BRIEF OF APPELLANTS ACCUSEARCH, INC. AND JAY PATEL

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION Plaintiff/Appellee, v. ACCUSEARCH, INC., d/b/a Abika.com, and JAY PATEL Defendants/Appellants.	))))))))))	Tenth Circuit No.: 08-8003

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

The Honorable William F. Downes
Chief United States District Court Judge

District Court No. 06-CV-105-D

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DEFENDANTS-APPELLANTS

ORAL ARGUMENT IS REQUESTED

Attachments are Included in Written and Scanned PDF Format

Appellant Accusearch, Inc.'s Corporate Disclosure Statement

In accordance with Fed. R. App. P. 26.1, Appellant Accusearch, Inc. by and through its counsel, Gay Woodhouse and Deborah L. Roden of Gay Woodhouse Law Office, P.C. hereby submits its corporate disclosure statement and states as follows:

Accusearch, Inc. does not have a parent corporation and there is no publicly held corporation that owns ten percent (10%) or more of Accusearch, Inc.'s stock.

Table of Contents

Table of Authorities

Case Law

Secondary Authorities

Statutes

Rules

Other Authorities

Jurisdictional Statement

Basis of District Court's Subject-Matter Jurisdiction

The Federal Trade Commission ("FTC") filed a Complaint in United States District Court for the District of Wyoming, alleging that Accusearch, Inc. and its President Jay Patel (collectively referred to as "Abika.com"), had engaged in an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a), and seeking permanent injunctive relief, disgorgement and other equitable relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §53(b). Based upon these allegations, the Federal Trade Commission asserted that the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1331, 1337(a), and 1345, and 15 U.S.C. §45(a) and 53(b).

Under the above cited United States Code sections, it is clear that the District Court has original subject matter jurisdiction over suits brought by the FTC under their unfair trade practice laws. However, in this case, the FTC alleged that Abika.com's practice of obtaining telephone call activity records was an unfair trade practice and one of the issues on appeal is whether or not the Federal Trade Commission has the authority and jurisdiction to prosecute matters related to telephone records or whether that authority is solely retained in the Federal Communications Commission.

Basis of Court of Appeals Jurisdiction

The Court of Appeals Jurisdiction is derived from 18 U.S.C. §1291, which gives the Court of Appeals jurisdiction from all final decisions of the District Courts. As set forth below in greater detail, the United States District Court for the District of Wyoming has entered its final decision in the case at hand.

Filing Dates Establishing Timeliness of Appeal

In this case, the authority fixing the time limit for filing the notice of appeal is set by Fed. R. App. 4(a)(1)(B). Pursuant to this provision, since an agency of the United States, the FTC, is a party, the notice of appeal was due within sixty (60) days after the judgment or order appealed from was entered. The District Court entered its final order disposing of all claims on December 20, 2007. The Notice of Appeal was filed on January 9, 2008, well within the sixty (60) day time limit. The District Court advised that the record was ready for purposes of appeal on March 11, 2008. Accordingly, pursuant to Fed. R. App. 31(a)(1) and 10th Cir. R. 31.1(A)(1) appellants' opening brief is due on or before April 21, 2008.

Assertion Appeal is from Final Order

The "FTC" filed suit against Abika.com alleging that Abika.com had obtained and sold confidential consumer telephone records and that those actions constituted an unfair trade practice in violation of the Federal Trade Commission Act. Abika.com sought to dismiss the case but the District Court denied this

motion. Abika.com, via a motion for summary judgment, sought immunity pursuant to Section 230 of the Communications Decency Act, 47 U.S.C. §230. In addition, both parties filed cross-motions for summary judgment on the unfair trade practice claim. The District Court entered its order on the summary judgment motions and denied Abika.com immunity and ruled in favor of the FTC on the unfair trade practice claim. However, the District Court's order left open the issue of what, if any, type of equitable relief, including injunctive relief and disgorgement, ought to be imposed. Abika.com sought permission from the District Court to take an immediate appeal since it had asserted but been denied immunity. The District Court did not allow Abika.com to file an interlocutory appeal. The parties submitted briefing on the issue of injunctive relief and disgorgement. Ultimately, on December 20, 2007, the Court entered its *Order and Judgment* which ordered Abika.com to pay disgorgement and imposed injunctive relief. This *Order and Judgment*, along with the Court's previous Order denying Abika.com's summary judgment motion based upon immunity and granting summary judgment on the FTC's unfair trade practice claim, disposed of all claims raised in the case.

Statement of the Issues

I. **The District Court erred in denying Abika.com's request for summary judgment based upon immunity pursuant to Section 230 of the Communications Decency Act.**

II. **The District Court should not have imposed injunctive relief because there is an adequate remedy at law, including a criminal penalty, for the actions at issue.**

III. **The injunction imposed by the District Court is not in the public interest, violates Abika.com's Fifth Amendment Due Process rights and constitutes a prior restraint on speech in violation of Abika.com's First Amendment rights.**

IV. **The information at issue was not legally protected confidential information, but rather, was protected commercial speech, the FTC had no jurisdiction to enforce information related to telecommunications, and as such the District Court erred in denying Abika.com's Motion to Dismiss.**

Statement of the Case

The Federal Trade Commission ("FTC") filed suit against Accusearch Inc., d/b/a Abika.com and its President Jay Patel (herein collectively referred to as "Abika.com") alleging that Abika.com had obtained and sold confidential consumer telephone records and that those actions constituted an unfair trade practice in violation of the Federal Trade Commission Act, 15 U.S.C. §45(a), and seeking permanent injunctive relief, disgorgement and other equitable relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §53(b). (Complaint, Aplt. App. at 18-24).

Initially, Abika.com sought to dismiss the case. (Motion to Dismiss & Brief in Support, Aplt. App. at 25-56). In its Complaint, the FTC stated that phone activity records were confidential under the Telecommunication Act, 47 U.S.C. §222, and that as such, the distribution of these records violated the Federal Trade Commission Act. (Complaint, Aplt. App. at 20-21). Abika.com directed the Court to the statutory language of the Telecommunication Act, which makes clear that the Act does not apply to Abika.com and as such Abika.com argued that the FTC's claims had failed to assert a proper cause of action. (Brief in Support of Motion to Dismiss, Aplt. App. at 29-30)

Abika.com also argued that there was no law which made it illegal or improper to obtain phone records. (*Id.*). In the criminal context, courts have made

it abundantly clear that individuals do not have any reasonable expectation of privacy in their phone records. (*Id*. at 30). Additionally, at the time Abika.com was offering searches for phone records, it was not illegal to do so. This fact was made evident during Congressional hearings on the matter. Ultimately, Congress did criminalize the distribution of this information, but at the time Abika.com offered these searches, it was not illegal. Despite the lawful nature of the activity and the FTC's inability to enforce the Telecommunications Act, the District Court denied Abika.com's motion to dismiss. (Aplt. App. at 93-99, 101).

Later, Abika.com filed for summary judgment seeking immunity pursuant to Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. §230 *et seq*. (Aplt. App. at 106-853). Through the undisputed facts, Abika.com set forth the requirements of immunity under the CDA and demonstrated how it was within the purview of the Act and met all requirements, which are: 1) It is a user or provider of an interactive service provider; 2) It is not an information content provider with respect to the disputed activity; and 3) Plaintiff seeks to hold it liable for information originating with a third-party user of its service. *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997). The undisputed facts are that Abika.com is a website, which is considered to be an interactive computer service under the CDA. Abika.com clearly did not create the phone records at issue,

meaning that Abika.com is not an information content provider, and lastly, the FTC via its Complaint was seeking to hold Abika.com liable for this information.

Prior to the Court entering an order on the CDA issue, both parties filed cross-motions for summary judgment on the unfair trade practice claim. (Aplt. App. at 903-1215 and 1216-1331). The FTC first alleged in its Complaint that Abika.com had "used, or caused others to use, false pretenses, fraudulent statements, fraudulent or stolen documents or other misrepresentations, including posing as a customer of a telecommunications carrier, to induce officers, employees or agents of telecommunications carriers to disclose confidential customer phone records." (Complaint, Aplt. App. at 21-22) However, in its summary judgment argument the FTC conceded that Abika.com itself had not engaged in these activities, but argued that nonetheless Abika.com was still liable for an unfair trade practice by distributing these phone records, making Abika.com in essence vicariously liable for the actions of other parties, parties who allegedly did "use, false pretenses, fraudulent statements, fraudulent or stolen documents or other misrepresentations, including posing as a customer of a telecommunications carrier, to induce officers, employees or agents of telecommunications carriers to disclose confidential customer phone records." (*Id.*)

Abika.com also moved for summary judgment on the unfair trade practice claim. (Aplt. App. at 1216-1331). Abika.com set forth that the FTC had failed to

meet the elements of an unfair trade practice as the FTC produced no evidence that Abika.com had engaged in any false or fraudulent acts, failed to demonstrate substantial consumer injury, and failed to show that there were no countervailing benefits to the activity. Further, Abika.com explained that injunctive relief was not necessary as Abika.com had ceased offering search services for phone records months prior to receiving the FTC's Complaint and that since the initiation of the lawsuit Congress had enacted the Telephone Records and Privacy Act, criminalizing the sale, transfer, purchase and receipt of confidential phone record information, which provided an adequate remedy at law thus rendering injunctive relief superfluous. Abika.com also reiterated its previous argument that the FTC did not have jurisdiction over phone records.

