is, indeed, a public figure who has opened her life to public scrutiny. The undisputed evidence also established that Matchmaker did not know

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[9] ER 96:1-36 (Order).

[10] ER 99:1-3. (Judgment).

that the profile was a hoax when it was created by an unknown person and posted on the Matchmaker service.

The evidence also establishes that Matchmaker is an interactive computer service, as defined by the CDA, and the statements that form the basis for Carafano's claims for relief were created solely by another content provider, and were not created by Matchmaker.

The undisputed facts, which are largely ignored in Appellant's Opening Brief, are as follows:

A. Matchmaker.com

Matchmaker is an interactive computer service, accessed from the World Wide Web, that permits members to search a database containing personal profiles of other members. At the time that the matter was considered by the District Court, Matchmaker had 79 "communities," 62 of which focused on particular cities, states or regions. Eleven communities focused on age groups, religious interests and lifestyles. Six were international communities.[11]

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[11] ER 98:2 (Findings of Fact and Conclusions of Law ("Findings") ¶ 5); ER 70:4 (Simpson Decl. ¶ 11).

Membership is anonymous. Once a person becomes a member of a Matchmaker community, such as the Los Angeles Metro community, he or she can search that community's database and view profiles posted by other members in the Los Angeles area. Each member has a mailbox; members can send e-mails to each other within the proprietary Matchmaker system.[12]

Matchmaker has more than 200,000 members. Many of these members are "trial members" who can use the service for a limited period at no charge. To continue after the trial period has expired, a member must agree to pay a monthly fee.[13]

To join Matchmaker, a new member must complete a questionnaire of up to 62 multiple-choice questions, must answer at least one of a series of essay questions, and may post up to 10 photographs.[14]

The data provided by the member -- which becomes the member's "profile" -- is stored on Matchmaker's computer servers. When a profile is called up

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[12] ER 98:3 (Findings ¶¶ 12, 13); ER 70:5-6 (Simpson Decl. ¶¶ 16, 17).

[13] ER 98:2 (Findings ¶ 6); ER 70:4 (Simpson Decl. ¶ 12).

[14] ER 98:3 (Findings ¶¶ 8, 9); ER 70:4-5, 11-50 (Simpson Decl. ¶¶ 13, 14, Exhs. A, B).

by the member who posted it, or by other members during searches of the Matchmaker database, it is displayed in a standard format.[15]

Many thousands of members are able to simultaneously access and use Matchmaker's searchable database. Indeed, when a member logs into the service, the member is informed of other members in their particular community who are also "on-line" at that time. This allows members to communicate immediately with each other by e-mail and in "chat rooms," where numerous people can share messages instantaneously. At the relevant time, Matchmaker's servers were capable of handling 16,400 transactions by members per second.[16]

Matchmaker does not review or verify the information provided by members when they respond to the questionnaire.[17] As soon as a new member completes the questionnaire, the resulting profile is made available on-line to other members of the community. At any time, existing members may call up their own profiles and make changes. These changes are not reviewed by the Matchmaker service prior to posting.[18]

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[15] ER 98:3 (Findings ¶¶ 10, 11); ER 70:5 (Simpson Decl. ¶ 15).

[16] ER 98:3-4 (Findings ¶ 14); ER 70:3-4 (Simpson Decl. ¶ 10).

[17] ER 98:4 (Findings ¶ 16); ER 70:5 (Simpson Decl. ¶ 18).

[18] ER 98:5 (Findings ¶ 21); ER 70:7-8 (Simpson Decl. ¶ 21).

Matchmaker notifies members that information in the profiles might be inaccurate or unreliable. To become a member and gain access to the Matchmaker database, every person must agree to the Matchmaker Disclaimer, which prohibits the inclusion of the following information (among other things) in a profile: home address, e-mail address, telephone number, offensive sexually suggestive or connotative language.[19]

Each community has a system operator who handles member inquiries and complaints. When a member submits photographs for his or her profile, the photographs are routed to the system operator assigned to that member's community. The system operator then reviews the photographs before they are included in the Matchmaker database and eliminates all photographs that violate Matchmaker's standards.[20]

When a new member signs up, Matchmaker sends an automatic "welcome e-mail" to the e-mail address provided by the member. If a person were to

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[19] ER 98:4-5 (Findings ¶¶ 18, 19); ER 70:6-7 (Simpson Decl. ¶ 18).

[20] ER 98:5 (Findings ¶ 22); ER 70:7-8 (Simpson Decl. ¶¶ 20, 21).

reply to the "welcome e-mail," it would go to the system operator assigned to the new member's community.[21]

The Matchmaker service relies on its members to report abuses. Whenever a member complains about inappropriate content posted by others, the system operator in charge of that community investigates and, if appropriate, edits or removes the offending profile.[22]

B. The Chase529 Profile

On October 23, 1999, an unknown person created a trial account under the name "Chase529" on Matchmaker's Los Angeles Metro community. Computer records show that the person who posted the profile, and modified it one time, used computer terminals in Europe. In the essay portion of the profile, the unknown person included Carafano's home address, a "Yahoo!" e-mail address that did not belong to Carafano, and four photographs of Carafano.[23]

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[21] ER 98:2 (Findings ¶ 7); ER 85:3 (McConnell Decl. ¶ 5).

[22] ER 98:5-6 (Findings ¶ 24); ER 70:8 (Simpson Decl. ¶ 22).

[23] ER 98:6 (Findings ¶¶ 25, 26); ER 71:[1]8-13 (Alger Decl. Exh. A (Chase529 profile)).

At an unknown point in time, the "Yahoo!" e-mail address, cmla2000@yahoo.com, was set up by the unknown person so that those who sent mail to that address received the following automatic response: "You think you are the one. Proof it!! [*sic*]" This e-mail also included Carafano's home address and telephone number.[24]

On or about Thursday, November 4, 1999, Carafano learned about the profile. The next day, Carafano reported the matter to police, but she did not contact Matchmaker.[25]

It was not until the weekend that anyone representing Carafano complained to Matchmaker about the profile. On or after Saturday, November 6, 1999, Siouxzan Perry, who maintains Carafano's personal website, learned of the profile from an e-mail sent to Carafano by an individual using the name "Jeff." Perry discussed the matter with Carafano and then contacted Matchmaker by telephone.[26]

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[24] ER 98:6 (Findings ¶ 27); ER 71:[1]14-16 (Alger Decl. Exh. B (e-mail)). Carafano's repeated assertions in her Opening Brief that Matchmaker published her telephone number are not correct. *See* ER 70:66-69 (Simpson Decl. Exhs. G, H).

[25] ER 98:7 (Findings ¶ 32); ER 71:[2]250-253, 260 (Carafano Tr. 130:21-133:2, 172:21-25).

[26] ER 98:7 (Findings ¶ 33); ER 71:[3]20-21, 22-23, 24-25, 26, 27, 28-30 (Alger Decl. Exh. XX (Perry deposition transcript ("Perry Tr.") 36:12-19,

(continued...)

An exchange of e-mails between "Jeff" and Perry establishes that the Chase529 profile was made inaccessible to Matchmaker members no later than Monday morning, November 8, 1999 -- the beginning of the first business day after Matchmaker allegedly was contacted.[27] That evening, the profile (which already had been made inaccessible) was marked by Matchmaker personnel for deletion, and the profile was purged from Matchmaker's servers at 4:00 a.m. on November 9, 1999.[28]

C. Carafano's Public Activities

Carafano describes herself as a "successful actress who works in television, motion pictures, and live theater." In her Complaint, Carafano states that she has "a worldwide following" and "her fan club has had a presence in eleven different countries." She states that she is best known for her "break-out" role as

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[26] (...continued)
36:25-37:23, 39:5-40:3, 42:12-43:4, 45:17-21, 46:9-13, 51:23-53:13)).

[27] Carafano's assertions that the profile remained accessible until Monday evening, November 8 (Appellant's Opening Brief ("AOB") at 7) are contradicted by the record. *See* ER 71:[3]31-32, 33-38 (Perry Tr. 59:13-60:13, 71:9-75:7, 75:11-76:22); ER 71:[1]14-26 (Alger Decl. Exhs. B-G (e-mails)). The last "modification" of the profile was likely the instruction by Matchmaker personnel to purge the profile from Matchmaker's computer servers. *See* ER 70:8-9 (Simpson Decl. ¶¶ 24-28).

[28] ER 98:7 (Findings ¶¶ 34, 35); ER 70:10, 60-63 (Simpson Decl. ¶ 33, Exh. E).

Leeta the D'abo Girl on *Star Trek: Deep Space Nine*, "the number one syndicated television show in the world."[29]

Carafano reports that "[a]t one point I had the largest fan club in Star Trek fandom of anyone, past or present actors on the show." Carafano's character was so popular that it was the subject of an action figure and a trading card, and her stage name was an answer on the game show, *Jeopardy!*[30]

In addition to *Star Trek: Deep Space Nine*, Carafano has had other prominent television roles, including a recurring role on *General Hospital* and as the featured guest star in an Emmy Award-winning episode of *ER*. For one year, Carafano co-hosted a news magazine show on the Sci-Fi Channel, and in the last several years she has appeared on the television programs *Sliders* and *Sci-Fi Vortex*. She also hosted *NBC Saturday Night at the Movies* and was a guest on *The Montel Williams Show*.[31]

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[29] ER 98:7 (Findings ¶¶ 37, 38); ER 1:3 (Compl. ¶ 9).

