NO. 02-55658

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

APPELLANT'S REPLY BRIEF

Stephen F. Rohde
Michele M. Berencsi
ROHDE & VICTOROFF
1880 Century Park East, Ste. 411
Los Angeles, CA 90067

Attorneys for Appellant

I. INTRODUCTION

Ill-prepared to address the issues and evidence presented by Appellant Christianne Carafano ("Carafano"), Appellees Lycos, Inc. and Metrosplash.com, Inc, formerly known as Matchmaker.com (collectively referred to as "Matchmaker") have distorted important issues, ignored key evidence and obscured the context in which this case arises.

To determine the critical issues of invasion of privacy, newsworthiness, offensiveness, and recklessness, the *context* of how *true and private* information about Carafano (i.e., her home address, telephone number and living alone with her young son) was linked to *false and sexually provocative* statements attributed to her, makes all the difference.

But one searches Matchmaker's "Statement of Facts" in vain for the slightest inkling of the true nature of the appallingly false and disgusting sexual portrayal of Carafano knowingly distributed over the Matchmaker.com website.

The Profile included personal facts about Carafano, including her home address and the fact that she lived alone with her son.[1/] It also included four photographs of her along with a partial listing of her film credits. ER Tab 70, p.68-74. The Profile contained a battery of false, salacious and provocative statements about her, indicating that *she was extremely promiscuous and wanted to have sex with anyone who responded, male or female*:

"Q: Have you had, or would you consider having a homosexual experience? A: I might be persuaded to have a homosexual experience. *** Q: What is your main source for current events? A: Playboy/Playgirl. *** Q: Finally, why did you call [Matchmaker.com]? A: Looking for a one-night stand." ER Tab 78, pp.11-13; ER Tab 70, pp.28, 34, 35-36.

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

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

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

It is understandable that Matchmaker would try to sanitize the facts of this case and reduce it to a few general propositions, wrapped in laudatory First Amendment principles. But when it comes to denying Appellant a trial on the merits over the shocking material published by Matchmaker, which caused her and her young son so much harm, the content and context of that material cannot be ignored.

Finally, Carafano seeks no "special privacy right" or "greater privacy rights" than anyone else, as Matchmaker argues (Appellee's Brief ("AB"), pps 6 and 38). She seeks only those privacy rights, as a limited public figure, to which she is entitled under the federal and state constitutions and statutory and common law.

II. ARGUMENT

A. CARAFANO DID NOT ABANDON ANY OF HER CLAIMS FOR WRONGFUL DISCLOSURE OF HER TELEPHONE NUMBER AND THE FACT THAT SHE LIVES ALONE WITH HER YOUNG SON

Despite the fact that in her Opening Brief, Carafano cited ***five*** instances in her Memorandum of Points and Authorities opposing summary judgment, in

which she argued that Matchmaker's disclosure of her telephone number and that she lived alone with her son (in the context of the sexually provocative statements attributed to her) invaded her privacy; ***eight*** such instances in her Declaration and ***five*** such instances in her Statement of Genuine Issues,[2/] Matchmaker asserts that she "abandoned" these claims, because she supposedly offered no "argument" why a trial was required. Matchmaker cites *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) for the proposition that issues raised in an appellate brief which are not supported by argument are deemed abandoned. In *Leer*, while prison inmates based their appeal on Eighth and Fourteenth Amendment grounds, in their appellate brief they only argued the Eighth Amendment issues. Not surprisingly, the Court found that issues raised on appeal which are not supported by argument are deemed abandoned, unless this would result in manifest injustice, citing *United States v. Loya*, 807 F.2d 1483, 1486-87 (9th Cir. 1987).

Leer has nothing to do with the "abandonment" of claims in the trial court, particularly here where the claims were raised and argued at no less than eighteen (18) different points in the pleadings, including Carafano's legal memorandum, her declaration and her statement of genuine issues.

Abandonment is a serious claim. Only an "explicit" act in the District Court will constitute an abandonment. *United Transp. Union v. Skinner*, 975 F.2d 1421, 1424-1425 (9th Cir. 1992); *Coalition For a Healthy Calif. v. F.C.C.*, 87 F.3d 383, 386 (9th Cir. 1996). Nothing close to an explicit abandonment occurred in this case. An issue is preserved, and therefore neither waived nor abandoned, when it has been presented and the District Court has a reasonable opportunity to consider it. *Kirshner v. Uniden Corp. Of America*, 842 F.2d 1074, 1079 (9th Cir. 1988); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992); *Simkins v.*

[2/] Appellant's Memorandum of Points and Authorities. ER Tab 75, pp.6:12, 8:22-24; 10:21, 11:17, 23:24-26. Appellant's Declaration ER Tab 78, p.2:12-25; p.3:13-15; p.3:26-27; p.4:11-14; p.4:23-25; p.5:78; p.6:3-4; p.7:4-5; Carafano Decl. ¶18. Appellant's Statement of Genuine Issues: ER Tab 78, p.2:12-25. ER Tab 79, pp.12:15-18, 27:14-18, 31:18-21, 31:23-25.