The District Court ruled on all three summary judgment motions in the same Order. (Order on Cross-Motions for SJ, Aplt. App. at 1383-1404). The District Court denied Abika.com immunity and ruled in favor of the FTC on the unfair trade practice claim. However, the District Court's Order left open what, if any, type of equitable relief should be imposed. The District Court received additional briefing on this issue (Aplt. App. at 1405-1604), held a hearing, and ultimately ordered Abika.com to pay almost two hundred thousand dollars ($200,000) in disgorgement and imposing broad injunctive relief, including prohibiting

Abika.com from offering ***any*** form of consumer personal information, not just phone record information. (Order and Judgment, Aplt. App. at 1605-1618).

Statement of the Facts

As noted by the District Court, "the relevant facts are undisputed." (Order on Cross Motions for Summary Judgment, Aplt. App. at 1384). Accusearch, Inc. d/b/a Abika.com and its president and owner Jay Patel (collectively referred to as "Abika.com") operates a home-based website that hosts an interactive person to person search engine that connects persons seeking information (searchers) to independent researchers who state that they can search that information for a fee. (Patel Affidavit, Aplt. App. at 144, 1244; Patel Deposition, Aplt. App. at pg. 1252).

Independent researchers submit their requests to Abika.com to have their listings added to the website. (Aplt. App. at 144, 1245). Abika.com does not solicit any specific type of search service, but rather, any researcher who offers a search service can list their services on the website. (*Id*.). However, the researchers must agree to the terms of use for the website and also provide additional assurances to Abika.com that they will only conduct searches in compliance with federal, state, or local laws. (*Id*.; Duffy Declaration, Aplt. App. at 1255-1263). If a researcher claims to have any government issued licenses those licenses are checked by Abika.com to see if they are valid and current. (Id.). If there is no licensing held by the researcher then a reference is required from any current or licensed researcher before the researcher can be listed on the website.

(*Id*.). After this screening process, the researchers advertise on Abika.com the description of they services they offer and the criteria for the searches they conduct. (*Id*.).

Before listings for search services related to phone records were placed on the Abika.com website, Mr. Patel checked the internet and found hundreds of sites that offered phone call activity records and looked at the copyright notices at the bottom of the websites and searched waybackmachine.org to see how long some of these businesses had been in operation. (Aplt. App. at 1246). Mr. Patel also conducted internet research which also revealed an article from 1999 on Wired Magazine which indicated to him that the dissemination of phone records was legal. (*Id*.). He also read an article from the Sidley Austin, LLP website regarding the case of *AT&T v. Conboy*, which indicated to him that telephone companies sold phone records and that it was legal to sell these records. (*Id*.). In addition, Mr. Patel sent a facsimile to EPIC, a non-profit privacy group, asking if they were concerned about the dissemination of phone records, but he never received a response to this fax. (*Id*.). On or about February 2003, independent researchers first listed on Abika.com's website that they could search outgoing phone calls. (Aplt. App. at 146, 1246-47). Independent researchers advertised on Abika.com that they could search "details of incoming or outgoing calls from any phone number, prepaid calling card or Internet Phone. Phone searches are available for

every country of the world." (*Id*.). Ultimately, four independent researchers listed their search services for phone calls on Abika.com after verbal and written verification that they would conduct their searches lawfully. (*Id*.; Aplt. App. at 1256). These researchers were: 1) PDJ Investigations; 2) AMS Research Services d/b/a Informationbrokers.net; 3) 1st Source Information Service; and 4) Double Helix Services, Inc. (*Id*.).

All searchers who use Abika.com's website fill out a search form, enter the search criteria and click the "next" button which takes the searcher to the search listings of the researchers. (Aplt. App. at 145, 1245). The searcher reviews multiple researcher listings and then selects the independent researcher listing that the searcher is interested in. (*Id*.). Upon selection, the searcher then must go to the terms of use page and read the terms of use for the website, including a listing of the site's permissible purposes. (*Id*.). The terms of use page states that the searcher is hiring the independent researcher to conduct their search. (*Id*.). The searcher can only proceed if he confirms that he has read and agrees to the terms of use. (*Id*.). The terms of use set forth permissible purposes for use of the website and for use of the information provided by the researchers. (*Id*.). The searcher then completes the request by adding the payment information to his request. (*Id*.).

Each searcher's request is screened and reviewed by Abika.com and/or the researcher. (*Id*.). If Abika.com does not find any problems, then the searcher's

request is forwarded to the researcher. (*Id*.). If any search request creates suspicion, then either more information is requested for verification or the request is cancelled and refunded. (*Id*.). When each request is forwarded to the researcher, Abika.com again notifies the researcher to process the search request only if it can conduct the search in compliance with federal, state, and local laws. (*Id*.; Aplt. App. at 1257-58). Researchers are directed that if they cannot comply with federal, state, and local laws then they should cancel the request immediately. (*Id*.). Ultimately, Abika.com charges an administrative search fee to the searcher for the use of its interactive site and search engine. (Aplt. App. at 145, 1246). The fee is based in part upon the costs that the independent researcher charges Abika.com for the search service. (*Id*.). If the researcher does not find any problems and can lawfully complete the search then the researcher completes the search. (*Id*.). The researcher emails the results to Accusearch which are then posted to the searcher's account on Abika.com. and emailed to the searcher. (*Id*.).

With regard to searches for phone records, it is an undisputed fact that Abika.com had no direct contact with either account holders or telecommunications companies in regard to the requested searches. (Aplt. App. at 146, 1247). Abika.com did not engage in any false or fraudulent practices, such as pretexting, bribery, or hacking into any online accounts. (FTC Representative Deposition, Aplt. App. at 1265-1268, 1272). Abika.com ceased allowing phone

record search listings on or about January 20, 2006 and no searches of this type have been advertised or processed by or through Abika.com since that date. (Aplt. App. at 147, 1248). Abika.com ceased allowing phone record searches in January 2006 when it learned through the news that a subsidiary of one of the independent researchers may have obtained data through the use of "pretexting." (*Id*.). Abika.com has affirmatively stated that it will not offer listings related to phone record searches. (*Id*.).

Prior to the time Abika.com stopped offering phone record search listings, it was not unlawful to obtain phone records, even through pretexting, (although it is undisputed that Abika.com did not engage in pretexting or any fraudulent conduct.) (FTC Representative Deposition, Aplt. App. at 1265-1268, 1272). The FTC also testified that: "Prior to January 21, 2006, the Commission had no specific policy, rules, or regulations pertaining to the practice of obtaining and selling to third parties confidential consumer phone records without the consumer's knowledge or consent." (FTC Interrogatory Responses, Aplt. App. at 1295).

On or about February 7, 2006, after Abika.com had ceased allowing any searches for phone records, the FTC sent cease and desist warning letters to approximately 20 other parties engaging in the acquisition or advertisement of access to phone records. (FTC Interrogatory Responses, Aplt. App. at 1302-1303; Letter, Aplt. App. at 1310). Prior to this time, hundreds of entities both on the

internet and otherwise advertised that they would conduct phone records searches for third parties and such advertisements were widespread. (Duffy Declaration, Aplt. App. at 1256-57; Patel Affidavit, Aplt. App. 1246). No warning cease and desist letter was sent to Abika.com, more than likely because Abika.com had already ceased the activity. On May 1, 2006, nearly four months after Abika.com ceased advertising search access to phone records on its website and allowing any searches, the FTC filed the instant action. (Complaint, Aplt. App. at 18).

Summary of the Argument

First, the District Court incorrectly ruled that Abika.com was not covered by the immunity provisions of Section 230 of the Communications Decency Act ("CDA"). Congress enacted the CDA to promote free speech and commerce on the Internet by eliminating liability against interactive services for injury caused by information provided by third parties. In order to accomplish these objectives users or providers of interactive computer services are immune from liability in certain circumstances. Under Section 230 of the CDA, a user or provider of an interactive computer service (such as a website) is immune from liability so long as it has not created or developed the content of the information upon which liability is based. Courts interpreting the CDA have granted broad immunity in order to stay within the bounds of the statutory language and to promote Congress' policy. Abika.com, and its activities related to phone call records, meets the requirements of immunity under the CDA.

Second, the District Court failed to apply sound legal principles in imposing injunctive relief against Abika.com. Injunctive relief should be granted sparingly, and must only be imposed when there is no adequate remedy at law and only to prevent future harm. In this case, there is an adequate remedy at law for the Government to avail itself. In addition, Abika.com's actions within this lawsuit demonstrate unlikely future harm and adequate deterrence for future harm. In

2006 Congress criminalized selling, transferring, purchasing and receiving confidential phone record information. This law was enacted prior to the District Court imposing injunctive relief. Certainly a criminal law addressing the same issue provides an adequate remedy at law and deters future harm to the greatest extent allowable under the law. Additionally, Abika.com had voluntarily ceased offering searches for phone records at least four months prior to the FTC initiating any action against them. During the course of the suit Abika.com voluntarily offered to pay and did pay nearly $200,000 in disgorgement. Therefore, Abika.com's voluntary actions in ceasing searches and its voluntary act of paying disgorgement served as a deterrent to future harm as well. Under these circumstances, injunctive relief was unnecessary and the District Court erred in imposing the relief.