[30] ER 98:7-9 (Findings ¶¶ 38, 47, 50); ER 71:[1]27-35 (Alger Decl. Exhs. H (plaintiff's website bio), I (action figure), J (trading card)); ER 71:[2]254-255 (Carafano Tr. 152:14-153:4).

[31] ER 98:8 (Findings ¶¶ 40, 41); ER 1:4 (Compl. ¶ 9); ER 71:[1]27-28 (Alger Decl. Exh. H) (plaintiff's website bio)).

Carafano has appeared in a number of films, and had lead roles in the movies *Frozen, Marina, In a Moment of Passion, Sammyville, Lighting, Digital Man,* and *Married People, Single Sex.* Her acting roles included a part in the hit Mel Brooks film, *Robin Hood: Men in Tights*. She has made a number of infomercials and television commercials, including a national TV ad where she played the CEO of Starkist Tuna.[32]

Carafano makes personal appearances at Star Trek conventions throughout the world, and joins fans on Star Trek cruises. These appearances, which can draw as many as 5,000 people, involve speeches, autograph signings, dinners, and mixing with fans. Carafano uses these convention appearances to advance her career as an actress and singer, and she sometimes attends without compensation.[33]

Other public appearances by Carafano included hosting the "Sexiest Geek Alive" contest and charity walkathons. The "Sexiest Geek" event was the

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[32] ER 98:8 (Findings ¶¶ 42, 43); ER 71:[2]210, 271 (Carafano Tr. 37:12-20, 207:3-13, 207:19-24).

[33] ER 98:8 (Findings ¶¶ 44, 45); ER 71:[2]220, 225-227, 242, 264, 265, 266, 269-270, 273, 285-286, 291-292 (Carafano Tr. 74:13-25, 82:8-84:11, 104:15-22, 194:16-17, 195:7-11, 196:10-19; 205:5-206:17, 209:3-15, 233:18-234:8, 262:21-263:23).

subject of national news reports and was a job that Carafano actively sought and hoped to turn into a television show.[34]

Carafano has gained media attention, including newspaper profiles and magazine articles. She made the cover of several magazines, including *Femme Fatales* as one of "Trek's Sexy Fifty."[35]

Managers and agents have been retained by Carafano in Hollywood and New York to advance her career as an entertainer. She also promotes herself and her career on the Internet, through a personal website, chasemasterson.com, which details Carafano's achievements, touts her upcoming appearances and activities, and provides contact information for her manager. The content of the website is selected by Carafano; she has retained a "webmistress" who maintains the site and handles Carafano's e-mail traffic. This website generates 200,000 to 300,000 "hits" by visitors each month.[36]

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[34] ER 98:8 (Findings ¶ 46); ER 71:[2]283-284 (Carafano Tr. 228:16-229:7); ER 71:[3]39 (Perry Tr. 92:7-11); ER 71:[1]140-144 (Alger Decl. Exhs. W, X (letters from plaintiff)).

[35] ER 98:7 (Findings ¶ 39); ER 71:[1]63-68 (Alger Decl. Exhs. P, Q, R (magazine covers)).

[36] ER 98:8-9 (Findings ¶¶ 48, 49); ER 71:[2]267, 279, 280-281, 293-294, 295, 296-297 (Carafano Tr. 201:12-24, 215:13-24, 216:3-7, 216:16-217:22, 272:24-273:19, 275:10-17, 281:14-19, 281:21-282:3); ER 71:[2]1-10

(continued...)

Carafano's fan club also maintains a separate website filled with photographs of Carafano, messages from Carafano, and articles about Carafano. The fan club website gets about 3,000 "hits" from visitors each month. The club also publishes and distributes a newsletter for its members. Carafano has the ability to control the content in her fan club's website and newsletter, and she has used her influence with the fan club to promote and gain contributions for her favorite charity.[37]

Carafano has made no secret of her status as a single mother, she has brought her son with her on Star Trek fan cruises, and she has discussed her son at public events and in interviews.[38]

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[36] (...continued)
(Alger Decl. Ex. Y (webpages from chasemasterson.com)); ER 71:[3]12-13, 17-18, 19 (Perry Tr. 13:5-14:10, 20:21-21:13, 23:5-11).

[37] ER 98:9 (Findings ¶¶ 51, 53, 55); ER 71:[2]22-162 (Alger Decl. Exhs. BB-FF (club webpages and newsletters); ER 71:[3]48, 49-50 (Alger Decl. Exh. YY (Kuhr Tr. 15:11-17, 16:22-17:6)).)

[38] ER 98:9 (Findings ¶ 56); ER 71:[2]215-216, 217, 228-230, 231-232, 233, 234-235, 236, 244-245 (Carafano Tr. 69:21-70:4, 71:4-15, 86:23-87:2, 87:10-11, 87:16-18, 87:20-88:25, 89:6-90:4, 90:16-22, 94:10-15, 96:23-97:7, 98:8-19, 106:16-107:4); ER 71:[2]22-58, 186-207 (Alger Decl. Exhs. BB (webpages from chaseclub.com), OO (article dated 2/27/99), PP (article from Star Trek The Magazine), QQ (article from chaseclub.com), RR (article from chaseclub.com), SS (article authored by Chase Masterson), TT (biography for Chase Masterson from imdb.com)).

SUMMARY OF ARGUMENT

Carafano seeks by this appeal to hold an interactive computer service liable for damages because the service did not identify one of hundreds of thousands of Internet postings as possibly fraudulent and mount an investigation into its authenticity. Her arguments, however, run afoul of First Amendment principles and a federal statute enacted to protect free speech on the Internet.

First, as recognized by the District Court, Carafano is a public figure, and she failed to present clear and convincing evidence that Matchmaker published false statements about her with knowledge of falsity or a substantial subjective awareness of probable falsity. An interactive computer service that simply serves as a forum for third-party speech, and which does not investigate the speech of its users, could not possibly have had the awareness of falsity or probable falsity required by the First Amendment. This required the District Court to dismiss Carafano's claims for defamation, false light, "negligence," and appropriation of the right of publicity.

Second, Carafano was unable to raise a triable issue as to three elements of her claim for invasion of privacy by disclosure of private facts. Disclosure on the Internet of a true fact that is in the public domain, such as a residential address, is not offensive as a matter of law. Such a disclosure also could not have been made in these circumstances with reckless disregard for its offensiveness. Moreover, a

celebrity's residential address is of legitimate public interest, and cannot provide the basis for a private facts claim.

Third, Matchmaker's collection and publication of third-party content is protected by the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA"), and this requires the Court to affirm the judgment on this additional ground.

The importance of the CDA's protections cannot be overstated. With the express goal of preserving and promoting free speech, Congress relieved the Internet community of the crushing burden of investigating and verifying all third-party content, and this immunity has contributed to the stunning success of the Internet. Lycos and other companies make available on the Internet an infinite array of information compiled and supplied by others. With a couple of mouse clicks, any person with a computer can reach websites packed with news articles, stock quotes, maps, job listings, weather reports, horoscopes, recipes, restaurant and movie reviews, directories of telephone numbers and addresses, on-line stores, health advice, government records, information about ancestors and high school classmates, classified advertisements, and a breathtaking array of fora where people can freely communicate about themselves and every subject imaginable. These services include bulletin boards, where people can post messages for all to see, and searchable databases, where information is provided by inquiry. Any person may search for

information about jobs (*see, e.g.,* Monster.com), books (*see, e.g.,* Amazon.com), automobiles (*see, e.g.,* Edmunds.com), lawyers (*see, e.g.,* Martindale.com), insurance (*see, e.g.,* InsWeb.com), collectibles (*see, e.g.,* eBay.com), mutual funds (*see, e.g.,* Morningstar.com), or people (*see, e.g.,* Matchmaker.com and its main competitor, Match.com). Virtually all of this information is provided by sources other than the operators of these websites -- employers, law firms, manufacturers, publishers, insurers, financial companies and individuals.

Like any means of communication, the Internet can be abused. But isolated wrongdoing does not justify imposing on every person or company that operates an interactive computer service the duty of authenticating through investigation all information that it collects from others and makes available on the Internet. Such an obligation would chill the flow of information and stunt the growth of the Internet, as Congress realized when it enacted the CDA.

Summary judgment was properly granted by the District Court, and should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The District Court's grant of summary judgment is reviewed *de novo*. Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002). Appellate review is governed by the same standard used by the trial court under Rule 56(c) of the Federal Rules of Civil Procedure. Delta Savings Bank v. United States, 265 F.3d 1017, 1021 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 816 (2002).