NevadaCare, Inc., 229 F.3d 729, 733 (9th Cir. 2000) .

Of course, the question of abandonment or waiver of an issue below is a "rule of practice," not a jurisdictional limitation. This Court has discretion to consider issues raised for the first time on appeal, *Telco Leasing Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980) and may remand for the District Court to consider an issue deemed first raised on appeal, *Williams v. UNUM Life Ins. Co. Of America*, 113 F.3d 1108, 1113 (9th Cir. 1997).[3/]

Here, where Carafano's Complaint alleged that Matchmaker invaded her privacy by the public disclosure of her telephone number and the fact that she lives alone with her son, as well as her home address (in the context of the salacious and disgusting Profile), and where evidence and argument to that effect was presented throughout her pleadings and where the pertinent record has been fully developed below, it would be a miscarriage of justice to treat these critical claims as somehow "abandoned".

The consequences of finding that Carafano did not abandon these claims are significant. Since the District Court excused itself from addressing these claims, it made no finding that the public disclosure of this private information was "newsworthy" and Matchmaker nowhere in its Brief claims that a personal telephone number is "newsworthy", especially in the context of the salacious Profile.

Therefore, summary judgment on these claims must be reversed.

3/ Even if a legal issue is deemed conceded or overlooked in the trial court, it may still be considered on appeal where, as here, the pertinent record has been fully developed below. *Scott v. Ross*, 140 F.3d 1275, 1283 (9th Cir. 1998). Fundamentally, this Court has the authority to excuse a party's failure to raise an issue in order to prevent a miscarriage of justice. *Wiksell v. C.I.R.*, 90 F.3d 1459, 1463 (9th Cir. 1996); *Roberts v. Hollandsworth*, 582 F.2d 496, 499-500 (9th Cir. 1978). Neither Appellee nor the District Court claims that Carafano affirmatively conceded this issue.

B. THE ISSUE OF "NEWSWORTHINESS," INVOLVING COMMUNITY MORES, CUSTOMS AND CONVENTIONS, FOCUSES ON THE CONTEXT OF THE PUBLICATION AND CONSEQUENTLY RAISES A JURY QUESTION

This Court has long held that whether a publication is "newsworthy," and consequently protected by the First Amendment, turns on whether the matter is of "legitimate concern to the public." *Virgil v. Time Inc.* 527 F.2d 1122 (9th Cir. 1975). Recently followed in *Demarest v. Athol/Orange Cnty. TV, Inc.* 188 F.Supp.2d 82 (D.Mass. 2002). See also *Sipple v. Chronicle Publishing Co.*, (1984) 154 Cal.App.3d 1040, 1048; *Schulman v. Group W Productions*, (1998) 18 Cal.4th 200, 223.

In *Virgil*, this Court adopted the Restatement (Second) of Torts §652D on the issue of "newsworthiness." *Id.* at 1130. In determining "what is a matter of legitimate public interest, account must be taken of the *customs and conventions of the community*; and in the last analysis what is proper becomes a matter of the *community mores*. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes *a morbid and sensational prying* into private lives for its own sake, with which *a reasonable member of the public*, with decent standards, would say that he [or she] had no concern." *Id.* at 1129. (Emphasis added.)

This Court drew two critical conclusions from this analysis which are particularly relevant here:

1. The First Amendment does not confine the question of "newsworthiness" to one of law to be decided by the judge. *Id.* at 1130. Where "there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function. The function of the court is to ascertain whether a jury question is presented." *Id.* at 1130. The determination of "newsworthiness" founded "on community mores must be largely resolved by a jury subject to close judicial scrutiny to ensure that the jury resolutions comport with First Amendment principles." *Id.* at

1130 n 13.

2. To decide whether a publication is sufficiently newsworthy to immunize it from liability, the fact that the "general subject" in question may be a matter of general public interest, does not mean that everything in the publication is a matter of legitimate public interest. *Id.* at 1131. In *Virgil*, this Court asked a series of questions to determine whether, *in the context in which the matters in question were publicized*, they would "prove highly offensive to a reasonable person – one of ordinary sensibilities." *Id.* at 1131.