Third, the injunctive relief imposed by the District Court violates Abika.com's due process, First Amendment, and equal protection rights. The District Court's Order and Judgment prohibits Abika.com from obtaining ***any*** type of consumer personal information. The Court imposed this prohibition despite not having made any finding that Abika.com had engaged in any unlawful activities with respect to any consumer personal information except for phone records. By restricting Abika.com from offering other unrelated types of information, the District Court violated Abika.com's due process rights. In addition, the Court's

order creates a prior restraint on speech without any finding of unlawfulness in violation of the First Amendment. Further, the District Court considered incorrect information as to similarly situated individuals in imposing greater relief against Abika.com. As such, the District Court's injunction is not proper.

Lastly, the District Court erred in not dismissing the Complaint originally. The FTC's Complaint, alleging an unfair trade practice, only stands if its allegation that the phone records were "confidential" is correct. The FTC bases the premise that the records were confidential on the Telecommunications Act of 1996. However, this Act only applies to telecommunications carriers and in no way governs the activities of any third parties, such as Abika.com. In addition, courts have consistently held that in the criminal context, individuals do not have a reasonable expectation of privacy in phone records. Furthermore, at the time Abika.com offered searches for phone records, it undisputedly was not illegal to obtain phone records, even via fraudulent means. Congress later enacted the Telephone Records and Privacy Act Act, H.R. 4709, 109th Cong. (2006), which makes it illegal to obtain these records, but at the time of Abika.com's activities, it was not unlawful. Accordingly, not only was it lawful for Abika.com to engage in this activity, but it was commercial speech protected by the First Amendment. Further, the FTC admittedly has no jurisdiction or authority to regulate the Telecommunications Act. As such, the FTC's Complaint failed to state a cause of

action under F.R.C.P. 12 (b)(6) and the FTC lacked the authority to prosecute and thus the Court lacked jurisdiction under 12(b)(1) and (b)(2).

Argument

I. The District Court erred in denying Abika.com's request for summary judgment based upon immunity pursuant to Section 230 of the Communications Decency Act.

A. Introduction

The Communications Decency Act ("CDA") was designed to promote free speech and commerce over the Internet. The CDA states that interactive computer services are not liable for information that it did not create. In keeping with Congress' goals in enacting the CDA, cases interpreting the Act have granted broad immunity. Abika.com clearly fits within the statutory requirements to receive protection under the CDA and it functions in an analogous manner to other interactive computer services that have received protection under the CDA, including the Tenth Circuit case of *Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980, (10th Cir. 2000).

B. Standard of Review

This Circuit has made clear that it will review a District Court order on summary judgment de novo and will review a District Court's interpretation of a federal statute de novo.

> We review the grant of summary judgment de novo, applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). *United States v. Hess*, 194 F.3d 1164, 1170 (10th Cir.1999). We also review de novo the district court's interpretation of a federal statute. *Id*. In construing a federal statute, we "'give effect to the

> will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'" *Id*. (quoting *Negonsott v. Samuels*, 507 U.S. 99, 104, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993)).

Ben Ezra, 206 F.3d 980, 984 (10th Cir. 2000).

C. Discussion

1. Legal Framework

a. Statutory Scheme

"Congress enacted §230 to promote freedom of speech in the 'new and burgeoning Internet medium' by eliminating the 'threat [of] tort-based lawsuits' against interactive services for injury caused by 'the communications of others.'" *Ben Ezra*, 206 F.3d at fn. 3 (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

In enacting section 230 of the CDA, Congress expressly found that:

> 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. . . . The Internet and other interactive computer services have flourished, the benefit of all American, ***with a minimum of government regulation***. . . . Increasingly Americans are relying on interactive media for a verity of political, educational, cultural, and entertainment services.

47 U.S.C. §230(a) (emphasis added). Along these same lines, the Act clearly states:

> It is the policy of the United States . . . to promote the continued development of 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***."

Id. at §230(b).

Section 230(c) of the Communications Decency Act ("CDA") states that "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." Therefore, under the CDA the Court must analyze whether the party from whom liability is sought is an interactive computer service and whether the party was the information content provider. "In light of [Congress'] concerns, reviewing courts have treated §230(c) immunity as quite robust, adopting a relatively expansive definition of "interactive computer service" and a relatively restrictive definition of "information content provider." *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1123 (9th Cir. 2003).

Interactive Computer Services

Section 230(f)(2) of the CDA defines "interactive computer services" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service of system that provides access to the Internet . . ." Case law

has made clear that a website constitutes an interactive computer service. In *Ben Ezra*, the Court found that Plaintiff did not dispute that America Online fit within the definition of an interactive computer service. Likewise, Amazon.com and eBay have been held to be internet service providers as have Matchmaker.com, Google, Inc. and Kinko's. *See Schneider v. Amazon.com*, 31 P.3d 37, 40-41 (Wash Ct. App. 2001); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (Cal. 4th 2002); *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp.2d 1055 (C.D. Cal. 2002); *Parker v. Google, Inc.*, 422 F.Supp.2d 492 (E.D. Pa. 2006). *See also Donato v. Moldow*, 865 A.2d 711 (N.J. Super. 2005) (holding local government website covered by Section 230). It is equally clear that websites meet the definition of access software providers, which is defined as "a provider of software . . . , or enabling tools that do any one or more of the following: (A) filter, screen, allow or disallow content; (B) pick, choose, analyze, or disallow content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." 47 U.S.C. §230(f)(2).

In addition, the statute confers immunity not only to ***providers*** of interactive computer services, but also to ***users*** of interactive computer services. 47 U.S.C. §230(c)(1). In the Ninth Circuit case of *Batzel v. Smith*, the Court discussed just such a situation, where immunity was conferred based upon the statutory language regarding a ***user*** of an interactive computer service. 333 F.3d 1018 (9th Cir. 2003).

An individual named Smith sent a defamatory email regarding Batzel to a nonprofit Network that maintains a website and an electronic email newsletter. *Id.* at 1021. The email was posted to the Network's website and posted on the listserve. *Id*. The Court, in analyzing whether the Network was protected under the CDA, stated:

> There is no dispute that the Network uses interactive computer services to distribute its on-line mailing and to post the listserve on its website. Indeed, to make its website available and to mail out the listserve, the Network *must* access the Internet through some form of "interactive computer service."

Id. at 1031.

Information Content Provider

Information content provider is defined under the CDA 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). Courts in numerous jurisdictions have narrowly interpreted the definition of information content providers.

This Circuit has previously analyzed the CDA in the case of *Ben Ezra,* 206 F.3d 980 (10th Cir. 2000). In *Ben Ezra* the Plaintiff brought claims for defamation and negligence, alleging that its stock quotes posted on America Online ("AOL") contained inaccurate information. *Id.* AOL asserted immunity under Section 230. This Circuit upheld the District Court's grant of immunity to AOL, finding that

AOL was an interactive computer service provider and that AOL was not the information content provider. *Id.* Plaintiff had alleged that AOL had worked so closely with the stock quote providers that AOL had operated as an information content provider. This Circuit noted that "[w]hile [AOL] did communicate with [the stock quote providers] each time errors in the stock information came to its attention, such communications simply do not constitute the development or creation of the stock quotation information." *Id*. at 985.

In the case of *Batzel*, discussed above, the Court notes that employees of the Network

> [o]bviously . . . did not create Smith's email. Smith composed the e-mail entirely on his own. Nor do [the Network's employee's] minor alterations of Smith's e-mail prior to its posting or his choice to publish the e-mail . . . rise to the level of "development." . . . The "development of information" therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication. Because [the Network's employee] did no more than select and make minor alterations to Smith's e-mail, [the Network] cannot be considered the content provider of Smith's e-mail for purposes of § 230."

Batzel, 333 F.3d at 1031.

The Ninth Circuit has also interpreted "information content provider" narrowly in keeping with Congress' goals. In *Carafano v. Metrosplash.com, Inc*., Metrrosplash.com provided a matchmaking service online. 339 F.3d 1119, 1120 (9th Cir. 2003). In order to participate in the matchmaking service, members had to

complete a detailed questionnaire that was created by Metrosplash.com. *Id.* at 1121. In discussing whether the creation of this questionnaire destroyed immunity, the Court stated that "[u]nder §230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process. The fact that some of the content was formulated in response to Matchmaker's questionnaire does not alter this conclusion." *Id*. at 1124.