As a general rule, summary judgment should be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). In a libel case brought by a public figure, summary judgment must be granted if the plaintiff cannot present "clear and convincing" evidence of constitutional actual malice. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). This is a "'heavy burden,' . . . far in excess of the preponderance sufficient for most civil litigation." Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1252 (9th Cir. 1997) (quoting United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir.1985)).

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON CARAFANO'S DEFAMATION AND FALSE LIGHT CLAIMS[39]

A. The District Court Correctly Found that Carafano Is a General-Purpose Public Figure

This Court should not disturb the District Court's holding that Carafano is a public figure. Carafano does not challenge any of the factual findings regarding her fame. Rather, Carafano argues that she is merely a limited-purpose public figure whose "primary notoriety" came from her role in *Star Trek: Deep Space Nine*. Carafano provides no authority for the proposition that her fame is somehow limited to her most recent acting job,[40] and she ignores the District Court's enumeration of her highly public activities unconnected to *Star Trek: Deep Space Nine* -- including seven films, other television programs, public charity events, and a singing career.

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[39] Carafano alleged the tort of false light as part of her invasion of privacy claim. *See* ER 1:8 (Comp. ¶ 39). California considers false light duplicative when it is alleged with, and based on the same facts as, a defamation claim. Kapellas v. Kofman, 1 Cal. 3d 35 n.16, 459 P.2d 912, 81 Cal. Rptr. 360 (1969); McClatchy Newspapers, Inc. v. Superior Court, 189 Cal. App. 3d 961, 965, 234 Cal. Rptr. 702 (1987).

[40] Indeed, the law is to the contrary. "[O]nce a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days." Forsher v. Bugliosi, 26 Cal. 3d 792, 811, 608 P.2d 716, 163 Cal. Rptr. 628 (1980); Werner v. Times Mirror Co., 193 Cal. App. 2d 111, 118, 14 Cal. Rptr. 208 (1961).

Under the First Amendment, a public figure plaintiff cannot recover damages for a false statement unless he or she proves with clear and convincing evidence that the statement was made by the defendant with constitutional actual malice -- *i.e.*, with knowledge that it was false or with a high degree of awareness of its probable falsity. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974); Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Failure to investigate is not enough: "There must be sufficient evidence to permit the conclusion that *the defendant in fact entertained serious doubts as to the truth of his publication*." St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added).

The requirement that a public figure plaintiff must prove the defendant knew or suspected that the allegedly defamatory statement was false has two rationales. First, public figures have exposed themselves to increased media attention and the risk of injury from falsehoods by assuming a greater role in the public arena. Gertz, 418 U.S. at 344-345. Public figures "have voluntarily exposed themselves to public scrutiny and must accept the consequences." Live Oak Pub. Co. v. Cohagan, 234 Cal. App. 3d 1277, 1289, 286 Cal. Rptr. 198 (1991). Second, public figures tend to have access to channels of communication, and, by engaging in "self-help," have an effective alternative to litigation. Gertz, 418 U.S. at 344; Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 253, 208 Cal. Rptr. 137 (1984).

Courts have consistently found that people in professions that necessarily involve public attention -- such as actors and sports figures -- are public figures. "Where a person has . . . chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community,' . . . he invites general public discussion." Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1280-1281 (3d Cir. 1979).

Public figure status does not require widespread fame; rather, it depends on whether the plaintiff engages in activities that meet the two rationales of Gertz. *See* Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir. 1968) ("Public figures . . . . include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done."); Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 746-47, 20 Cal. Rptr. 405 (1962) ("public figures" include actors and actresses); Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 177 (2d Cir. 2000) (plaintiff who described himself as a "well-known radio commentator" in Filipino-American community); Stolz v. KSFM 102 FM, 30 Cal. App. 4th 195, 206-07, 35 Cal. Rptr. 2d 740 (1994) (radio station owner held to be a public figure); Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 941, 120 Cal. Rptr. 186 (1975) (television personality and author found to be a public figure); Braden v. News World

Communications, Inc., 1991 WL 161497, *8-9 (D.C. Super. 1991) (co-host of CNN's "Crossfire" found to be a public figure).

In Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), the court found that Anita Brewer, a singer who gained media exposure in part because of her romantic relationship with Elvis Presley, and her husband, a former college football player, were public figures. Anita Brewer appeared on television variety shows, was a radio disk jockey, co-hosted a television program, and acted in plays and commercials. *Id.* at 1248. The court found that the Brewers, by becoming celebrities, engaged in activities that involved risk of increased exposure and injury to reputation: both had "vigorously and successfully sought the public's attention or gained notoriety for their own achievements . . . ." *Id.* at 1253. *See also* James v. Gannett Co., 40 N.Y.2d 415, 353 N.E.2d 834 (N.Y. 1976) (belly dancer was public figure because she sought public attention; "[a]lthough [entertainers] have not necessarily taken an active part in debates on public issues, they remain, nevertheless, persons in whom the public has continuing interest").

Carafano's activities satisfy the standards of Gertz. Carafano has sought public attention and thus faces increased risk of false statements. Through her choice of career, and by establishing a fan club, hiring managers and agents, operating a promotional website, and by generally doing everything within her power to maintain

and expand upon her *Star Trek: Deep Space Nine* notoriety, Carafano has intentionally exposed herself to the public, the scrutiny of the media, and the focused attention and discussion of many thousands of fans. A natural consequence of this is increased risk that statements will be made about her that are disagreeable and false. The First Amendment does not permit Carafano to simply reap the benefits of public exposure without bearing the risks that come with it.

Carafano's continued exposure in the media also provides Carafano with an effective means of self-help. Gertz, 418 U.S. at 344; Reader's Digest, 37 Cal. 3d at 253. Through her use of press interviews and the Internet, Carafano has shown herself to be adept at managing her public image and responding to criticism. As the District Court observed, Carafano has active control over the content of both her fan club website and her own personal promotional website.[41] Given that Carafano has injected herself into the public eye, and has ready access to channels of communication, the District Court correctly held that she is a general-purpose public figure.

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[41] ER 96:26-27 (Order).

B. At Minimum, Carafano Is a Limited-Purpose Public Figure, and the Profile Directly Relates to Her Public Activities

Carafano contends that she is, at best, a limited purpose public figure, and the Chase529 profile did not relate to her activities as an actress, since her work was directed to a "narrow fragment of society."[42] This is contradicted by the record; Carafano was active on a variety of fronts, and any evaluation of her public figure status must take into consideration Carafano's activities over time. *See, e.g.,* Brewer, 626 F.2d at 1255 (plaintiff had relationship with Elvis Presley ten years before article and had retired as a singer eight years before article).

It is quite clear from the face of the Chase529 profile that the profile related directly to Carafano's role as an entertainer: it included a photograph of Carafano signing autographs and a publicity photograph, it used her stage name, and it made reference to movies in which she had appeared.[43] Carafano "invited public attention -- and scrutiny -- to [her] public life," and, as a consequence, statements about her must be judged under First Amendment standards. Thomas v. Los Angeles Times Communications, LLC, 189 F. Supp. 2d 1005, 1011 (C.D. Cal. 2002) (teacher became a public figure when he cooperated in book about his life); *see also* WFAA-

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[42] AOB at 26.

[43] ER 71:[1]8-13 (Alger Decl. Exh. A (Chase529 profile)).

TV, Inc. v. McLemore, 978 S.W.2d 568, 572-73 (Tex. 1998), *cert. denied,* 562 U.S. 1051 (1999) (television reporter was a public figure because he engaged in activities that drew public attention and scrutiny).[44]

C. Carafano Failed to Create a Triable Issue Regarding Constitutional Actual Malice

The District Court correctly found that Carafano had failed to meet her burden of "affirmatively establish[ing] by clear and convincing evidence that a genuine issue of fact exists as to whether actual malice can be proven at trial."[45]

First, it was undisputed that the profile was posted without review by Matchmaker. Matchmaker promptly responded when it learned of the hoax: it made the profile inaccessible to members on the morning of the first business day after

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[44] The relationship between Carafano's activities as a public figure and the Chase529 profile is further supported by Carafano's belief that Eike Lange, a leader of her fan club, created the profile. Carafano testified at her deposition that she had a confrontation with Lange on a Star Trek cruise. Carafano also testified that Lange knew her home address, home phone number, and that she was a single mother. ER 71:[2]217-18, 220-22, 224, 228 (Carafano Tr. 71:19-72:17, 74:13-76:5, 78:8-9; 86:19-22).

[45] ER 96:28 (Order) (citing Aisenson v. ABC, Inc., 220 Cal. App. 3d 146 (1990)).

Perry claims to have called Matchmaker to complain.[46] That same day, Matchmaker also ordered the profile deleted from its servers, and it was purged that night.[47] Matchmaker's prompt removal of the profile contradicts Carafano's assertion that Matchmaker harbored constitutional actual malice.[48]

Second, Carafano's assertion that Matchmaker received an automatic reply to the "welcome aboard" e-mail is sheer speculation.[49] Carafano's counsel admitted as much at argument.[50] There is no evidence that Matchmaker received any response to the membership confirmation e-mail that is automatically generated by Matchmaker's computer servers after an account is opened, let alone the "You think you are the right one?" e-mail that Bradley Tyer forwarded to Carafano much later.