Context is everything. Yet Matchmaker has deliberately stripped the illicit Profile of all context. One would think that Carafano's home address had been innocently displayed on a Yellow Pages website or an innocuous "Map of the Star's Homes" (as the District Court suggested).

But that is not the context in which her home address (or her telephone number or the fact that she lived alone with her young son) was publicized. These matters were publicized in the context of a false, extremely gross, salacious and disgusting invitation to have promiscuous sex with anyone who responded, male or female.

Whether the disclosure of Carafano's home address (and all the rest) in that context is "highly offensive to a reasonable person - one of ordinary sensibilities," taking into account "the customs and conventions of the community," thereby crossing the line and ceasing "to be the giving of information to which the public is entitled" and instead becoming "a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he [or she] had no concern," is plainly a question for the jury.

Under *Virgil* and its progeny, since there is "room for differing views," the best arbiter we have to measure the Profile against "community mores" and what is "highly offensive to a reasonable person," is a jury.

It was error, on this record, for the District Court to dispose of the issue of "newsworthiness," as a matter of law. Given genuine issues of material fact, summary judgment should have been denied.

C. THERE IS CLEAR AND CONVINCING EVIDENCE THAT MATCHMAKER HAD ACTUAL KNOWLEDGE OF FALSITY AND OFFENSIVENESS FROM THE OUTSET.

1. Matchmaker concedes that 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 reply to the 'welcome e-mail', it would go to the system operator assigned to the new member's community." (A.B. p.10-11, citing ER 98:2 and ER 85:3.)

Because the unknown individual who originally set up the Profile also provided Matchmaker with the *cmla2000@Yahoo.com* e-mail address,[4/] in accordance with Matchmaker's own explanation of its system, the automatic reply from *cmla2000@Yahoo.com* "would go to the system operator assigned to the new member's community."

That reply stated: "You think you are the right one? Proof it!! [Carafano's home address and home phone]" ER Tab 71 A-X, pp. 14-16. Consequently, from the very outset, Matchmaker had actual knowledge that the Profile was questionable and violated its own terms and conditions, yet Matchmaker stubbornly continued to circulate the Profile with knowledge of falsity and in reckless disregard of truth and offensiveness.

Confronted with such clear and convincing evidence of "actual malice," sufficient by itself (and in conjunction with the other evidence of "actual malice") to reverse the summary judgment, Matchmaker tries to reargue the evidence by claiming that the earliest evidence of the automatic response was November 5, 1999.

4/ ER Tab 76 Ex. 1-15, pp. 111:17-23; 113:22-114:9; ER Tab 76 Ex. 16-21, pp. 3:2-4:6, 8:20-10:22; ER Tab 71 A-X, pp. 14-16.

ER 71:[1] 14-16.[5/]

But summary judgment is not an occasion to argue the evidence or to ask the court to choose between competing inferences or to rely on the interpretation of the evidence most favorable to the moving party. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2077 (1992). Instead, the court's responsibility begins and ends with identifying genuine issues of material fact sufficient to go to the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106. S.Ct. 2505, 2512 (1986).

It is undisputed that the *cmla2000@Yahoo.com* e-mail address was established on October 23, 1999. ER 94:3. There is also evidence from which the jury could find that Carafano received obscene phone calls generated by the automatic response as early as October 31, 1999. ER 85:79-80, 81, 82.

In any event, even using the November 5, 1999 date conceded by Matchmaker, the evidence shows that Matchmaker had actual knowledge of falsity at least three (3) days before the Profile was removed, and yet continued to circulate it, resulting in over 120 additional "hits".

2. Matchmaker also argues that Doris McConnell, the system operator in charge of the Los Angeles Metro community in 1999, "does not recall receiving such an e-mail." While her memory lapse is convenient for Matchmaker,

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[5/] Matchmaker also claims that Carafano's counsel "admitted" below that whether Matchmaker received the automatic response to the "welcome aboard" e-mail is "sheer speculation." Counsel did nothing of the sort. ER RT:12. He pointed to evidence that the e-mail address, *cmla2000@Yahoo.com*, was set up on October 23, 1999 and that while that didn't necessarily mean that the auto response was there, the fact that the automatic response was generated at least by November 5 gave rise to an inference from which the jury could conclude that it was there from day one. There is a big difference between "sheer speculation" and inferences legitimately drawn from undisputed evidence. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1222 (9th Cir. 1995); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992).

self-serving statements from a defendant's representatives are matters of credibility for the jury, *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998). In any event, this Court has observed that since it has "yet to see a defendant who admits to entertaining serious subjective doubts about the authenticity of an article it published, we must be guided by circumstantial evidence." *Eastwood v. Natl'l Enquirer*, 123 F.3d 1249, 1253 (9th Cir. 1997).