The Seventh Circuit has also addressed the definition of information content provider in the case of *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc.*, No. 07-1101, 2008 WL 681168 (7th Cir. 2008). Craigslist was sued on the basis that some of the notices posted on the website advertising housing violated the Fair Housing Act. *Id*. The plaintiff alleged that Craigslist had "caused" the discriminatory statements. *Id*. at *5. The Court in response, notes:

> Doubtless craigslist plays a casual role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money "cause" bank robbery, because if there were not banks there could be no bank robberies. . . . If cragslist "causes" the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for "causing" discriminatory advertisements.

Id.

b. Case Law

The case law interpreting immunity under the CDA grants broad immunity in keeping with Congress' findings and policy of the CDA. As discussed below, reviewing courts have upheld CDA immunity for non-defamation claims, including claims sounding in distributor liability, for websites that utilize a sales model approach rather than a bulletin board approach, even if the websites pay for the material, and even when the material provided is itself illegal.

Non-Defamation Claims and Distributor Liability

The CDA provides immunity to numerous causes of action and is not limited only to defamation cases. The word defamation does not appear in the statute. The CDA provides immunity to users and providers of interactive computer services who are not information content providers with respect to the offending information. This statutory language covers a myriad of situations that arise for users and providers of interactive computer services. As such, numerous reviewing courts have appropriately applied CDA immunity to a broad variety of claims. *See, e.g. Ben Ezra*, 206 F.3d 980, 986 (10th Cir. 2000) (negligence claim); *Zeran*, 129 F.3d 327, 300 (4th Cir. 1997) (negligence claims); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (invasion of privacy, misappropriation of the right of publicity, defamation, and negligence); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (claim under

Maryland Commercial Electronic Mail Act); *Barnes v. Yahoo!, Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602 at *4 (D. Or. Nov. 8, 2005) (negligence claim resulting in personal injury); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 at *5 (E.D. Tex. Dec. 27, 2006) (negligence, negligence per se, intentional infliction of emotional distress, invasion of privacy, civil conspiracy, and distribution of child pornography). "Nothing on the face of the statute supports [a] narrow interpretation that the CDA's immunity applies only to cases involving defamation and defamation-related claims. 47 U.S.C. §230." *Doe v. Myspace, Inc., et al.*, Case No. A-06-CA-983-SS (W.D. Tex. Feb. 13, 2007).

Along these same lines of providing immunity to cases that are not defamation cases, reviewing courts have also made clear that distributor liability is a subset of publisher liability and as such is also immune from suit under Section 230. "[E]very court to reach the issue has decided that Congress intended to immunize both distributor and publishers." *Batzel*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003) (citing *Zeran*, 129 F.3d at 331-34; *Ben Ezra*, 206 F.3d 980, 986 (10th Cir. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-17 (Fla. 2001)). "Any attempt to distinguish between 'publisher' liability and notice-based 'distributor' liability and to argue that Section 230 was only intended to immunize the former would be unavailing." *Blumenthal v. Drudge, et al.*, Civil Action No. 97-1968 (D.C. Apr. 22, 1998). The theory of distributor liability "is merely a

subset, or species, of publisher liability, and is therefore also foreclosed by §230." *Zeran*, 129 F.3d at 331-34 (4th Cir. 1997).

Sales Model and Payment for Material

Additionally, courts have held that for purposes of the CDA, there is no distinction between websites that sell items rather than websites where other individuals simply post information. In the case of *Stoner v. eBay, Inc.* the Court stated:

> Plaintiff attempts to draw a distinction between eBay's interactive service, which he argues is based on a sales model, and other interactive services which are based on bulletin board models. While the majority of cases addressing CDA immunity may fit the bulletin board description, nothing in those cases or in the statutory language so limits the CDA's application. A principle objective of the immunity provision is to encourage commerce over the Internet by ensuring that interactive computer service providers are not held responsible for how third parties use their services.

Cal. Rptr. 2d, 2000 WL 1705637 at *3 (Cal. 2000).

Further, in the case of *Blumenthal v. Drudge, et al.*, America Online ("AOL") contracted with and paid Drudge to prepare the "Drudge Report" which amounted to a gossip and rumor report. Civil Action No. 97-1968 (D.C. Apr. 22, 1998). AOL also advertised this service and promoted the service to its subscribers. The Court noted that AOL was not a "passive conduit," but that

immunity under the CDA was appropriate ***even when AOL had an active and aggressive role in making the information available***.

Illegal Information

The nature of the information distributed is not dispositive of the issue of whether or not immunity under Section 230 applies. Even if the information distributed is illegal, this does not affect immunity under Section 230. In fact, Section 230 ensures that redress for the illegal information is obtained from the true wrong-doer and not the user or provider of the interactive computer service.

In the *Stoner* case, the Plaintiff alleged that eBay's auction business sold contraband sound recordings. 2000 WL 1705637 at *1-2 (Cal. 2000). The Court addressed the basis under which Plaintiff was seeking to hold eBay liable and determined eBay was entitled to immunity under Section 230 even if the items it sold were illegal.

> The more difficult question is whether plaintiff is seeking to hold eBay responsible for content provided by third parties. . . . However, plaintiff contends that eBay's services constitute more than mere publication of product descriptions prepared by others, and are instead independent acts of eBay in furtherance of illegal sales. Therefore, plaintiff claims, this suit does not seek to hold eBay responsible for the publication of information provided by others, but for eBay's own participation in selling contraband musical recordings.
> Despite plaintiff's attempt to characterize eBay as an active participant in the sale of products auctioned over its service, plaintiff is seeking to hold eBay responsible for informing prospective purchasers that illegal

> recordings may be purchased-information that originates with the third party sellers who use the computer service. The uncontroverted facts establish that eBay's role does not extend beyond the scope of the federal immunity. . . . eBay provides interactive computer services for which it charges a fee, just as America Online provides interactive services for which it charges a fee.

Id. at *2. The same analysis was set forth in the *Craigslist* case. No. 07-1101, 2008 WL 681168 (7th Cir. 2008). The housing notices placed on Craigslist violated the Fair Housing Act, however the Craigslist website was not found to be liable under Section 230. *Id*.

The cases of *Doe v. American Online, Inc.*, 783 So.2d 1010 (Fla. 2001) and *Doe v. Bates, et al.*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) addressed immunity under the CDA when the information provided was illegal, namely child pornography. In each of these cases, immunity was upheld.

2. Analysis

In spite of all of the case law from reviewing courts granting broad immunity under the CDA and although the activities of Abika.com fit squarely within the definitions and protections under Section 230 of the CDA, the District Court incorrectly held that Abika.com should not be given immunity.

Abika.com fits all three requirements for immunity under Section 230, which are: 1) It is a user or provider of an interactive service provider; 2) It is not

an information content provider with respect to the disputed activity; and 3) Plaintiff seeks to hold it liable for information originating with a third-party user of its service. *Stoner*, 2000 WL 1705637 (Cal. 2000); *Zeran*, 129 F.3d 327, 330 (4th Cir. 1997); *Schneider v. Amazon.com*, 31 P.3d 37, 40-41 (Wash Ct. App. 2001).

As noted by the district Court, the relevant facts are not in dispute. What is at issue before this Court is how those facts should have been applied to the law. As set out below, Abika.com fits within the statutory requirements for immunity under Section 230.

Factual Analysis

Abika.com operated such that any independent researcher who agrees to the terms of use of the website and who provides assurances to Abika.com that they will conduct their searches in compliance with federal, state, and local laws, can submit its request to have their search listings added to the Abika.com website. (Aplt. App. at 144, 1245, 1255-63). After agreeing to these terms and undergoing a screening process, the researchers advertised on Abika.com the description of the search services and criteria for the searches they conducted. (Aplt. App. at 144, 1245).

All searchers who use Abika.com's website fill out a search form, enter the search criteria and click the “next” button which takes the searcher to the search listings of the researchers. (Aplt. App. at 145, 1245). The searcher reviews

multiple researcher listings and then selects the independent researcher listing that the searcher is interested in. (*Id*.). Upon selection, the website requires the searcher to go to the terms of use page and read the terms of use for the website, which includes a listing of the site's permissible purposes and states that the searcher is hiring the independent researcher to conduct their search. (*Id*.). The searcher can only proceed if he confirms that he has read and agrees to the terms of use. (*Id*.). Each request is screened and reviewed by Abika.com and/or the researcher and then the searcher's request is forwarded to the researcher. (*Id*.). When each request is forwarded to the researcher, Abika.com again notifies the researcher to process the search request only if it can conduct the search in compliance with federal, state, and local laws. (*Id*.; Duffy Declaration, Aplt. App. at 1257-58). Researchers are directed that if they cannot comply with federal, state, and local laws then they should cancel the request immediately. (*Id*.). Ultimately, Abika.com charges an administrative search fee to the searcher for the use of its interactive site and search engine, although on occasion that fee may be refunded to the searcher. (*Id*.). Ultimately, the researcher emails the results to Accusearch which are then posted to the searcher's account on Abika.com. and emailed to the searcher. (*Id*.).