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[46] ER 71:[3]31-32, 33-38 (Perry Tr. 59:13-60:13, 71:9-75:7, 75:11-76:22); ER 71:[1]14-26 (Alger Decl. Exhs. B-G (e-mails)).

[47] ER 70:10, 60-63 (Simpson Decl. ¶ 33, Exh. B).

[48] Perry's call to Matchmaker does not give rise to constitutional actual malice, of course. It is well-settled that denials of the accuracy of a publication do not establish that the defendant knew at the time of publication that the statements were false or probably false. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 n.37 (1989) (quoting Edwards v. National Audobon Soc'y, 556 F.2d 113, 121 (2d Cir. 1977)).

[49] AOB at 22.

[50] ER RT:12 (hearing transcript).

The Chase529 profile was created on October 23, 1999.[51] The earliest telephone calls relating to the profile (which Carafano contends were the result of the "right one" e-mail) were received by Carafano on October 31, 1999.[52] The earliest evidence that the cmla2000@yahoo.com address was generating an automatic response is the Tyer e-mail, dated *November 5, 1999* -- two weeks after someone opened the Chase529 account.[53] The automatic "right one" e-mail response could have been set up *at any time*, and Carafano offers no evidence whatsoever that the automatic response existed and was sent to Matchmaker when the account was created on October 23, 1999.

Third, *even if* Matchmaker had received such an e-mail, it would not be clear and convincing evidence of constitutional actual malice. The system operator in charge of the Los Angeles Metro community in 1999, Doris McConnell, does not recall receiving such an e-mail.[54] McConnell received in excess of 100 e-mails every day, and often more than 200 e-mails.[55] There is no reference in the alleged e-mail to Matchmaker or a Matchmaker account, and nothing in the alleged e-mail -- which

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[51] ER 70:9, 66-67 (Simpson Decl. ¶ 28, Exh. G).

[52] ER 85:79-80, 81, 82 (Alger Supp. Decl. Exh. 8 (Carafano Tr. 41:24-42:7, 43:12-22, 51:8-18)).

[53] ER 71:[1]14-16 (Alger Decl. Exh. B (e-mail)).

[54] ER 85:3 (McConnell Decl. ¶¶ 5, 6).

[55] ER 85:2-3 (McConnell Decl. ¶ 4).

would have come from the "Yahoo!" address, and not from the proprietary Matchmaker e-mail system -- that would have caused a system operator to question the authenticity of a particular profile, or treat the e-mail as anything other than "junk" or "spam."[56]

Fourth, the alleged receipt of the alleged "right one" e-mail after the posting of the Chase529 profile, even if it occurred, does not meet the First Amendment's requirement that the defendants harbored actual malice *at the time of the publication.* *See* Bose Corp. v. Consumers Union, 466 U.S. 485, 513 (1984) (affirming the reversal of bench trial verdict in favor of plaintiff where the plaintiff failed to present clear and convincing evidence that author realized the inaccuracy at the time of publication); *accord* Schoen v. Schoen, 48 F.3d 412, 417 (9th Cir. 1995) (evidence of ill will after the making of the false statements is insufficient proof of constitutional actual malice); Herbert v. Lando, 781 F.2d 298, 305-06 (2d Cir. 1986) ("It is self-evident that information acquired after the publication of defamatory material cannot be relevant to the publisher's state of mind of his alleged malice at the time of publication."). Matchmaker does not review member profiles before they are posted, so it could not have had any knowledge that the Chase529 profile was false or probably false at the time of publication. Neither the alleged receipt of an automatic

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[56] ER 85:3 (McConnell Decl. ¶ 7).

e-mail, which necessarily came *after* the posting (if at all), nor Perry's telephone call to Matchmaker, which occurred two weeks after the posting, change this analysis.

The rest of Carafano's actual malice "evidence" is merely argument that Matchmaker should have screened profiles as a general practice and verified their accuracy.[57] This is an argument for *negligence*, however -- not knowledge of falsity or probable falsity. "[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989). Constitutional actual malice requires not only "obvious reasons to doubt the veracity" of a statement, but *also* "purposeful avoidance of the truth." Dodds v. American Broadcasting Co., 145 F.3d 1053, 1061 (9th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999). "[I]n the absence of a subjective awareness by the defendant that he should have investigated more carefully, *mere innocent or negligent failure to investigate has been held not to establish actual malice.*" Velle Transcendental Research Ass'n v. Sanders, 518 F. Supp. 512, 518-19 (C.D. Cal. 1981) (emphasis added) (citing St. Amant, 390 U.S. at 733); *accord* McCoy v. Hearst Corp., 42 Cal. 3d 835, 860, 868, 727 P.2d 711, 231 Cal. Rptr. 518 (1986) (defendant must have "in fact" entertained serious doubts about truth of the publication; "Lack of due care is

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[57] AOB at 14-19.

not the measure of liability, nor is gross or even extreme negligence."); Newton v. National Broadcasting Co., 930 F.2d 662, 680 (9th Cir. 1990) ("'should have foreseen' is an objective negligence test while the actual malice test of New York Times is deliberately subjective"). There is simply no evidence -- let alone clear and convincing evidence -- that McConnell or anyone else at Matchmaker concluded that the Chase529 profile probably was false, but then "deliberately avoided learning the truth." Dodds, 145 F.3d at 1062-63.[58]

The District Court therefore correctly found that Carafano had failed to create a triable issue as to the existence of constitutional actual malice, and summary judgment was properly granted on Carafano's claims for defamation and false light.

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[58] Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), relied on heavily by Carafano, was reversed by the D.C. Circuit *en banc*. *See* Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987) (reversing the panel's finding that plaintiffs had proven the existence of constitutional actual malice by clear and convincing evidence). In any event, the panel's decision does not apply any less exacting standard for evidence of constitutional actual malice. The Tavoulareas I decision reviewed a jury verdict that rested on a great deal of evidence that the defendants engaged in an effort to "get" the plaintiff and ignored obvious signs that "facts" they were printing about the plaintiff were false or unreliable. Tavoulareas I reiterated the requirement that there be "a showing of *subjective doubts*." 759 F.2d at 114. It also concluded that "serious doubts were circulating within the *Post*'s newsroom while the article was being prepared," but the article "was published without apparent additional investigation and without substantial change." *Id.* at 117. There is no evidence here that anyone at Matchmaker suspected that the Chase529 profile was false before or at the time it was posted, or at anytime prior to November 6, 1999 -- whereupon Matchmaker promptly removed it.

III. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON CARAFANO'S "NEGLIGENCE" CLAIM

Carafano attempts to avoid the requirement of constitutional actual malice by arguing that she has an independent claim for "negligence." What Carafano ignores is the fact that her "negligence" claim is one for publication of false statements. The alleged acts and omissions of Matchmaker that Carafano contends give rise to a "negligence" claim are merely factual allegations relating to the *fault* element of a *defamation* claim.

Carafano's "negligence" claim contends that Matchmaker is liable for negligent "handling" of the profile by allegedly failing to do more to block the posting and by allegedly failing to act swiftly once the hoax was discovered.[59] Negligent "handling" cannot be pleaded without the act of publication of the Chase529 profile. Without the publication, she cannot allege breach of duty and damage, and her "negligence" claim fails. With the publication, her "negligence" claim merely duplicates her failed claim for defamation. *See* Restatement (Second) Torts § 558 (1977) (defamation is an unprivileged false publication to a third party made with fault amounting at least to negligence on the part of the publisher).

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[59] AOB at 22-25.

If Carafano's theory had merit, all of the free speech protections of the First Amendment, statute, and common law would be swept away: for example, a public figure plaintiff unhappy about a newspaper article could simply allege that the reporter negligently conducted his or her research -- perhaps by not conducting a particular interview, or by not including a particular fact in the article that the plaintiff considered important. The "negligence" plaintiff would be entitled to damages even if the statements in the article were privileged, or were protected opinion, or were published without knowledge of falsity or probable falsity.

This, of course, is not the law, and no amount of parsing permits Carafano to skirt such constitutional standards as the requirement of actual malice. The California Supreme Court made this clear in Blatty v. New York Times Co., 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986), in dismissing negligence and other claims alleging that the defendant newspaper injured plaintiff by not including his book in its bestseller list:

> Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement: "that constitutional protection does not depend on

the label given the stated cause of action" and no cause of action "can claim . . . talismanic immunity from constitutional limitations."

