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VICKIE EDGERLY

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HOLLIE TOUPS, MARISSA DEITZ, MARISSA JEFFCOTT, MARIANNA TASCHINGER, CAITLYN LaGRONE, MEEGHAN FALLS, CORINA LUMMUS, KELSI GOOK, KINSEY STAUDT, JESSICA DUPUY, ASHLEY MARTIN, JILLIAN HOWARD, MALLORY PETRY, LARAMIE GILBERT, TAYOR BARNWELL, PATRICIA HINSON, MARGARET NOBLE, AND OTHER SIMILARLY SITUATED PERSONS

IN THE DISTRICT COURT OF
DISTRICT CLERK
ORANGE COUNTY, TEXAS
Vickie Edgerly

ORANGE COUNTY, TEXAS

Vs.

GODADDY.COM, TEXXXAN.COM, UNIDENTIFIED DEFENDANTS THAT INCLUDE, (1) THE PERSONS AND/OR ENTITIES HOSTING TEXXXAN.COM, AND (2) ALL SUBSCRIBING MEMBERS

260TH JUDICIAL DISTRICT

DEFENDANT GODADDY.COM, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULE 91a OF THE TEXAS RULES OF CIVIL PROCEDURE

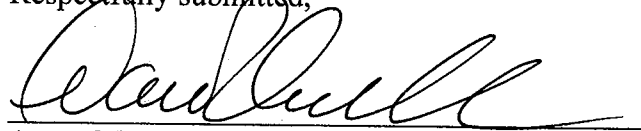
TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Defendant GoDaddy.com, LLC ("Go Daddy"), will move this Court, the Honorable Buddie J. Hahn, 260th District Court, 801 W. Division Street, Orange, Texas 77630, on April 16, 2013 at 2:00 p.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 91a of the Texas Rules of Civil Procedure dismissing the Amended Complaint filed by Plaintiffs Hollie Troups, Marissa Deitz, Marissa Jeffcott, Marianna Taschinger, Caitlyn LaGrone, Meeghan Falls, Corina Lummus, Kelsi Gook, Kinsey Staudt, Jessica Dupuy, Ashley Martin, Jillian Howard, Mallory Petry, Laramie Gilbert, Taylor Barnwell, Patricia Hinson, and Margaret Noble.

Go Daddy seeks the dismissal of Plaintiffs' Complaint in its entirety on the basis that (1) each of the claims asserted therein is barred by the Communications Decency Act, 47 U.S.C. § 230 and (2) each of the claims independently fails to state a claim upon which relief may be granted in that they have no basis in either law or fact.

Dated: March 8, 2013
Irvine, California

Respectfully submitted,



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ORANGE COUNTY, TEXAS
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HOLLIE TOUPS, MARISSA DEITZ, MARISSA JEFFCOTT, MARIANNA TASHINGER, CAITLYN LaGRONE, MEEGHAN FALLS, CORINA LUMMUS, KELSI GOOK, KINSEY STAUDT, JESSICA DUPUY, ASHLEY MARTIN, JILLIAN HOWARD, MALLORY PETRY, LARAMIE GILBERT, TAYOR BARNWELL, PATRICIA HINSON, MARGARET NOBLE, AND OTHER SIMILARLY SITUATED PERSONS

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260TH JUDICIAL DISTRICT

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GODADDY.COM, LLC'S
MOTION TO DISMISS PURSUANT TO RULE 91a OF THE
TEXAS RULES OF CIVIL PROCEDURE

Defendant GoDaddy.com, LLC (“Go Daddy”), through its undersigned counsel, respectfully submits this memorandum of law in support of its motion pursuant to Rule 91a of the Texas Rules of Civil Procedure to dismiss the Amended Complaint filed by Plaintiffs Hollie Toups, Marissa Deitz, Marissa Jeffcott, Marianna Taschinger, Caitlyn LaGrone, Meeghan Falls, Corina Lummus, Kelsi Gook, Kinsey Staudt, Jessica Dupuy, Ashley Martin, Jillian Howard, Mallory Petry, Laramie Gilbert, Taylor Barnwell, Patricia Hinson, and Margaret Noble.

INTRODUCTION

Assuming (as required for purposes of this motion) that Plaintiffs' allegations are true, this case arises from circumstances in which a series of unidentified individuals came into possession of sexually explicit photographs of Plaintiffs, and without Plaintiffs' consent or permission, uploaded those photographs onto an Internet website that was established and operated by Defendant Hunter Thomas Taylor at TEXXXAN.COM. Go Daddy has been named as an additional defendant in this matter simply because the unidentified individuals and Defendant Taylor used Go Daddy's interactive computer service in part to make the allegedly illegal photographs available on the Internet.

A federal statute, the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), immunizes interactive service providers such as Go Daddy from liability for precisely this type of litigation. As numerous courts in this State and across the country have uniformly held, Section 230 broadly prohibits the imposition of civil liability on interactive service providers for harms caused by the dissemination of content created and developed by third parties. In passing Section 230, Congress made the policy decision that liability for harmful online content should be imposed on only the actual wrongdoers—that is, the originators of the harmful content—and not interactive computer service providers. .

Section 230 immunity applies with full force here. The Amended Complaint does not allege, nor could it, that Go Daddy participated in the creation or development of the allegedly unlawful photographs of Plaintiffs that are the subject of this lawsuit, nor does it allege any involvement in the operation of the website at TEXXXAN.com, other than the generic provision of hosting services typical of interactive service providers. Instead, Go Daddy has been sued solely in its capacity as an online intermediary for allegedly harmful content of others.