User or Provider of Interactive Service Provider

The District Court correctly concluded that Abika.com is a provider of an interactive computer service. Again, Section 230(f)(2) defines "interactive computer services" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet . . ." Websites are considered interactive service providers. Website sites are also clearly access software providers which are also defined as an interactive service provider. It is undisputed that Abika.com is a website and that Abika.com uses the internet and e-mail in providing its interactive service. (Patel Deposition, Aplt. App. at 878-79, 885-87). Declarations provided by the FTC also state that Abika.com is a website. (Quale Declaration, Aplt. App at 652-63; Wolf Declaration, Aplt. App. at 789-90). The FTC's pleadings also repeatedly characterized Abika.com as a website. (Complaint, Aplt. App. at 21).

The District Court correctly held:

> Courts have generally found that websites are "interactive computer services" within in the meaning of the CDA. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1030 n.16 (9th Cir. 2003) (noting that several courts that have reached the issue "have decided that a website is an 'interactive computer service'). Nor does that retail nature of the Abika.com website necessarily take it outside the purview of the CDA. *See Almedia v. Amazon.com*, (S.D. Fla. July 30, 2004), *aff'd on other grounds*, 456 F.3d 1316 (11th Cir. 2006); *Schneider v.*

> *Amazon.com*, 108 Wash. App. 454, 31 P.2d 37, 40-41 (Wash. App. 2001). The Court finds that the language of the statute is broad enough to encompass the Abika.com website. Accordingly, the first Section 230 requirement is met.

(Order on Cross-Motions for SJ, Aplt. App. at 1390). In addition, the statutory language also provides immunity to ***users*** of interactive computer services. *Batzel*, 333 F.3d at 1031. The undisputed facts show Abika.com used an interactive computer service to access the Internet and to send and receive e-mails. (Patel Affidavit, Aplt. App. at 145, 1245-46; Wolf Declaration, Aplt. App. at 789-90). Clearly Abika.com is both a user and provider of an interactive computer service and as such, meets the first requirement of immunity under Section 230.

Not An Information Content Provider

In spite of voluminous case law to the contrary and without regard to the clear facts which were undisputed and evident in the record, the District Court found that Abika.com was an information content provider with respect to the phone activity records.

The CDA defines "information content provider" as "any person or entity that is responsible, in whole or in part, ***for the creation or development*** of information provided through the Internet or any other interactive computer service." 47 U.S.C. §230(f)(3) (emphasis added).

It is undisputed that Abika.com did not provide the information content of the disputed activity. Although the parties characterize the individuals involved in the process differently, it is undisputed that four independent researchers, PDJ Investigations, AMS Research Services d/b/a Informationbrokers.net, 1st Source Information Service, and Double Helix Services, Inc, provided the call activity records to Abika.com who then either posted the information to the searchers account or emailed the information to the searcher. (Patel Affidavit, Aplt. App. at 146, 1247). The FTC stated that these four researchers provided the phone records, and through discovery provided emails containing search results from phone call activity searches which were sent from the researchers to Defendants, and discussed the information from the researchers with Mr. Patel during his deposition. (Patel Deposition, Aplt. App. at 880-82, 901-902). Even under the FTC's theory that Abika.com is a retail website, Abika.com would not be considered the information content provider, as a retailer obtains the items it sells from manufacturers. (Order on Cross-Motions SJ, Aplt. App. at 1384).

The District Court's holding with regard to whether or not Abika.com was the information content provider contradicts itself. First, the District Court clearly states, "The phone records at issue in this case clearly were 'created' (at least originally) by various telephone companies for lawful purposes." (Order on Cross-Motions for SJ, Aplt. App. at 1395). Additionally, the District Court's Order also

states "The Complaint does not allege that the Defendants themselves contacted the telephone companies or directly obtained the telephone records at issue in this case." (Order on Cross-Motions for SJ, Aplt. App. at 1385-86). However, after making these statements, the District Court summarily concludes:

> While Defendants made admittedly few changes to the records themselves, the Court finds that by soliciting requests for such phone records and purchasing them for resale, Defendants "participat[ed] in the creation or development of [the] information, and thus [do] not qualify for §230 Immunity." *Ben Ezra*, 206 F.3d at 980 n.4."

(Order on Cross-Motions for SJ, Aplt. App. at 1395). The District Court readily admits Abika.com did not create the phone records, nor did they directly obtain the records, nonetheless the District Court incorrectly surmises that because Abika.com on behalf of searchers solicits this information, it has somehow created or developed the information. This analysis does not follow existing case law. The analysis set forth in the *Craigslist* case is applicable here. In *Craigslist* the Court stated that Craigslist had not caused any discriminatory notices by having a forum in which people can post such notices an analogized that under a theory where Craigslist was deemed to have caused the messages, so had the company that created the computer. No. 07-1101, 2008 WL 681168, at *5 (7th Cir. 2008). In the same manner Abika.com can not be found to have created or to have "participated in the creation" of phone records simply by having a forum in which

people advertise and request this information. For example, under the theory utilized by the District Court, AOL would not have immunity in the *Ben Ezra* case because AOL solicited requests for stock information to post on its website. 206 F.3d 980 (10th Cir. 2000). Similarly, the Network in the *Batzel* case, solely by virtue of requesting and allowing people to send the Network emails and by sending those emails out on the listserve, would not receive immunity. In the *Blumenthal* case, AOL solicited, contracted, and paid for the Drudge Report. Civil Action No. 97-1968 (D.C. Apr. 22, 1998). However, the *Blumenthal* Court held that the soliciting of this information did not mean that AOL was "responsible, in whole or in part ***for the creation or development***" of the information. 47 U.S.C. §230(f)(3); *Id*. Using the District Court's theory, any website that offered a chat room would be considered to have solicited information and as such, would be considered the information content provider of any information posted within the chat room.

Additionally, looking at the plain language of the statute and the common usage of the words create and develop, the District Court's analysis does not make sense.

Webster's Online dictionary defines create as:

> **1**. Make or cause to be or to become; "make a mess in one's office"; "create a furor".
> **2**. Bring into existence; "The company was created 25 years ago"; "He created a new movement in painting".

> * * *
> **6**. Create or manufacture a man-made product: "We produce more cars than we can sell"; "The company has been making toys for two centuries".

Webster's Online dictionary contains the following definitions for develop:

> **1**. Make something new, such as a product or a mental or artistic creation; "Her company developed a new kind of building material that withstands all kinds of weather"; "They developed a new technique".
> * * *
> **5**. Come into existence; take on form or shape; "A new religious movement originated in that country" "a love that sprang up from friendship," "the idea for the book grew out of a short story"; "An interesting phenomenon uprose".

If Congress meant for mere solicitation of information to destroy immunity, then Congress would have included such language. "In construing a federal statute, we 'give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'" *Ben Ezra*, 206 F.3d at 984 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 104, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993)). The District Court cannot impose additional language into the statute. In reaching its conclusion, the District Court added to the statutory language stating that the "by soliciting requests for such phone records and purchasing them for resale, Defendants "participat[ed] in the creation or development of [the] information." (Order on Cross-Motions for SJ, Aplt. App. at 1395). The statute says nothing of "soliciting" information and

soliciting information is entirely different from creating or developing the information. As a matter of law, the District Court's analysis as to whether or not Abika.com was an information content provider of phone records was incorrect.

Liability For Information Originating with a Third-Party

The third requirement to obtain immunity is that the Plaintiff seeks to hold the user or provider of interactive computer services liable for information originating with a third-party user of its service. *Stoner*, 2000 WL 1705637 (Cal. 2000); *Zeran*, 129 F.3d 327, 330 (4th Cir. 1997); *Schneider v. Amazon.com*, 31 P.3d 37, 40-41 (Wash Ct. App. 2001). Section 230 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). The District Court's Order states that "[n]otably . . . the FTC's Complaint does not sound in defamation." (Order on Cross-Motions for SJ, Aplt. App. at 1392). However, as discussed previously, immunity under Section 230 has been applied to a myriad of causes of action, including negligence (including negligence resulting in personal injury), negligence per se, invasion of privacy, misappropriation of the right of publicity, intentional infliction of emotional distress, civil conspiracy, and distribution of child pornography.

Clearly, the FTC through its Complaint sought to hold Abika.com liable for information that originated with a third-party. At the heart of the FTC's

Complaint, although phrasing the cause of action in terms of an unfair trade practice, the actions which the FTC alleges are improper, are at their core, distribution and publication of phone call activity records. Any assertion that the FTC is not treating Abika.com as a publisher or distributor is an argument of form, not substance.

The circumstances in the *Stoner* case are akin to the present case.

> The more difficult question is whether plaintiff is seeking to hold eBay responsible for content provided by third parties. . . . [P]laintiff contends that eBay's services constitute more than mere publication of product descriptions prepared by others, and are instead independent acts of eBay in furtherance of illegal sales. Therefore, plaintiff claims, this suit does not seek to hold eBay responsible for the publication of information provided by others, but for eBay's own participation in selling contraband musical recordings.
>
> Despite plaintiff's attempt to characterize eBay as an active participant in the sale of products auctioned over its service, plaintiff is seeking to hold eBay responsible for informing prospective purchasers that illegal recordings may be purchased-information that originates with the third party sellers who use the computer service. The uncontroverted facts establish that eBay's role does not extend beyond the scope of the federal immunity. . . . eBay provides interactive computer services for which it charges a fee, just as America Online provides interactive services for which it charges a fee.