Id. at 1042-43 (citing Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 265, 690 P.2d 610, 208 Cal. Rptr. 137 (1984), and New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).[60]

This principle extends to creative pleading that attempts to focus on the acts prior to publication, rather than the false publication that results from those acts. Thus, in Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), the Fourth Circuit rejected the plaintiff's contention that he could maintain a "negligence" claim because of alleged delays in the removal of a false bulletin board posting and AOL's failure to block subsequent similar false postings. The court stated:

> Although [plaintiff] attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation

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[60] Consistent with this rule, federal and state courts dismiss all injurious falsehood claims that cannot meet the constitutional and statutory requirements for a defamation claim. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1057-58 (9th Cir. 1990); Leidholdt v. L.F.P., Inc., 860 F.2d 890, 893-94 (9th Cir. 1988); Fellows v. National Enquirer, Inc., 42 Cal. 3d 234, 240, 721 P.2d 97, 228 Cal. Rptr. 215 (1986).

> action, only one who publishes can be subject to this form of tort liability. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party -- each alleged by [plaintiff] here under a negligence label -- constitute publication.

Id. at 332 (citing Restatement (Second) Torts §§ 558(b), 577 (1977)); *accord* Ben Ezra, Weinstein and Co., Inc. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 835, 121 Cal. Rptr. 2d 703 (2002); Smith v. Intercosmos Media Group, Inc., 2002 WL 31844907, *3-4 (E.D. La. Dec. 17, 2002).

Thus, Carafano's allegations that Matchmaker should have done more to keep the profile from being posted, and should have acted faster in taking it down, fail for the same reasons as her defamation claim. Carafano must -- but did not -- raise a triable issue as to constitutional actual malice, and the District Court correctly granted summary judgment on Carafano's claim for "negligence."

IV. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON CARAFANO'S DISCLOSURE OF PRIVATE FACTS CLAIM

Carafano has no special privacy right because she is an entertainer, and there is no evidence that Matchmaker was aware, at the time the profile was posted, that the profile contained information that posed a special risk to her. Moreover, Carafano's address is a matter of public knowledge, and legitimate public interest, so its publication does not meet the "highly offensive" and "not newsworthy" requirements imposed by common law and the First Amendment.

A. Carafano Abandoned Any Private Facts Claim Relating to Her Living Situation and Her Telephone Number

Carafano alleged in her Complaint that Matchmaker invaded her privacy by the public disclosure of her home address, telephone number, and the fact that she lives alone with her son.[61] In opposing summary judgment, however, Carafano offered no argument as to why a trial was required on any portion of her privacy claim other than the disclosure of her address. The District Court correctly found that Carafano abandoned her claim with respect to the disclosure of her telephone number (which was *not* published in the Chase529 profile) and the fact that she lived alone

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[61] ER 1:8-9 (Comp. ¶ 41).

with her son.[62] *See* Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) ("Issues raised in a brief which are not supported by argument are deemed abandoned."). In any event, Carafano failed to demonstrate the existence of a triable issue as to these allegations, and summary judgment was proper. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

B. Carafano's Celebrity Made the Disclosures "Newsworthy"

The District Court was correct when it granted summary judgment on Carafano's private facts claim on the ground that the disclosure was of legitimate public interest. The private facts tort requires "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public interest." Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 214, 955 P.2d 469, 74 Cal. Rptr. 2d 843 (1998). The fourth element

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[62] ER 96:20 (Order). Although Carafano argues that she "asserted at several points [in her Opposition brief] that Matchmaker's disclosure of her telephone number and that she lived alone with her son invaded her privacy," she mischaracterizes the record. AOB at 8 n.3. Four of the five references in the Opposition were factual citations, and the fifth reference was a footnote concerning Matchmaker's policy on the disclosure of telephone numbers. *See* ER 75:1-30 (Oppn. to Mot. Sum. Jgmt). At the hearing on the motion, Carafano's counsel -- who had received the Court's order before argument -- did not challenge the Court's conclusion that Carafano had abandoned these allegations. *See* ER RT:1-26 (hearing transcript).

(often referred to as lack of "newsworthiness") is a *constitutional* hurdle that requires the plaintiff to prove that the disclosed facts are not of legitimate public interest. *Id.* at 214-16.

It must be noted at the outset that Carafano's protestations about the "private" nature of her residential address are contradicted by the facts. Carafano apparently ran a business from her home, and that address is a public record that is readily accessible to any person.[63] *See* Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 747-48, 20 Cal. Rptr. 405 (1962) (facts that are contained in the public record cannot support private facts claim; "'When the incidents of a life are so public as to be spread upon a public record they come within the knowledge and into the possession of the public and cease to be private.'" (quoting Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931))). *See also* Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 491, 494-96 (1975) (no privacy claim can be based on a fact open to public inspection in government records; "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man.").

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[63] *See* ER 85:7, 68-69 (Alger Suppl. Decl. ¶ 15 & Exh. 6 (fictitious business registration for Merchants of Wow)).

Even beyond that, however, the District Court properly held that the publication of Carafano's home address was "newsworthy," given her public stature. The "newsworthiness" element does not apply only to news reports; rather, it precludes liability for all types of speech that involve matters of public interest, including the personal lives of celebrities. *See, e.g.,* Eastwood v. Superior Court, 149 Cal. App. 3d 409, 423, 198 Cal. Rptr. 342 (1984); Carlisle, 201 Cal. App. 3d at 746-47; Restatement (Second) Torts § 652D, cmt. h ("the home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen"). The defense "'extends . . . to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.'" Shulman, 18 Cal. 4th at 225 (quoting Restatement § 652D, cmt. j); *accord* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 535 & nn.5-6, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). *See also* W. Page Keeton, *et al.,* Prosser on Torts (5th ed. 1984) § 117, at 860 (for private facts claim, public figure is "anyone who has arrived at a position where public attention is focused upon him as a person").

Here, Carafano "voluntarily acceded to a position of public notoriety" by becoming a television and movie actress and engaging in activities designed to gain

public attention, including press interviews and fan conventions at which she discussed her personal life. Carafano has willingly submitted "to a searching beam of public interest and attention." Kapellas v. Kofman, 1 Cal. 3d 20, 37, 459 P.2d 912, 81 Cal. Rptr. 360 (1969) (dismissing private facts claim of children of political candidate); *see also* Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (1993) (surfer was "newsworthy" even though he "spent a good deal of energy avoiding the limelight"); Werner v. Times Mirror Co., 193 Cal. App. 2d 111, 118, 14 Cal. Rptr. 208 (1961) (rejecting private facts claim by controversial former city attorney over disclosure of impending marriage).

Carafano describes herself as "an actress who a lot of people would like to know,"[64] with fans who want to know details about her life.[65] Carafano has discussed her son at public events and in interviews, and her status as a single parent was certainly known by the hundreds of fans who have joined Carafano and her son on Star Trek cruises.[66] Carafano cannot now declare her personal life "off limits."

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[64] ER 71:[2]261 (Carafano Tr. 176:14-15).

[65] ER 71:[2]282 (Carafano Tr. 224:1-8).

[66] ER 98:9 (Findings ¶ 56); ER 71:[2]215-216, 217, 228-230, 231-232, 233, 234-235, 236, 244-245 (Carafano Tr. 69:21-70:4, 71:4-15, 86:23-87:2, 87:10-11, 87:16-18, 87:20-88:25, 89:6-90:4, 90:16-22, 94:10-15, 96:23-97:7, 98:8-19, 106:16-107:4); ER 71:[2]22-58, 186-207 (Alger Decl. Exhs. BB

(continued...)

See Shulman, 18 Cal. 4th at 222 ("newsworthiness" compares the intrusion to the plaintiff's public activities); *accord* Kapellas, 1 Cal. 3d at 36 ("newsworthiness" considers "the extent to which the party voluntarily acceded to a position of public notoriety").[67]

Ignoring these settled, common-sense rules, Carafano takes the opposite approach and contends that she has a *greater* right of privacy because she is a celebrity who uses a stage name. Lycos has found no published court decision holding that an entertainer has a privacy right in her residential address, and no case holds that an otherwise public fact becomes "private" for those who use stage names. Any holding that publication of Carafano's address could give rise to a private facts

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[66] (...continued)
(webpages from chaseclub.com), OO (article dated 2/27/99), PP (article from Star Trek The Magazine), QQ (article from chaseclub.com), RR (article from chaseclub.com), SS (article authored by Chase Masterson), TT (biography for Chase Masterson from imdb.com)).