3. Matchmaker also argues that the automatic response would not have "caused a system operator to question the authenticity of a particular profile." A.B. p.31. But this argument flies in the face of Matchmaker's own Terms and Conditions which prohibit the inclusion of "Telephone numbers;" "Street addresses;" or "Offensive sexually suggestive or connotative language." In this case, the automatic response contained all three. It is for the jury, not the District Court or this Court, to decide whether or not to believe Matchmaker's systems operator when she claims she had no reason to "question the authenticity of a particular profile."

4. The undisputed evidence also establishes that Matchmaker had actual knowledge of falsity, sufficient in and of itself to satisfy the actual malice standard, rendering the grant of summary judgment erroneous. Siouxan Perry notified Matchmaker of the bogus profile on November 6, 1999 and demanded that it be removed immediately, but Matchmaker refused. ER Tab 76 EX 16-21, pp.18:2-19:21.

Matchmaker attempts to excuse the impact of having deliberately continued to distribute the Profile, resulting in at least 123 additional "hits," with <u>actual knowledge of falsity</u>, for at least two days after Carafano's web consultant notified Matchmaker that the Profile was a sham, by suggesting that it acted "promptly" by waiting until the "first business day" to remove the Profile. There is no evidence that Matchmaker only operated on "business days." On the contrary, the evidence shows that Matchmaker's "network operations personnel" worked on weekends. ER 76:126. In any event, whatever a jury may think of Matchmaker's excuse, it does not

alter the fact that Matchmaker deliberately continued to distribute the Profile, despite actual knowledge of falsity and offensiveness. That alone precludes summary judgment.

5. Matchmaker also argues that neither the receipt of the automatic response nor the complaint by Carafano's assistant on November 6, 1999, establish "actual malice" at the "time of the publication." A.B. p. 31. In the first place, as noted above, the jury could reasonably conclude that Matchmaker received the automatic response on October 23, 1999, the very first day the Profile was circulated.

The Profile was continuously circulated from October 23 until November 8 or 9. Given the technology of the Internet, once Matchmaker was confronted with evidence of the hoax and the questionable nature of the Profile, the continued circulation of the Profile was done with knowledge of falsity and reckless disregard of its falsity and offensiveness.

One who knowingly permits defamatory material (or material that invades one's privacy) to continue to be published after being put on notice of falsity or offensiveness, despite a reasonable opportunity to remove it, is guilty of republication. *Heller v. Bianco* (1952) 111 Cal.App.2d 424.

Heller is chillingly similar to the case at hand, absent the Internet. There, an unknown person falsely wrote on the men's room wall at a tavern that the plaintiff was an unchaste woman who indulged in what the court coyly called "illicit amatory ventures." The graffiti included the plaintiff's home telephone and the notation "ask for Isabelle," (her real first name). A married woman, she was shocked and appalled to receive a call from a perfect stranger on her home telephone. The man told her where he had gotten her number. When the plaintiff's husband immediately called the tavern and demanded the words be removed from the men's room wall, the bartender refused, saying he was too busy and would remove it when he got around to it. The husband, the police and several people went to the bar and discovered that the libelous matter was still on the wall.

The Court held, in words as relevant to the Internet today as they were to a men's room wall fifty years ago, that "[p]ersons who invite the public to their premises owe a duty to others not to knowingly permit their walls to be occupied with defamatory matter." *Id.* 111 Cal.App.2d at 426. "The theory is that by knowingly permitting such matter after reasonable opportunity to remove the same the owner of the wall or his lessee is guilty of republication of the libel." *Id.*

In response to the defendant's claim, echoed here by Matchmaker, that "there is no proof that they knew of the existence of the libelous matter and therefore that [plaintiff] failed to make proof sufficient to warrant submission of her cause to the jury for its determination," the Court disagreed. It held that "[r]epublication occurs when the proprietor has knowledge of the defamatory matter and allows it to remain after a reasonable opportunity to remove it." *Id.* at 427.