2000 WL 1705637 at *2. Although the claims are cleverly brought fashioned in different terminology, at the core it is the publishing and distribution of the information which forms the basis of the Complaint. The FTC by alleging that

Abika.com has "made information available," "disclosed" information, and "sold information" is really alleging publication and distribution of the information. In this regard, FTC is treating and attempting to hold Abika.com liable for publishing and distributing the information provided by the researchers, for which Abika.com is immune under the CDA.

This District Court also used improper factors, including that Abika.com advertised, solicited and purchased the information, as a basis that it would not grant Abika.com immunity. (Order on Cross-Motions for SJ, Aplt. App. at 1395). Again, in the *Blumenthal* case AOL contracted with and paid Drudge to prepare a gossip report entitled the "Drudge Report." Civil Action No. 97-1968 (D.C. Apr. 22, 1998). AOL actively advertised this service and promoted the service to its subscribers. The Court found that immunity under the CDA was appropriate even when AOL had an active and aggressive role in making the information available, including paying for the information. *Id*. The factors the District Court utilized in making its determination are not factors that destroy immunity, yet the District Court held as such.

3. Policy

Ultimately, it appears that the District Court based its decision upon the discomfort it feels with having phone records published. The District Court went to any length to achieve its desired result, including ignoring case law and

imposing additional statutory language. There are other cases in the CDA world where the information that was disseminated was offensive, sexist, racist, and oftentimes illegal. Nonetheless, Congress chose to immunize users and providers from civil liability for information they did not create or develop.

> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. 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.
> None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. . . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Zeran, 129 F.3d at 330-31.

As pointed out by the Court in *Batzel*, oftentimes Congress' decision to enact the CDA creates case-by-case results that are uncomfortable, noting "[a]s other courts have pointed out, the broad immunity created by §230 can sometimes lead to troubling results. *See*, *e.g.*, *Blumenthal*, 992 F. Supp. at 51-52(expressing opinion that "[i]f it were writing on a clean slate," AOL would be liable for defamation when it had editorial control over the defamatory material)." 333 F.3d

at 1031 n.19. However, also as noted by the *Batzel* court, district court's cannot circumvent the law Congress enacted – no matter how uncomfortable the result.[1] Although perhaps at times following the CDA provides troubling results, the CDA actually serves to encourage aggrieved parties to seek their remedy from the true wrongdoers. As noted in *Zeran* "[n]one of this means [under the CDA], of course, that the original culpable party who posts defamatory messages would escape accountability." 129 F.3d at 330-31.

Ultimately, society as a whole benefits from the immunity Congress granted under the CDA and the case law which interprets that immunity broadly. The Internet opens up a world of information, commercial opportunity, and convenience for individuals to access information and products on the Internet. Congress, in enacting the CDA recognized this opportunity and convenience and chose to protect users and providers of interactive computer services from civil liability in order to ensure these benefits. All of the case law discussed above serves to provide broad immunity under Section 230, the purpose of which is to ensure benefit to society. When wrongdoing occurs over the Internet, the wronged individual has a full opportunity to seek redress from the wrongdoer. The CDA only protects the interactive computer services. Many of the cases cited herein are

[1] With regard to phone call activity records, in 2006 Congress enacted the Telephone Records and Privacy Act ("Act"), H.R. 4709, 109th Cong. (2006). This Act criminalizes selling, transferring, purchasing and receiving confidential phone record information. The enactment of this Act gives the Government broad power to act with regard to the distribution of telephone records and provides an adequate remedy at law.

from other jurisdictions and are not binding on this Circuit. However, this Circuit should adopt the reasoning of the other jurisdictions that have granted broad immunity under Section 230 in order to effectuate the plain language of the statute and to promote Congress' rationale in adopting the CDA.

Conclusion of CDA Issue

The Abika.com website and its functions and activities with regard to phone records fit squarely within the requirements of immunity under the CDA. Additionally, the operations of Abika.com mirror the operations this Circuit held to be immune in the *Ben Ezra* case. In *Ben Ezra*, AOL advertised the availability of stock data, solicited requests for orders for the data, purchased the data from third party sources for a fee, and then re-sold the data to paying subscribers only. Only paying subscribers, not society as a whole, had access to the data. Similarly, Abika.com advertised the availability of phone records, solicited requests for orders for the information, purchased the information from third party sources for a fee, and then re-sold the information to paying searchers only. Accordingly, Abika.com requests that this Court find as a matter of law that Abika.com's activities with respect to phone call records meets the requirements of immunity under Section 230 and as such hold that Abika.com is immune from the claims asserted by the FTC.

II. The District Court should not have imposed injunctive relief because there is an adequate remedy at law, including a criminal penalty, for the actions at issue.

A. Introduction

Injunctive relief is a drastic relief and should be imposed only when there is no adequate remedy at law and only to prevent future harm. Months prior to the FTC filing its Complaint against Abika.com voluntarily ceased offering searches for phone records. (Aplt. App. 147, 1248). During the course of the lawsuit, Abika.com agreed to pay nearly $200,000 in disgorgement, in essence putting its money where its mouth is and constituting an affirmative statement that it would no longer engage in the complained of activities. In addition, prior to the Court imposing injunctive relief, Congress enacted a law which made it a crime to sell, transfer, purchase or receive confidential phone record information. These combined circumstances provide an adequate remedy at law and sufficiently deter future harm, making imposition of injunctive relief unnecessary and unlawful.

B. Standard of Review

The Standard of Review of a District Court's order imposing injunctive relief is abuse of discretion. *Signature Properties Intern. Ltd. P'ship. v. City of Edmond*, 310 F.3d 1258, 1268 (10th Cir. 2002). "The district court's discretion is not unbounded, of course, and in particular its judgment is to be guided by 'sound legal principles.'" *Id*. at 1268-69.

C. Discussion

1. Legal Framework

Injunctive relief is a drastic remedy and therefore, its imposition should not be undertaken lightly. *Aaron v. SEC*, 446 U.S. 680, 703 (1980). "Because injunction is an extraordinary remedy, the power to issue injunctions should be exercised 'sparingly and cautiously, and only in cases reasonably free from doubt.'" *Loewen Group Acquisition Corp. v. Matthews*, 12 P.3d 977, 980 (Okla. Civ. App. Div. 4, 2000). Injunctions can carry civil and criminal penalties. Further, injunctions can result in very real and practical losses, such as the loss of personal and professional reputation, employment prospects, the total loss of a business and an individual's financial livelihood.

Injunctive relief is designed for a very narrow purpose. Courts have made clear that the sole purpose of injunctive relief is to prevent ***future*** harm. "Injunctive relief is designed to prevent future wrongs, not to punish past acts." *Abu-Nantambu-El v. Lovingier*, 2007 WL 684132 at *7 (D. Colo. 2007) (quoting *Knutson v. Daily Review, Inc.*, 401 F.Supp. 1374 (D.C. Cal. 1975)). Simply because a court has the power to issue an injunction does not mean the court should. "Indeed, under appropriate circumstances, the district court may justifiably withhold injunctive relief altogether even though the law has been violated by the party sought to be enjoined." *Prows v. Federal Bureau of Prisons*, 981 F.2d 466,

468 (10th Cir. 1992) (internal citations omitted). Further, injunctive relief is a form of equitable relief and a court of equity will not undertake a useless activity. *New York Times Co. v. U.S.*, 403 U.S. 713, 744 (1971). Clearly, an injunction is not warranted where there is an adequate ***criminal*** remedy. *U.S. v. Petersen*, 91 F.Supp. 209, (S.D. Cal. 1950) *aff'd* 191 F.2d 154, *cert. denied* 72 S.Ct. 174, 342 U.S. 885, 96 L.Ed. 664.

The language of the FTC Act itself makes clear that injunctions are not automatic, but that "in proper cases the Commission ***may*** seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. §53(b) (emphasis added). Although the FTC Act allows for injunctive relief, it is "a remedy whose basis 'in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959)). When there is an adequate remedy at law, the Court should not issue an injunction.

2. Analysis

Activities are Now Criminally Proscribed

In the case at hand, the activities complained of are now criminally proscribed, thus eliminating the possibility of future harm to the greatest extent allowed by the law and creating an adequate remedy at law. In 2006, after the FTC filed its Complaint but prior to the time the District Court imposed injunctive relief

against Abika.com, Congress enacted the Telephone Records and Privacy Act ("Act"). H.R. 4079, 109th Cong. (2006). This Act criminalizes selling, transferring, purchasing and receiving confidential phone record information. The Act gives the Government broad power to act with regard to the distribution of telephone records and provides an adequate remedy at law.