[67] Carafano makes a clumsy attempt at mocking the District Court's reference to maps to the star's homes, and argues that Carafano's address has never been included in such maps. AOB at 12. That is not the point, of course. The thriving market for such maps in Los Angeles -- a fact of which the District Court could take judicial notice -- is evidence of the high public interest in where celebrities live. In evaluating public interest, courts do not engage in value judgments. *See* Shulman, 18 Cal. 4th at 225 ("Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it.").

claim, while the publication of the address of her non-celebrity next-door neighbor might not, would offend the First Amendment by creating a moving standard that chills speech. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232, 1234-35 (7th Cir. 1993) (cited repeatedly with approval in Shulman) (discussing the constitutional limitations on the private facts tort and rejecting the notion that a claim can rest merely on the unconsented-to disclosure of facts the plaintiff wants to conceal).[68]

Carafano cannot now withdraw a fact from the public domain -- a fact that is readily available in public records, open to the view of neighbors, and known to utility companies, mailmen, magazine publishers, and catalog merchants -- in the

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[68] Times Mirror Co. v. Superior Court, 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556 (1988), relied on by Carafano, does not hold that a residential address is a private fact. Rather, Times Mirror stands for the proposition that invasion of privacy can occur where a fact is disclosed that the defendant had reason to know would place the plaintiff in jeopardy. *Id.* at 1426-28. This subjective awareness requirement is consistent with the requirement, in Briscoe, 4 Cal. 3d at 543 & nn.18, 19, that the defendant publish a private fact "with a reckless disregard for its offensiveness." In Times Mirror, the defendant newspaper publicly identified the plaintiff as the discoverer of the body of her murdered roommate *after the police informed the reporter* that the killer was still at large and the plaintiff had provided police with the killer's description. *Id.* at 1424; *see also* Pasadena Star-News v. Superior Court, 203 Cal. App. 3d 131, 134, 249 Cal. Rptr. 729 (1988) (discussing the holding of Times Mirror). The facts here do not come close to those in Times Mirror. Matchmaker did not have any awareness at the time it was posted that the contents of the Chase529 profile placed Carafano in danger.

hope of obtaining damages from Lycos. The California Supreme Court stated, in Kapellas v. Kofman, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969):

> If the information reported has previously become part of the "public domain" or the intrusion into an individual's private life is only slight, publication will be privileged even though the social utility of the publication may be minimal.

Id. at 36 (citations omitted).

Carafano's home address is of legitimate public interest, and the District Court properly dismissed Carafano's claim for disclosure of private facts.

C. Defendants Did Not Act With Reckless Disregard

The District Court also was correct when it concluded that there was no evidence that Matchmaker acted with reckless disregard when publishing Carafano's home address.[69] The California Supreme Court held that a plaintiff cannot prevail on a claim for public disclosure of private facts without establishing that the defendant published the information "with reckless disregard for the fact that reasonable men would find the invasion highly offensive." Briscoe, 4 Cal. 3d at 543. The undisputed evidence shows that Matchmaker was not aware of the contents of the Chase529 profile when it was posted. Necessarily, then, it could not have acted with reckless

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[69] ER 96:22 (Order).

disregard for whether reasonable persons would find the contents of the profile highly offensive.

Carafano offers no authority for her contention that "reckless disregard," as an element of a private facts claim, is something less than "reckless disregard" as an element of a defamation claim. In adopting the requirement, the California Supreme Court expressed its concern for protecting free speech. Briscoe, 4 Cal. 3d at 542-43. At minimum, "reckless disregard" cannot exist without knowledge of the content of the publication. Carafano's attempt to transform "reckless disregard" into a negligence standard[70] flies in the face of the California Supreme Court's holding, and would, if adopted by the Court, inevitably chill truthful speech.

D. The Disclosure Was Not Highly Offensive To The Reasonable Person

Although the District Court declined to address whether the disclosure of Carafano's home address was highly offensive to a reasonable person, this Court may affirm summary judgment on any ground presented below. First Pacific Bank v. Gilleran, 40 F.3d 1023, 1024 (9th Cir. 1994). The disclosure of Carafano's address

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[70] *See* AOB 14-15.

was not highly offensive as a matter of law, and, for this separate and additional reason, the Court should affirm the dismissal of Carafano's private facts claim.

A private facts plaintiff must establish that the disclosure was "so offensive as to *shock* the community's notions of decency." Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370 (1974) (emphasis added); *accord* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1230, 1233 (7th Cir. 1993) ("the core [of the tort] . . . is the protection of those intimate physical details the publicizing of which *would be not merely embarrassing and painful* but *deeply shocking* to the average person subjected to such disclosure" (emphasis added)).

Liability does not arise from publication of a fact that is open to the "more or less casual observation of . . . neighbors." Restatement § 652D, cmt. c; Keeton, *supra*, § 117, at 857 (*citing* Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940)). Consistent with this black-letter rule, every court that has addressed the issue has held that publication of a home address is not sufficiently offensive to support a private facts claim. *See* Reeves v. Fox Television Network, 983 F. Supp. 703, 709 (N.D. Ohio 1997); Bisbee v. John C. Conover Agency, Inc., 452 A.2d 689, 690-92 (N.J. App. Div. 1982); Strutner v. Dispatch Printing Co., 442 N.E.2d 129, 133 (Ohio App. 1982); McNutt v. New Mexico St. Tribune Co., 538 P.2d 804, 808 (N.M.

1975); *cf.* Grunseth v. Marriott Corp., 872 F. Supp. 1069, 1075-76 (D.D.C. 1995) (disclosure of hotel receipt not offensive). *See also* NLRB v. British Auto Parts, Inc., 266 F. Supp. 368, 373 (C.D. Cal. 1967) (rejecting attempt to block disclosure of names and addresses on privacy grounds; "those who do not welcome visits to their homes are free to turn visitors away and will have the protection of the law in doing so"); *accord* Hechler v. Casey, 333 S.E.2d 799, 811-12 (W.Va. 1985); Tobin v. Michigan Civil Service Comm'n, 331 N.W.2d 184, 189, 191 (Mich. 1982).[71]

Any holding that a fact that is open to public view, such as a street address, is "private" also would run afoul of the constitution's restrictions on the private facts tort. The United States Supreme Court has made clear that "state action to punish the publication of truthful information seldom can satisfy constitutional

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[71] Disclosure of living arrangements also is not "offensive." Haynes, 8 F.3d at 1230-33. As discussed above, Carafano has freely discussed her son in public, and her status as a single parent was certainly known by the hundreds of fans who have joined Carafano and her son at Star Trek conventions and cruises. *See* ER 71:[2]215-18, 228 (Carafano Tr. 69:21-72:17, 86:5-22 (describing her son's attendance at fan events); 86:19-22 (fans are "aware" Carafano is a single mom)). *See* Sipple v. Chronicle Publishing Co., 154 Cal. App. 3d 1040, 1047-48, 201 Cal. Rptr. 665 (1984) (no private facts claim where further publicity is given "to matters which the plaintiff leaves open to the public eye"); Dora, 15 Cal. App. 4th at 543-44 (same); Restatement § 652D, cmt. b (same). Likewise, although Matchmaker did not publish Carafano's telephone number, it *is* publicly listed, and is available to anyone who calls the telephone company or inquires on the Internet. *See* ER 85:64-67 (Supp. Alger Decl. Exhs. 4, 5 (Yahoo! and infoUSA.com telephone listings)).

standards." Bartnicki v. Vopper, 532 U.S. 514, 527 (2001); *see also* Shulman, 18 Cal. 4th at 225 and n.8 (acknowledging constitutional limits on private facts tort). Thus, because the publication of her address was not highly offensive, summary judgment on Carafano's private facts claim should be affirmed on that separate and additional basis.

V. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON CARAFANO'S APPROPRIATION CLAIM

The District Court found that the Chase529 profile was not commercial speech, and, as a consequence, Carafano was required to raise a triable issue with respect to constitutional actual malice to survive summary judgment on her claim for appropriation of the right of publicity. *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1187 (9th Cir. 2001).

Carafano repeats here the same argument presented to the District Court: that Matchmaker's profiles are commercial speech and not subject to the ruling in Hoffman because Matchmaker wants to sign up dues-paying members. But there is no evidence that the Chase529 profile was used for marketing purposes, and speech does not become "commercial" simply because its publisher earns a profit. If Carafano's theory is correct, the entire contents of every magazine, newspaper, and

movie would be "commercial," since readers and viewers must pay a fee for access to this speech. *See* Hoffman, 255 F.3d at 1186 (defendant's goal of gaining a profit from magazine sales or "rev[ing] up" the magazine's profile, did not make fashion article "commercial"); *accord* Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1197-98 (9th Cir. 1989); *see also* Guglielmi v. Spelling-Goldberg Productions, Inc., 25 Cal. 3d 850, 868-69, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (Bird, C.J., concurring) (rejecting plaintiff's claim that the First Amendment did not protect profit-making movie).

There is no similarity between the profiles posted on Matchmaker, which simply contain non-commercial information posted by members about themselves, and the clothing catalog at issue in Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001), where the defendant retailer used plaintiffs' images directly as a tool to sell merchandise. *See id.* at 1003 & n.2 (distinguishing the Hoffman decision); *see also* Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 412, 114 Cal. Rptr. 2d 307 (2001) ("It was not the business of the messenger, but the *commercial nature of the message* that distinguished the [Hoffman and Downing] decisions." (emphasis added)).

Carafano's characterization of the Matchmaker profiles as advertisements is wrong, and, in any event, such a label does not change the analysis. No

Matchmaker profile proposes a commercial transaction (including the Chase529 profile), and Carafano does not even suggest as much. Moreover, the fact that members pay a fee to have their profiles posted beyond the trial period does not change the expressive, non-commercial character of their speech; if that were true, political advertisements would lose much of their First Amendment protection. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (applying constitutional actual malice rule to an advertisement).