Likewise here, republication occurred when Matchmaker had knowledge of the defamatory matter, as a result of the automatic e-mail response (as early as October 23, 1998) and the call from Carafano's web consultant (on November 6, 1998), and still allowed it to remain despite a reasonable opportunity to remove it. The decision in *Hellar v. Bianco*, recently cited with approval in *Live Oak Publishing Company Inc. v. Gladys Cohagan*, (1991) 234 Cal.App.3d 1277, 1284, establishes that a jury may find Matchmaker liable for allowing the defamatory and invasive Profile to remain, despite being put on notice and despite a reasonable opportunity to remove it.

D. "ACTUAL MALICE" MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE AND EVIDENCE OF NEGLIGENCE, SO LONG AS IT DOES STAND ALONE.

Matchmaker urges this Court to judge the question of "actual malice" by ignoring <u>any</u> circumstantial evidence or evidence of negligence. But that is the wrong legal standard. While evidence of negligence <u>alone</u> cannot support a finding of "actual malice," evidence of negligence and circumstantial evidence may be used

in conjunction with other more direct evidence to prove "actual malice," or here, to create genuine issues of material fact precluding summary judgment.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Supreme Court held that ("[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." *Id.* at 731.); *Harte-Hankes Communications, Inc. v. Connaughton*, 491 U.S. 657, 658 (1989), (while a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers cannot alone support a verdict in favor of a public figure plaintiff in a libel action," (emphasis added) a newspaper's choice not to interview the one witness who was most likely to confirm the instigator's account of events is evidence that the paper had serious doubts about the accusations because that one witness' denial of the statements would end the story." *Id.* at 683.)

Here, Matchmaker turned a blind eye to the text of the profiles it was publishing, despite its subjective awareness of the harm resulting from the publication of one's home address. Such *"purposeful avoidance"* is clearly some evidence of reckless disregard.

In *Antonovich v. Superior Court of Los Angeles County*, 234 Cal.App.3d 1041, 1047, 1049 (1991), the court denied summary judgment and held that a trier of fact could draw an inference of actual malice from the fact that there was circumstantial evidence alerting defendant to the probable falsity of his statements against plaintiff placing him on inquiry notice after the initial statement was made, and by the fact that defendant thereafter continued publication without ascertaining the truth of the matter. Here, given the automatic response to its "welcome" email, Matchmaker was alerted to the probable falsity of the Profile and worse yet when actually told by Appellant's web consultant that the Profile was bogus, Matchmaker failed and refused for 2 ½ more days to remove it, exposing Appellant to the danger of further

embarrassment, harassment or worse.[6/]

The court in *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189 (1st Cir.1982), held that "The subjective determination of whether a defendant in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts … A court typically will infer actual malice from objective facts … These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice."

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

Under certain circumstances, evidence of a refusal to retract a statement after it has been demonstrated to be false is relevant in showing recklessness at the time the statement was published.[7/] Here, there is undisputed evidence that after

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

[7/] See also *Goldwater v. Ginzburg*, 414 F.2d 324, 329 (2nd Cir. 1969), (the court found that circumstantial evidence of actual malice existed thereby precluding summary judgment); *Schiavone Construction Co. v. Time Inc.*, 847 F.2d 1069, 1073 (3rd Cir. 1988) (the court noted that the determination of falsity depends in large part on the "sting" of the article, which is a question for the jury) *Westmoreland v. CBS*

(continued...)

Appellant's web consultant alerted Matchmaker to the bogus Profile and demanded that it be removed, Matchmaker failed and refused to do so for 2 ½ critical days while another 123 "hits" accessed the shockingly embarrassing material in the Profile.

Plainly, the District Court exceeded its circumscribed role on a motion for summary judgment by going from *issue-finding* to *issue-resolution*. *United States v. One Tintoretto Painting*, 691 F2d 602 (2nd Cir. 1982). Once Appellant presented admissible evidence from which a reasonable jury could infer "reckless disregard," it was not up to the Court to weigh that evidence against Matchmaker's denials and choose sides.

E. CARAFANO'S MISAPPROPRIATION CLAIM BASED ON THE UNAUTHORIZED USE OF HER PHOTOGRAPHS FOR COMMERCIAL PURPOSES SHOULD GO TO TRIAL

1. The Use of Carafano's Photographs Constituted Commercial Speech

This Court held in *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001), and reaffirmed in *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), that the "actual malice" standard does not apply to commercial speech.