Since the sole purpose of injunctive relief is to prevent ***future*** harm this equitable remedy is available only when there is no adequate remedy at law. Based upon the fact that Congress has now criminalized the activities complained of, the District Court should not have imposed injunctive relief. "[I]n order for [a] Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime." *New York Times Co. v. U.S.*, 403 U.S. 713, 744 (1971) See also *Nat'l Ass'n of Letter Carriers v. Indep. Postal Sys. of Am., Inc.*, 470 F.2d 265, 271 (10th Cir. 1972); 42 AM. JUR. 2D *Injunctions* § 148 (2006). The injunction in this case does not enhance the power of the Government to act and as such was improper.

Voluntary Cessation and Payment of Disgorgement

In addition to the fact that the activities are now criminally proscribed, Abika.com ***voluntarily*** ceased all of these activities ***months prior*** to receiving the

FTC's Complaint. (Aplt. App. at 147, 1248). "[A]lthough the defendant's voluntary cessation of the challenged practice does not moot the case, '[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 193 (2000). Abika.com stopped allowing searches for phone records in January of 2006. (*Id*.). On or about February 7, 2006, the FTC sent cease and desist warning letters to approximately 20 other parties engaging in the acquisition or advertisement of access to consumer phone records. (*Id*.; Letter, Aplt. App. at 1310). Prior to this time, hundreds of entities both on the internet and otherwise advertised that they would conduct phone records searches for third parties and such advertisements were widespread. (Patel Affidavit, Aplt. App. at 1246; Duffy Declaration, Aplt. App. at 1256-57). No warning cease and desist letter was sent to Abika.com, seemingly because Abika.com had already ceased the activity. On May 1, 2006, nearly four months after Abika.com ceased advertising search access to phone records on its website and allowing any searches, the FTC filed the instant action. (Complaint, Aplt. App. at 18).

Separate and apart from the injunctive relief, Abika.com agreed to and paid the FTC $199,692.71 in disgorgement. Payment of this extensive disgorgement amount also serves as a substantial deterrent and Abika.com's voluntary payment

of the disgorgement also demonstrates that they will comply and there will be no future harm.

Conclusion of Injunction Issue

Although the District Court had discretion in determining whether or not to impose injunctive relief, it was still bound to make its determination based upon "sound legal principles." *Signature Properties Intern. Ltd. P'ship. v. City of Edmond*, 310 F.3d 1258, 1268 (10th Cir. 2002). Taking into account ***only*** the fact that the complained of activity is now criminally proscribed, justifies Abika.com's position that the District Court should not have entered injunctive relief. However, this fact taken with all the other undisputed facts, that the FTC never issued any warning to Abika.com and that Abika.com voluntarily stopped offering listings for phone records months before any action by the FTC, and that Abika.com paid nearly $200,000 in disgorgement, supports that the District Court erred in imposing injunctive relief against Abika.com. The criminal law provides an adequate remedy at law and deters future harm. Abika.com's voluntary cessation and voluntary payment of disgorgement also clearly demonstrate adequate deterrence and assurance that there will not be any future harm. Therefore, Abika.com respectfully requests that this Court find that based upon the circumstances of this case, the District Court abused its discretion and hold that injunctive relief is not appropriate.

III. The injunction imposed by the District Court is not in the public interest, violates Abika.com's Fifth Amendment Due Process rights and constitutes a prior restraint on speech in violation of Abika.com's First Amendment rights.

A. Introduction

The District Court's injunction broadly prohibits Abika.com from "purchasing, marketing, offering for sale, or selling, or causing another to purchase, market, offer for sale, or sell consumer personal information," information that the District Court did ***not*** find to be unlawful. (Order and Judgment, Aplt. App. at 1606-1608). Allowing the District Court to enjoin activities that it has not found to be unlawful violates Abika.com's due process rights. Further, restricting Abika.com's free speech rights by prohibiting the distribution of information the District Court has not found is unlawful, constitutes a prior restraint on speech and violates Abika.com's First Amendment rights.

B. Standard of Review

The Standard of Review of a District Court's order imposing injunctive relief is abuse of discretion. *Signature Properties*, 310 F.3d 1258, 1268 (10th Cir. 2002). "The district court's discretion is not unbounded, of course, and in particular its judgment is to be guided by 'sound legal principles.'" *Id*. at 1268-69.

C. Discussion

The District Court's Order and Judgment imposed injunctive relief that violates Abika.com's First, Fifth and Fourteenth Amendment rights and as such, is

not in the public interest. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383, 99 S.Ct. 2898, 2907, 61 L.Ed.2d 608 (1979); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir.1987)).

Fifth Amendment Due Process Violation

The District Court imposed injunctive relief that not only banned Abika.com from selling customer phone records, but also prohibited Abika.com from "purchasing, marketing, offering for sale, or selling, or causing another to purchase, market, offer for sale, or sell consumer personal information." (Order and Judgment, Aplt. App. at 1606-1608). The District Court painted with too broadly of a brush in imposing injunctive relief.

The only allegation set forth in the FTC's Complaint and therefore, defended by Abika.com, dealt with phone call activity records. The FTC based its allegation that the practice was unfair on the confidential nature of Section 222 of the Telecommunications Act. (Complaint, Aplt. App. at 20-21). There were no other allegations or other categories of business practices set forth in the Complaint or argued before the District Court. The District Court made no rulings regarding any other business practice other than the practice of offering searches for phone call

activity records. (Order on Cross Motions for Summary Judgment, Aplt. App. at 1383-1404; Order and Judgment, Aplt. App. at 1605-1618). Despite this fact, the District Court imposed an injunction order which was far broader in scope than the issues litigated in this case. This flies in the face of 5th Amendment due process. In the case of *NAACP v. Claiborne Hardware Co.* the Supreme Court noted that injunctions must "restrain only unlawful conduct." 458 U.S. 886, 924 n. 67 (1982). "Injunctions must be narrowly tailored and should prohibit only unlawful conduct. An 'order must be tailored as precisely as possible to the exact needs of the case.'" *CPC Intern., Inc. v. Skippy Inc.***,** 214 F.3d 456, 461, (4th Cir. 2000) (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 184 (1968)).

The Court's injunction governs ***all*** consumer information. (Order and Judgment, Aplt. App. at 1606-1608). However, the FTC did not present any evidence and the District Court did not make any findings regarding any other consumer information or how distribution of that information met the elements of an unfair trade practice. Accordingly, the District Court cannot legally enjoin activities which it has not found to violate any law.

The District Court apparently utilized the FTC's argument that the Court could "fence in" Abika.com. A district court's limited authority to "fence in" is discussed in the Tenth Circuit case of *Thiret v. FTC*, 512 F.2d 176 (10th Cir. 1975). The *Thiret* case deals with a cease and desist order issued by the FTC. The

Commission found that Thiret had violated the unfair trade practice and the Truth-in-Lending Act and accordingly entered a cease and desist order. Ultimately, the reviewing Court stated that the Commission can "effectively close all roads to the ***prohibited goal***" and found that the cease and desist orders must "have a 'reasonable relationship' to both the unfair trade practices and the violations of the Truth-in-Lending Act." *Id*. at 181 (emphasis added). This holding states that the provisions in an order issued by the Commission must have a reasonable relationship to the unfair trade practice. In this case, the only unfair trade practice the District Court found was the distribution of telephone call activity records. (Order on Cross-Motions for SJ, Aplt. App. at 1383-1404). Therefore the prohibited goal is the distribution of phone records and any "fencing in" must be related to the distribution of telephone call activity records. Fencing in allows the Commission, in a cease and desist order, to make sure that all manners by which a Defendant may undertake the unfair practice are blocked. Fencing in does **not** allow the Court to enjoin activities it has not found to be unfair.

As cited by the FTC, the 1969 case of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, states that a "federal court has broad power to restrain acts ***which are of the same type or class as unlawful acts which the court has found to have been committed*** or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." 395 U.S. 100, 132 (1969)

(emphasis added). Again, the District Court interpreted this language far too broadly and violates due process. The Supreme Court limited the federal courts' power to restrain acts only to those ***which are the same type or class*** as those the court has found violate law. In the present case, only acts related to the distribution of telephone call activity records are the same type or class as the unfair trade practice. The Court cannot legally restrain acts for which it has not received evidence, legal authority, or made a finding as to their lawfulness. Nonetheless, in prohibiting the distribution of all consumer personal information, the District Court has done just that. The District Court's Order violates Abika.com's due process rights and should be overturned.

First Amendment Violation

Further, the District Court's injunction prohibiting "purchasing, marketing, offering for sale, or selling, or causing another to purchase, market, offer for sale, or sell" ***all*** consumer information constitutes a prior restraint on speech and infringes on Abika.com's First Amendment rights. (Order and Judgment, Aplt. App. at 1606-1608). "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' Temporary restraining orders and permanent injunctions - i.e., court orders that actually forbid speech activities-are classic examples of prior restraints." *Alexander v. U.S.*, 509 U.S. 544, 550 (1993)

(internal citations omitted). Prior restraints of expression bear a heavy presumption against constitutional validity. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *Id.* In the case of *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980) the Supreme Court found that a nuisance statute was procedurally deficient because it authorize prior restraints that were more onerous than was permissible. The Court noted that the statutes enjoined the showing of films which had not yet been determined to be obscene. In the same manner, the District Court's injunction on ***all*** consumer information enjoins the distribution of information which was not determined to be unlawful. Thus, the District Court's injunction constitutes a prior restraint on speech and violates Abika.com's First Amendment rights. Accordingly, Abika.com respectfully requests that this Court order that the District Court's injunctive order be overturned.