Given that the profiles posted on Matchmaker are not commercial speech, Carafano, as a public figure, must present clear and convincing evidence that Matchmaker acted with constitutional actual malice. Hoffman, 255 F.3d at 1187. This she could not do, and her right of publicity claim was properly dismissed.

VI. ALL OF CARAFANO'S CLAIMS ARE BARRED BY THE COMMUNICATIONS DECENCY ACT OF 1996

The Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA") immunizes interactive computer services from publisher liability for content provided by third parties. Congress recognized that many interactive computer services could not operate, and the expansion of the Internet would be stymied, if the services were confronted with the dilemma of either (1) reviewing, verifying, and editing *all* third-

party content, or (2) acting as a pure conduit, exercising no editorial control whatsoever.

The District Court's denial of summary judgment on the ground that Matchmaker is an "information content provider" is the only published decision holding that an interactive computer service loses its immunity under the CDA when it collects information from third parties and then makes that information available, without alteration, to other users of the service. The District Court erred, and summary judgment should be affirmed under the CDA. *See* First Pacific Bank v. Gilleran, 40 F.3d 1023, 1024 (9th Cir. 1994) (summary judgment may be affirmed on any basis argued in the court below).

A. Under The CDA, Interactive Computer Services Are Not Subject To Liability For Content Provided By Third Parties

The CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." *Id.* § 230(f)(2).

Congress enacted this provision in response to the decision in Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995), in which Prodigy was found liable as a "publisher" of false information posted by a third party on Prodigy's "financial computer bulletin board." Under common law, one who repeats a libel is subject to liability as if he had originally published it. Barry v. Time, Inc., 584 F. Supp. 1110, 1122 (N.D. Cal. 1984); Restatement (Second) Torts § 578 (1977). In contrast, conduits that do not exercise editorial control are "distributors" and are not liable unless they knew or had reason to know that a statement provided by another was false. Lewis v. Time, Inc., 83 F.R.D. 455, 463-64 (E.D. Cal. 1979), *aff'd,* 710 F.2d 549 (9th Cir. 1983); Restatement § 581.

The Stratton Oakmont court held that Prodigy was liable as a "publisher" because it edited content "on the basis of offensiveness and 'bad taste.'" Stratton Oakmont, 1995 WL 323710 at *4. The court made clear that the outcome would have been different if Prodigy had merely made third-party content available to subscribers without alteration, and had not taken "the role of determining what is proper for its members to post and read on its bulletin boards." *Id.*

By withdrawing interactive computer services from the common law rule of republication liability, Congress sought to overrule Stratton Oakmont while encouraging open discourse on the Internet. Congressman Christopher Cox, who

co-authored the immunity provision, declared during the House debate that the purpose of the provision was to "protect [interactive computer services] from taking on liability such as occurred in the Prodigy case . . . ."[72] Congress expressly recognized that the information revolution made possible by the Internet would be hampered if computer services that made third-party content available to others were held to the same liability standards as the original speakers. *See* 47 U.S.C. § 230(b)(1) ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

B. The CDA's Immunity Is Broad And Absolute

With the exception of the District Court's decision in this case, every court that has considered the immunity provision of the CDA has found that it precludes liability for interactive computer services that collect and make available

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[72] ER 71:[3]65-87 (Alger Decl. Exhs. BBB-DDD (141 Cong. Rec. H8460-01, *H8470 (daily ed. August 4, 1995)); House Conf. Rpt. No. 104-458 (104th Cong., 2d Sess.), at 194 (purpose of immunity provision was to overrule Stratton Oakmont and protect all interactive computer services); Senate Rpt. No. 104-230 (104th Cong., 2d Sess.), at 194 (same)).

third-party content. In Zeran v. America Online, Inc. 129 F.3d 327 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998), false postings on an America Online bulletin board caused the plaintiff to be deluged with abusive phone calls, including death threats. *Id.* at 329. The Fourth Circuit rejected the contention that AOL was liable for defamation for allowing the postings and then not removing them quickly enough. In doing so, the court gave proper weight to the CDA's goal of protecting and enhancing free speech:

> It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 330-31.

Zeran's broad view of the CDA's immunity provision has been consistently applied by federal and state courts in a variety of contexts. *See, e.g.,* Ben Ezra, Weinstein and Co., Inc. v. America Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (stock information made available on AOL's

"Quotes & Portfolios" service); Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C. 1998) (allegation of wife-beating in on-line magazine); PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001) (statements about patent service made in chat room by user of defendant's computers); Morrison v. America Online, Inc., 153 F. Supp. 2d 930, 933-34 (N.D. Ind. 2001) (threats directed at physician, distributed by e-mail); Doe v. America Online, Inc., 783 So.2d 1010, 1017 (Fla.), *cert. denied,* 122 S. Ct. 208 (2001) (use of chat rooms to market obscene photos); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 832, 121 Cal. Rptr. 2d 703 (2002) (offers to sell counterfeit sports memorabilia on Internet auction site); Schneider v. Amazon.com, Inc. 31 P.3d 37, 41-42 (Wash. Ct. App. 2001) (allegation in reader book review that author was a felon).

C. The CDA's Immunity Extends To Matchmaker

The District Court properly found that Matchmaker is an "interactive computer service," as that term is defined in the CDA and has been interpreted by the courts.[73] *See* 47 U.S.C. § 230(f)(2). Matchmaker falls within this definition because it provides access by multiple users to the searchable database maintained on

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[73] ER 96:14-16 (Order).

defendants' computer servers.[74] *See* Gentry, 99 Cal. App. 4th at 831 n.7 (eBay "provides an information service that enables access by multiple users to a computer server and brings it within the broad definition of an interactive computer service provider"); Schneider, 31 P.3d at 40 (Amazon.com provides an information service that enables access by multiple users to a server and falls within the definition of an interactive computer service).

The District Court erred, however, in holding that Matchmaker is an "information content provider," as that term is defined in the CDA.[75] The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The District Court held that Matchmaker participated in the creation of the Chase529 profile and became responsible for its contents because it posed questions that, when answered, resulted in the profile.[76] The District Court misunderstood the nature of the Matchmaker website, and incorrectly applied the relevant law.

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[74] ER 70:3-4 (Simpson Decl. ¶ 10).

[75] ER 96:16-20 (Order).

[76] ER 96:17 (Order).

1. Matchmaker functions like a traditional bulletin board in providing a forum for third-party speech

The Matchmaker service functions like a bulletin board or any other type of on-line forum for speech. A Matchmaker member completes a questionnaire, the information from which is stored on Matchmaker's servers *without any alteration*.[77] Other members may then access Matchmaker's servers and call up that information, which is displayed in the standard graphic format of a profile. Indeed, the multiple-choice questions developed by Matchmaker are not even displayed when a profile is called up.[78]

The District Court distinguished Matchmaker from bulletin board services because Matchmaker asks specific questions and does not allow members to post other additional information.[79] This simply is not correct. Matchmaker's essay questions are open-ended; they ask, for example, "Give a detailed description of

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[77] ER 70:7 (Simpson Decl. ¶ 19).

[78] ER 70:47-48 (Simpson Decl. Exh. B (example profile)). The third-party content is retained as data separate from Matchmaker's questionnaire and standard profile format. *See* ER 70:5, 9-10, 66-74 (Simpson Decl. ¶¶ 15, 28-31 Exhs. G (multiple choice answers), H (essay answers), and I (photos)).

[79] ER 96:17-18 (Order).

yourself," and "If you could choose an ideal friend, what would he/she be like?"[80] This is no different from the bulletin boards in Amazon.com or eBay, where users also are provided a general forum for the creation of their own information.[81] Indeed, Matchmaker members have the freedom to post a broad sweep of information about themselves: the final question in the questionnaire is "Any additional comments?"[82]

Likewise, the multiple choice questions give members a broad range of choices, including neutral, innocuous answers.[83] Members are not compelled or even encouraged to give "sexually charged" responses,[84] and they certainly are not

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[80] ER 70:39, 43 (Simpson Decl. Exh. A).

[81] *See* ER 85:24, 47 (Alger Supp. Decl. Exh. 1 (Amazon.com "Customer Reviews" link provides users the option to "Write an online review"), Exh. 2 (eBay's "Feedback Forum" provides users the option to "leave feedback")).

[82] *See* ER 70:45 (Simpson Decl. Exh. A (questionnaire)).

[83] ER 70:16-38 (Simpson Decl. Exh. A). *See* Partington v. Bugliosi, 56 F.3d 1147, 1156 (9th Cir. 1995) (only questions that can be reasonably read as an assertion of false fact can be defamatory).