In her second cause of action, Carafano alleged that the unauthorized use of her photographs on the Matchmaker.com website constituted a misappropriation of her likeness for commercial purposes. In a vain attempt to evade the combined impact of *Hoffman* and *Downing*, Matchmaker repeatedly mischaracterizes this claim

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(...continued)
Inc., 596 F.Supp. 1170 (S.D.N.Y. 1984) "Whether the broadcast conveys a false message and if so whether the false presentation was either deliberate or reckless are questions appropriately submitted to a jury.") *Id.* at 1177.

as based on the Profile,[8/] when in fact it is based exclusively on her photographs.

Matchmaker's business is dependent on enticing trial members to become paying members through access to profiles and photographs. Matchmaker sells memberships to customers to stay in business. ER Tab 76 Ex. 1-15, p.131:5-13. Matchmaker's use of the Profile was far more akin to the unauthorized use of the Hawaiian surfer photographs in Abercrombie & Fitch's catalog than to *Los Angeles Magazine*'s use of Dustin Hoffman's image. *Downing* at 102 n2 (in overturning summary judgment against plaintiff, court finds "use more commercial in nature" than in *Hoffman* where magazine "was unconnected to and received no consideration from the [gown] designer").

Consequently, given the commercial use of Carafano's photographs, under *Downing*, the "actual malice" standard does not apply.

2. If and To the Extent, Carafano Is Required to Prove Actual Malice, She Has Raised Genuine Issues of Material Fact Entitling Her To Go To Trial

For all the reasons set forth above, Carafano has already raised genuine issues of material fact on the issue of actual malice entitling her to go to trial on all her claims, including this one. Furthermore, when it comes to this claim, there is additional evidence of actual malice.

It is undisputed that Matchmaker screens all photographs before they are posted. ER Tab 70, p.7:12-8:2. As Matchmaker itself puts it, 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

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8/ "The District Court found that the *Chase529 profile* was not commercial speech. . ." (A.B. p. 49); ". . .Matchmaker's *profiles*. . . (A.B. p.49); ". . .Chase529 profile. . ." (A.B. p.49); ". . .the profiles posted on Matchmaker. . ." (A.B. p.50); ". . .Matchmaker profiles. . ." (A.B. p.50); and ". . .the profiles posted on Matchmaker. . ." (A.B. p.51).

the photographs before they are included in the Matchmaker database and eliminates all photographs that violate Matchmaker's standards." (A.B., 10, citing ER 98:5 and 70:7-8.)

Regardless of the fact that the parties disagree over whether Carafano is an all-purpose or limited public figure, everyone agrees that she is a successful actress who works in television, motion pictures, and live theater, with a worldwide following and fan clubs in eleven countries, whose "break-out" role was Leeta the D'abo Girl on *Star Trek: Deep Space Nine*, the number one syndicated television show in the world.

Consequently, in addition to the other evidence of reckless disregard, Matchmaker will have to explain to the jury why their systems operator did not recognize the photographs of a "world famous" actress, with a home address in Los Angeles, yet the person who posted them used a computer terminal in Europe.

3. No Other Grounds Exist For Dismissing Carafano's Misappropriation Claim

The only grounds asserted by Matchmaker (and found by the District Court) to dismiss Carafano's claim for misappropriation of her photographs for commercial purposes was that she failed to prove actual malice. Since that ruling was erroneous, summary judgment on this claim must be reversed and Carafano is entitled to go to trial.

F. MATCHMAKER, HAVING CREATED AND DEVELOPED, IN WHOLE OR IN PART THE USER PROFILES, IS NOT IMMUNE UNDER SECTION 230

An Interactive Computer Service ("ICS") like Matchmaker can be held liable for the creation and/or development, in whole or in part, of Internet content. See *Blumenthal v. Drudge and America Online,* Inc., 922 F.Supp.44 (D.C. Dist. 1998) at 50; *Ben Ezra, Weinstein and Company, Inc. v. America Online Inc* , 206 F.3d 980

(10th Cir. 2000) FN4. Section 230 does not immunize an Internet Content Provider ("ICP") from liability for information it develops or creates, in whole or in part. *Id.*

Matchmaker and Amici Curiae cite *Gentry v. eBay, Inc.,* (2002) 99 Cal.App.4th 816 to support their argument that the District Court erred by concluding that Matchmaker forfeited its statutory immunity by giving its users a question-and-answer method for structuring the information contained in the dating service profiles through extensive multiple choice and essay questions which were required to generate the profiles. *Gentry* is distinguishable from the case at bar because *Gentry* merely involved a method for eBay customers to rate sales transactions with the dealers as "positive", "negative" or "neutral". *Id.* at 834. In practice, the Feedback Forum allowed anyone to rate a dealer, even if there had never been a sales transaction between the parties, leading to most, if not all, positive feedback ratings as self-generated or as provided by other dealers. eBay automatically added color-coded stars next to user's names based solely on the number of "positive feedbacks" each user received. *Id.* eBay also offered a Power Sellers Endorsement which was given to select eBay dealers automatically based upon the volume of sales and positive feedback ratings. *Id.* Given these objective statistical indicators, the court found that eBay did not create or develop content sufficient to transform it into an ICP.