Equal Protection Violation

In addition to the First and Fifth Amendment violations contained in the injunction, the injunction also violates the equal protection provisions of the Constitution, as the FTC submitted incorrect evidence to the Court in support of its requested broad injunctive relief. The FTC submitted an affidavit to the Court stating that compared to the other five entities that were sued for the same conduct,

Abika.com operated the largest scale information brokering business and stating that the other entities had either quit the business altogether or that the focus of the businesses had changed. (Thorleifson Affidavit, Aplt. App. at 1595-97). This affidavit was incorrect and Abika.com provided evidence to the District Court that the other entities still had active websites, sites which claimed to do thousands of transactions. (Reply to Injunctive Brief, Aplt. App. at 1531-1589). Nonetheless, the District Court did not strike the FTC's affidavit and considered this improper evidence in determining whether or not and to what extent it should impose injunctive relief. Ultimately, the District Court imposed broad injunctive relief based, at least in part, upon incorrect sworn statements from the FTC.

IV. The information at issue was <u>not</u> legally protected confidential information, but rather, was protected commercial speech, the FTC had no jurisdiction to enforce information related to telecommunications, and as such the District Court erred in denying Abika.com's Motion to Dismiss.

A. Introduction

The sole basis for the FTC's assertion that Abika.com's search listings for phone records was an unfair trade practice was based upon the incorrect premise that the records were confidential. In support of this incorrect proposition, the FTC cited to Section 222 of the Telecommunications Act of 1996. (Complaint, Aplt. App. at 20-21). However, the statutory language of the Telecommunications Act makes clear that the act applies only to telecommunications carriers. All other

individuals and entities are not governed by the Act. Because the Act does not apply to Abika.com, the FTC's Complaint failed to state a cause of action for which the Court could grant relief.

Furthermore, the FTC does not have authority to govern information related to telecommunications. Congress gave that authority solely to the Federal Communications Commission ("FCC"). The fact that this authority lies solely with the FCC was made clear during Congress' recent discussions prior to enacting the Telephone Records and Privacy Act. (Brief in Support of Motion to Dismiss, Aplt. App. at 37-56).

B. Standard of Review

The standard of review of an order denying a motion to dismiss is de novo. *Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 837 (10th Cir. 2003). This is the standard for a motion to dismiss brought under Rule 12(b)(1) or Rule 12(b)(6). *Colorado Envtl. Coalition v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004).

C. Discussion

The FTC's Complaint alleges that Abika.com obtained "confidential" customer phone records. (Complaint, Aplt. App. at 20-21). The FTC bases its assertion that the records are confidential on the Telecommunications Act of 1996 which defines "customer proprietary network information" and then restricts the

manner in which ***telecommunications carriers*** can disclose this information. 47 U.S.C. §222(h)(1) and (c)(1). (*Id*.). Every substantive paragraph of the FTC's Complaint relies upon a violation of the Telecommunications Act. (Aplt. App. at 18-24). It is only by improperly alleging that these records are "confidential" under the Telecommunications Act, that the FTC has any claim for an unfair trade practice. However, it was not illegal for Abika.com to obtain this information, nor was it illegal for a non telecommunications carrier third-parties to disclose this information.

Furthermore, in the criminal context, courts have made clear that individuals do not have a reasonable expectation of privacy in their phone records. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979); *U.S. v. Miller*, 425 U.S. 435, 442-44 (1976); *State v. Gubitosi*, 886 A.2d 1029, 1034 (N.H. 2005); *State v. Johnson*, 131 P.3d 173, 184 (Or. 2006). If individuals have no legitimate expectation of privacy in their phone records in the criminal context where courts afford individuals greater protections, certainly these same individuals do not have a legitimate expectation of privacy outside the criminal arena either.

Lastly, during the time Abika.com offered search services for phone records, it was simply not illegal to obtain phone records, ***even*** through fraudulent means.[2] This is clear based upon the fact that it was not until mid 2006 that Congress

[2] However, Abika.com did not itself obtain the phone records nor did it engage in any fraudulent means. This fact is admitted and conceded by the FTC.

enacted the Telephone Records and Privacy Act, making it illegal to transfer phone records. (Motion to Dismiss, Aplt. App. at 37-56). To underscore the fact that the actions alleged in the Complaint were not illegal, Senate Bill ESSB 6776 was passed on February 8, 2006, in an attempt to make the acts alleged in the Complaint illegal. (Motion to Dismiss, Aplt. App. at 37-38). The House of Representatives proposed similar legislation in H.R. 4943. (Motion to Dismiss, Aplt. App. at 39-47). The House bill attempted to give authority to the FTC to enforce the "Prevention of Fraudulent Access to Phone Records Act." Ultimately, this bill was pulled. (Motion to Dismiss, Aplt. App. at 48-52). The actions taken by the Senate and the House clearly demonstrate that there was no law preventing a third-party from collecting telephone records.[3] As such, the FTC's Complaint failed to state a cause of action and the District Court incorrectly denied Abika.com's motion to dismiss.

In addition, because it was lawful to obtain and distribute phone records, Abika.com's actions were protected under the First Amendment. As noted in Abika.com's Motion to Dismiss, this Circuit previously held that the FCC's regulations "restricting the use and disclosure of and access to customer proprietary network information" violated the First Amendment. *U.S. West v. FCC*, 182 F.3d 1224, 1229 (10th Cir. 1999). In the same manner, because

[3] Additionally, as soon as it appeared that these activities may become illegal, Abika.com voluntarily stopped offering searches related to phone records.

Abika.com's activities were lawful, any restriction on its ability to provide phone record information was in violation of Abika.com's protected commercial speech rights under the First Amendment. "The First Amendment states, 'Congress hall make no law . . . abridging the freedom of speech.'" *Id*. at 1231-32. "It is well established that nonmisleading commercial speech regarding a lawful activity is a form of protected speech under the First, Amendment." *Id*. at 1233. In this case, it was undisputed that Abika.com was engaging in commercial speech and that the commercial speech was nonmisleading. Abika.com charged an administrative fee for search services related to phone records and as such was engaged in a commercial activity. (Aplt. App. at 145, 1246). The information provided from phone record searches was non-misleading. (Transcript of Hearing on SJ, Aplt. App. at 1702). Therefore, Abika.com's activities were protected commercial speech and the action taken by the FTC in charging Abika.com with an unfair trade practice and the District Court's action in upholding that claim violated Abika.com's First Amendment rights.

The only action which the FTC alleged was an unfair trade practice was obtaining phone records. However, the FTC does not have the authority to govern telephone records. Congress gave that authority solely to the FCC. As noted by the District Court, the FTC has conceded that only the FCC can enforce the Telecommunications Act. (Transcript of Hearing on Motion to Dismiss, Aplt. App.

at 95). Accordingly, any action taken by the FTC in relation to the Telecommunications Act is done without authority. Again, each substantive provision in the FTC's Complaint was based upon a perceived violation of the Telecommunications Act. As such, the FTC prosecuted its claim based upon a statute it had not authority to enforce. The District Court erred in failing to dismiss the FTC's Complaint on this basis. Therefore, Abika.com respectfully requests that the court reverse the District Court's denial of the motion to dismiss.

STATEMENT REGARDING ORAL ARGUMENT

Abika.com requests that the Court set this matter for oral argument. The issue of immunity under Section 230 of the Communications Decency Act has been addressed by this Circuit in only a limited number of cases. In the specific factual context of this case, the case will be one of first impression for this Circuit. Resolution of the issue will affect many individuals and companies who utilize the internet to provide services.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that on this 17th day of April, 2006, the foregoing Brief of Appellant was digitally submitted to the Tenth Circuit Court of Appeals via e-mail to esubmission@ca10.uscourts.gov., that any required privacy redactions have been made, that it is an exact copy of the written document filed with the clerk, and the digital submission has been scanned for viruses with Symantec Anti Virus Coporate Edition, last updated in 2007, and, according to the program, is free of viruses.

Dated this 17th day of April, 2008.

GAY WOODHOUSE LAW OFFICE, P.C.

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CERTIFICATE OF COMPLIANCE WITH RULE 28.2(A)

In accordance with Fed. R. App. P 28.2(A) attached to the brief are copies of all pertinent written findings, conclusions, opinions, or orders of the district judge and any oral judicial pronouncements of such orders.

Dated this 17th day of April, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 13,971 words according to the word processor software, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 with 14 point Times New Roman style font.

Dated this 17th day of April, 2008.

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CERTIFICATE OF SERVICE

I, Deborah L. Roden, attorney for Accusearch, Inc., and Jay Patel, hereby certify that on April 17th, 2008, I sent a copy of the foregoing, addressed as follows, to:

Lawrence DeMille-Wagman
John F. Daly
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-582
Washington, DC 20580

Dated this 17th day of April, 2008.

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