[84] Carafano attempts to make much of what she calls the "provocative" nature of Matchmaker's questions. AOB at 3. In effect, Carafano seeks to punish defendants for protected adult speech, which has been condemned by the United States Supreme Court. Reno v. American Civil Liberties Union, 521 U.S. 844, 874-75 (1997) (rejecting as unconstitutional that portion of the CDA that prohibited transmission by interactive computer services of offensive communications to minors); *see also id.* at 880 (condemning any standard that permits someone to use a "heckler's veto" to limit speech on the ground that it was indecent).

prompted to give *false* answers. It is the user, not Matchmaker, who makes the selections, and those selections are not altered by Matchmaker when the user submits the answers that become a profile. The answers that comprise a Matchmaker profile are completely the creation of the individual responding to the questionnaire. If the answers are false, they are false because a *user of the service* decided to give false response.

There is no significant difference between this process and a traditional on-line bulletin board, in which a person can use the Internet to access a computer server operated by a company such as "Yahoo!," call up a bulletin board containing messages dealing with a particular subject, and then search and selectively view those messages and replies.[85] There also is no significant difference between the Matchmaker process of collecting and displaying third-party information and that which is employed by such popular interactive computer services as Amazon.com and eBay.[86]

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[85] *See* ER 85:6-7, 53-63 (Alger Suppl. Decl. ¶¶ 9-12, Exh. 3 (printouts from Yahoo! Clubs)).

[86] Schneider, 31 P.3d 37 (*see* ER 85:5, 8-29 (Alger Suppl. Decl. ¶¶ 2-4, Exh. 1 (printouts from http://www.amazon.com))); Gentry, 99 Cal. App. 4th 816 (*see* ER 85:5-6, 30-52 (Alger Suppl. Decl. ¶¶ 5-8, Exh. 2 (printouts from http://www.ebay.com))).

2. Matchmaker's method of collecting third-party statements does not transform the service into an "information content provider"

After the District Court's decision in this case, the California Court of Appeal had the opportunity to address the same question that troubled the District Court. In Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (2002), the plaintiff brought claims against eBay, an on-line auction site, for violation of the Autographed Sports Memorabilia statute (Cal. Civ. Code § 1739.7), negligence, and unfair business practices (Cal. Bus. & Prof. Code § 17200 *et seq.*), because counterfeit sports memorabilia had been posted for sale on the site. The plaintiff argued that eBay was an "information content provider" (and not entitled to immunity under the CDA) because eBay provided its own descriptions of categories of collectibles and created a system which rated sellers based on volume and positive feedback from buyers. Gentry, 99 Cal. App. 4th at 833-34.

The trial court sustained eBay's demurrer, and the Court of Appeal affirmed. The alleged wrongdoing was not the content provided by eBay, but the content posted by third parties, the court explained.

> [E]nforcing appellants' negligence claim would place liability on eBay for simply compiling false and/or misleading content created by the individual

defendants and other co-conspirators. *We do not see such activities transforming eBay into an information content provider with respect to the representations targeted by appellants as it did not create or develop the underlying misinformation.* We are constrained from enforcing such liability under California law because it would treat eBay as the publisher or speaker of the individual defendants' materials, and thereby conflict with section 230.

Id. at 834 (emphasis added) (citing Ben Ezra, 206 F.3d at 985-86).

As in Gentry, Matchmaker gathers the statements of third parties and makes them available in a practical, user-friendly format. The Matchmaker questionnaire facilitates the creation by members of profiles that can be readily retrieved from a database and viewed by other members. The questionnaire is simply a method of collecting information for a searchable database.

The District Court's view, if accepted by the Court, would strip interactive computer services of immunity under the CDA whenever they use prompts, questions, or categories. The CDA would apply only to bulletin boards or similar forums where the third-party content is completely unrestricted and unformated, *i.e.*, where the third-party posts content on a blank screen.[87] This

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[87] *See* ER 96:16-20 (Order) (observing that the outcome would be different under the CDA if Matchmaker was a "conduit" and ran an open

(continued...)

cramped view of the CDA's immunity is clearly contrary to the broad sweep of section 230 and Congress' express goal preserving and promoting "the vibrant and competitive free market" on the Internet. Gentry, 99 Cal. App. 4th at 833 n.10.

The CDA does *not* limit its protection to raw, unformatted third-party data; rather, it was intended to overturn Stratton Oakmont, Inc. v. Prodigy, 1995 WL 323710 (N.Y. Sup. Ct. 1995), which held that Prodigy, by *controlling* and touting its *review and editing* of content provided by others, assumed any liability for that content under common law.[88] If Congress' only concern was the protection of open-ended, unrestricted, unformatted postings on Internet bulletin boards, it would not have needed to enact section 230, because the distributor liability doctrine already protected interactive computer services that functioned as mere conduits. *See* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991). The fact

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[87] (...continued)
forum).

[88] *See* Morrison v. America Online, Inc., 153 F. Supp. 2d 930, 933-34 (N.D. Ind. 2001) (by enacting the CDA immunity, Congress "did not intend for various parties to bring a cause of action against such service providers because of voluntary actions taken by [the provider] based upon the content transferred via its medium"); Zeran, 129 F.3d at 330 ("The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

that Matchmaker's method of collection involves some limited restrictions (such as multiple choice answers and topics for the essays) does not make the content Matchmaker's, and does not cause Matchmaker to lose its immunity under the CDA.

Carafano seeks damages for the publication of the Chase529 profile, which was comprised of statements by a third party. Lycos is immune from liability, and, accordingly, summary judgment should be affirmed as to all of Carafano's claims on this additional ground.

CONCLUSION

The District Court correctly held that Carafano is a public figure who failed to create a triable issue as to the existence of constitutional actual malice. This required the dismissal of Carafano's claims for defamation, false light, "negligence," and appropriation of the right of publicity. The District Court also correctly held that the true facts that were disclosed about Carafano were of public interest, and were not made with reckless disregard, and this required dismissal of Carafano's claim for invasion of privacy for disclosure of private facts.

In addition, Lycos is immune under the CDA because Matchmaker is an interactive computer service, the statements about which Carafano complains were made by a third party, and Carafano's lawsuit seeks to impose liability for the

publication of those third-party statements by Matchmaker. Summary judgment as to all of Carafano's claims should be affirmed on this additional basis.

Also, the true statements about which Carafano complains are not highly offensive as a matter of law, and summary judgment as to Carafano's claim for disclosure of private facts should be affirmed for this additional reason.

DATED: January 6, 2003

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,937 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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DATED: January 6, 2003

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Lycos is not aware of any related case pending in this Court.

DATED: January 6, 2003

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART I--COMMON CARRIER REGULATION

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Current through P.L. 107-330 (excluding P.L. 107-273, 107-296, 107-306, 107-314) approved 12-06-02

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "good samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [FN1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

Internet

(2) Interactive computer service

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The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

interactive computer service

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

information content provider

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

access software provider

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

2001 Main Volume

(June 19, 1934, c. 652, Title II, § 230, as added Feb. 8, 1996, Pub L. 104- 104, Title I, § 509, 110 Stat. 137; Oct. 21, 1998, Pub L 105-277, Div. C, Title XIV, § 1404(a), 112 Stat. 2681-739.)

[FN1] So in original. Probably should be "subparagraph (A)".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No 104-204 and House Conference Report No. 104- 458, see 1996 U.S. Code Cong. and Adm. News, p. 10.

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

References in Text

The Electronic Communications Act of 1986, referred to in subsec. (e)(4), is Pub.L. 99-508, Oct. 21, 1986, 100 Stat 1848, as amended, and is classified principally to chapter 121 (section 2701 et seq.) of Title 18, Crimes and Criminal Procedure For complete classification of this Act to the Code, see Short Title note under section 2510 of Title 18 and Tables.

Codifications

Section 509 of Pub.L. 104-104, which directed amendment of Title II of the Communications Act of 1934 (47 U S C A. § 201 et seq.) by adding section 230 at end, was executed by adding the section at end of Part I of Title II of the Act to reflect the probable intent of Congress.

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Amendments

1998 Amendments. Subsec. (d). Pub.L. 105-277, Title XIV, § 1404(a)(2), (3), Oct. 21, 1998, 112 Stat. 2681-739, added subsec. (d) and redesignated former subsec. (d) as (e).

Subsec. (d)(1). Pub.L. 105-277, Title XIV, § 1404(a)(1), Oct. 21, 1998, 112 Stat. 2681-739, redesignated former subsec. (d)(1) as (e)(1), and, in subsec. (e)(1) as so redesignated, added "or 231" after "section 223".

Subsec. (e). Pub.L. 105-277, Title XIV, § 1404(a)(2), Oct. 21, 1998, 112 Stat. 2681-739, redesignated former subsec. (e) as (f).

47 U.S.C.A. § 230

47 USCA § 230

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On January 6, 2003 I served by mail the following document(s) on interested parties in this action described as **Brief of Appellee Lycos, Inc.** addressed as follows:

Steve Rohde, Esq.
Rohde & Victoroff
1880 Century Park East, Suite 411
Los Angeles, CA 90067

Deborah Pierce
Linda Ackerman
Privacyactivism
4026 18th Street
San Francisco, CA 94114

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X____(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jennifer Leetz
Type Name

Signature