In the present case, however, the facts are entirely different. Matchmaker provides approximately 62 detailed multiple choice questions, each with a set of pre-prepared responses, that are created by Matchmaker, seeking personal information about each user. Examples of the questions and the choice of responses created by Matchmaker include: [Excerpts Tab 70, Exhibit A]

QUESTION	MATCHMAKER PRE-PREPARED RESPONSES
Your current living situation is?	Happily married; Not-so-happily Married; Married and we swing; Divorced living alone

Of this list, what is your favorite OUTDOOR activity?	... Girl/Boy watching...
Of this list, what is your favorite INDOOR activity?	... Hot tubbing; Bar Hopping...
Do you drink?	I do not drink; I drink socially; I drink daily; I drink like a fish
Do you smoke?	I do not smoke; I smoke in moderation; I smoke like a chimney; I occasionally get high; I get high daily; I never come down; I'm kicking the habit
Have you had, or would you consider having a homosexual experience?	Homosexuality repulses me; I have never considered a homosexual experience; I might be persuaded to have a homosexual experience; I have had many homosexual experiences; Of course, silly
I have:	Very good looks; Above average looks; Average looks; Less than average looks; Bring your bag
Is religion a part of your life?	Religion is a large part of my life; I am moderately religious; Religion is not a part of my life; Satan laughs
Are you happy with the fame and fortune in your life?	I don't have many of the things I really want; I'm just about where I want to be; I want a bit more, but I have everything I need; I have plans to take more control of my life; I will set the world on fire with what I plan to do; What? Me worry?
Would you consider meeting someone from this system?	I'll meet anyone, anywhere, anytime for any reason; I'd make a date with someone interesting; I'd meet someone at a party or club; A clandestine rendezvous might be fun; I'm not "available" but I might do lunch; It's unlikely that I'd meet someone from here; Pen-pals is the limit for me; I'm never going to meet anyone (ever again!)
What style of dress do you prefer?	... I dress for the occasion; What ever is clean; Preppy; Punk; Nude...
I would rather watch a movie:	... At the drive in; In a booth with lotsa quarters...
What is your main source of current events?	... National Enquirer; Playboy/Playgirl...
What type of movie do you like best?	... Pornographic; Adventure...

Finally, why did you call?	Hoping to start a relationship; seeking an occasional lover; Hunting for a roommate; Scouting out for swinging couples; Looking for a pen pal only; Just looking; Curious; A friend put me up to this; Looking for a one-night-stand; I found the number on a bathroom wall; I don't know and I won't call back

Matchmaker also provides eighteen (18) detailed essay questions to develop the content of the user's profile. A user must complete at least three of these questions or else Matchmaker require the user to fill out the questionnaire again. Examples include: [Excerpts Tab 70, Exhibit A]

- Have you ever accomplished anything that got your name on television, radio, in a magazine or newspaper? What was it you did?
- What would someone notice first about you?
- Share about your spiritual life in terms of its depth, your involvement, and your goals
- Where were you born? What is your ethnic origin or ancestry? List some of the places you have lived or traveled.
- What would be the perfect 1st date? Where would you go?

Clearly, these detailed essay questions are designed to develop the content of the user's profile in a way that Matchmaker believes will better serve its goals of attracting subscribers and making compatible matches of users. This is quite different from the third-party "positive", "negative" and "neutral" ratings of sales transactions involved in *Gentry*.

Matchmaker and Amici Curiae also cite *Ben Ezra, Weinstein, and Company, Inc. v. America Online Incorporated* 206 F.3d 980 (10th Cir. 2000) to support their argument that the District Court erred. But *Ben Ezra* is also distinguishable because defendant America Online ("AOL") hired third parties to provide the content, namely stock quote information, and the plaintiff presented no evidence showing that AOL participated in any way in the creation or development of the stock information at issue. *Id*. at 985-6. In fact, the contract AOL had with the third party content provider specifically stated that "AOL may not modify, revise or change" the information provided. *Id*. at 986. AOL's only involvement was to report errors to

the third party content providers and to delete incorrect information brought to its attention. *Id*. at 985-6. The court found there was no evidence to suggest that AOL was responsible, in whole or in part, for the creation and development of information published in its Quotes and Portfolios section. *Id*. at 986.

In the present case, Matchmaker provides the questionnaire that shapes the entire content of each user's profile. There is ample evidence showing the Matchmaker's involvement, including the numerous multiple choice questions with responses created by Matchmaker, the detailed essay questions created by Matchmaker which mold the content of the user responses, Matchmaker's review of photographs prior to posting, and the "welcome email" which allows the user and Matchmaker to be informed of potentially offensive content and suspected misuse. This is quite different from hiring a third party to prepare content and providing no input whatsoever, as was the case with *Ben Ezra*.

Finally, Amicus Curiae cites *Blumenthal v. Drudge and America Online, Inc.* 992 F.Supp. 44 (D.C. Dist. 1998). *Blumenthal* is also distinguishable because the evidence showed that all AOL did was publish Matt Drudge's column without doing anything whatsoever to edit, verify or even read it and that no person, other than Drudge himself, edited, checked verified, or supervised the information in the "Drudge Report." *Id*. at 49-50. Therefore, the court found that AOL was not a content provider in that case.

Blumenthal differs substantially from the present case because in *Blumenthal*, AOL did not provide questions for Drudge to answer or a format for him to follow, nor did AOL box him into a specific set of responses, such as Matchmaker did with the multiple choice questions. Drudge was free to write his columns as he wished and post them on AOL, without any restrictions other than AOL's reservation of right to remove them, which there was no evidence AOL ever did.

Nothing contained in the CDA immunizes an ICP which is responsible "in whole or in part" for either the "creation" or "development" of the information

provided through the Internet. Each term in a statute must be given meaning and cannot be ignored. *Connecticut National Bank v. Germaine*, 503 U.S. 249, 254 (1992).

To be liable, an ICP need not be solely and exclusively responsible for the creation of the information. It need only be responsible, "in whole *or in part*." And the ICP need not have *created* all the information, it may only have "developed" it, again, "in whole or in part." The statute plainly contemplates liability for one that "develops" information, as well as one who "creates" it. In this case, Matchmaker was actively and deliberately involved in *both* the creation and development of information provided through the Internet.

One could easily imagine an Internet dating service in which an ICS was a mere conduit, passively posting profiles entirely created and developed by the users, without the ICS playing any role whatsoever, in whole or in part, in any creation or development, doing nothing more than serving as the common carrier to post the profiles written entirely by users. In such a case, which is comparable to all of the cases cited by Matchmaker and Amici, the immunity provided in Section 230 would properly attach, thereby advancing the high ideals of the CDA in promoting "the continued development of the Internet and other interactive computer services and other interactive media."

The present case is a far cry from such a passive "common carrier." Instead of electing to serve as the mere conduit for profiles created entirely by users, Matchmaker actively insinuated itself into the creation and development of the information provided. As far as the 62 multiple choice questions are concerned, it was Matchmaker which created all of the content, the questions and the answers. Indeed, Matchmaker was the active creator, while the users ironically served a more passive role in choosing from the prepackaged information already created by Matchmaker.

As far as the 18 essay questions are concerned, Matchmaker plainly

"developed" the information provided by the users. Matchmaker created the outline and specific subjects to be covered. The essay questions shaped the topics and issues on which users would comment. This is precisely what is meant by the "development" of information, for purposes of the CDA.

All told, it is clear that Matchmaker, in whole or in part, created and developed the information provided by the user profiles and is not immune by reason of Section 230.

III. CONCLUSION

For each of these reasons and those fully set forth in Appellant's Opening Brief, Carafano is entitled to her day in court and the decision granting summary judgment should be reversed.

DATED: August 25, 2003

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

By: _____
STEPHEN F. ROHDE, ESQ.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 02-55658

Pursuant to Fed.R.App.P.32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,974 words.

DATED this 10th day of February, 2003

By: _____

Stephen F. Rohde, Esq.
Rohde & Victoroff
1880 Century Park East, Suite 411
Los Angeles, California 90067

Attorneys for Appellant
CHRISTIANNE CARAFANO

PROOF OF SERVICE

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

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1880 Century Park East, Suite 411, Los Angeles, California 90067.

On August 25, 2003, I served the document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action by placing true copies thereof in sealed envelopes addressed as follows:

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

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

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

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

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

___ **STATE Court:**

_X_ **FEDERAL Court:**

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

Executed on August 25, 2003 at Los Angeles, California.

_____
PATRICIA ANN LEWIS

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