As demonstrated below, both the plain language of the statute and well-established precedent render Go Daddy immune from civil liability as a matter of law. Liability for the unlawful content rests on the actual perpetrators, each of whom may be sued for harm caused by any unlawful content they produced and disseminated. Accordingly, the claims against Go Daddy should be dismissed with prejudice.

RELEVANT FACTUAL BACKGROUND

The events at issue in this case began when Plaintiffs discovered that sexually explicit photographs of themselves had been uploaded and posted by unidentified third parties to a website entitled TEXXXAN.COM. Am. Comp. ¶ 11. Defendant Taylor owned and operated TEXXXAN.COM, which made Plaintiffs' photographs and other personal information available to website subscribers. *Id.* at ¶11. Plaintiffs allege that their photographs and other personal information were uploaded and posted on TEXXXAN.COM without consent or permission. *Id.* at ¶ 17.

Defendant Go Daddy is the world's largest domain name registrar, with over 54 million domain names under management. In addition to offering registration services, Go Daddy offers website hosting services to its customers. By way of background, the contents and images of any website on the Internet are contained in the form of electronic files that reside on a server physically located at the site of the entity providing the hosting services for the particular website. When an Internet user visits a particular website, a series of computer interactions allow for the hosting provider to serve to the website the requested content or images. This service by the hosting provider is an interactive computer service that is vital to the proper operation of the Internet.

For a monthly fee, Go Daddy provides computers to host content for its users' websites. When content is hosted by Go Daddy, it resides on Go Daddy's servers and may be accessed via the Internet. Although Go Daddy's services are invisible to most Internet users, they provide critical background functionality that permits websites to operate properly.

Go Daddy's involvement in this lawsuit derives exclusively from the fact that Defendant Taylor and a number of unidentified defendants allegedly distributed sexually explicit photographs of Plaintiffs on a website hosted by Go Daddy. Am. Comp. ¶ 11. The Amended Complaint makes clear that Go Daddy is named in this suit based solely on its role as the internet service provider hosting the website and any revenue it derives in that role. *Id.* at ¶¶ 11, 13.

The Amended Complaint does not allege, nor could it, that Go Daddy participated in the creation or development of the allegedly unlawful photographs of Plaintiffs that are the subject of this lawsuit, nor does it allege any involvement in the operation of the website at TExXXAN.com, other than the generic provision of hosting services typical of interactive service providers. Nonetheless, Plaintiffs seek to hold Go Daddy liable for the alleged content posted on the TExXXAN.com website by third parties. Am. Compl. ¶¶ 11, 13, 15.

Plaintiffs' original Complaint, filed on January 18, 2013, listed, without factual support, a series of state law torts allegedly committed by the Defendants. These were for negligence, gross negligence, intrusion on the right to seclusion, public disclosure of private facts, wrongful appropriation of names and likenesses, false light invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. The original complaint also singled out Go Daddy in a separate claim for civil conspiracy. Before any party had answered or otherwise responded to the Complaint, on February 11, 2013, Plaintiffs filed their Amended Complaint. The principal

substantive change in the Amended Complaint is that it identifies a previous Doe defendant. The Amended Complaint remains devoid of factual allegations.

Go Daddy now moves for dismissal of all of the claims asserted against it, based on the immunity it enjoys under 47 U.S.C. § 230. Dismissal of the claims against Go Daddy will in no way hinder or prevent Plaintiffs from proceeding with civil claims against the actual wrongdoer(s) who allegedly uploaded the photographs depicting them on the TEXXXAN.com website and unlawfully presented them for public consumption.

LEGAL STANDARD

Rule 91a of the Texas Rules of Civil Procedure allows the Court to dismiss a complaint where the causes of action therein have no basis in law or fact. Tex. R. Civ. P. 91a.1. No basis in law means “the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” *Id.* No basis in fact means “no reasonable person could believe the facts pleaded.” *Id.* Pursuant to Rule 91a, the motion must (1) state it is made pursuant to Rule 91a, (2) identify each cause of action to which it is addressed, and (3) state specifically the reasons the cause of action has no basis in law, fact, or both.

Because Rule 91a is based on Federal Rule of Civil Procedure 12(b)(6), the case law interpreting that statute is also instructive. As relevant here, to withstand a Rule 12(b)(6) motion, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

ARGUMENT

Interactive computer services and the Internet have revolutionized the way people and businesses share and receive information. Unlike traditional media such as television, radio,

newspapers, and books—where content typically flows from a single, centralized “publisher”—information and content on interactive computer services is created and disseminated by millions of different content providers. These content providers include the tens of millions of individual users of interactive computer services, each of whom now has the ability to engage in a wide, ever-changing array of broadcasting, communicating, and making connections with each other. One of the great challenges of the communication revolution was the development of legal rules to govern this new medium that recognize this fundamental distinction between traditional media and interactive services: As interactive computer services enabled more and more users to communicate in more and different ways, courts and policymakers began to confront the challenge of assigning liability when users abused the new communication tools to transmit unlawful content.

In 1996, Congress enacted Section 230 in response to this challenge. Section 230 was designed to eliminate uncertainties in the law governing whether providers of interactive computer services, such as Go Daddy, could be liable for harms resulting from the dissemination of tortious or otherwise harmful content created or developed by users or other third parties. Specifically, Congress passed Section 230 generally to immunize interactive service providers such as Go Daddy from liability for harm caused by the dissemination of third-party information, subject only to a handful of narrow statutory exceptions that are not applicable here.

Congress’s grant of broad statutory immunity to interactive service providers represented a critical legislative policy judgment that is spelled out in Section 230’s extensive preamble, as well as its legislative history. Congress accurately recognized that imposing liability on online intermediaries for unlawful third-party content would threaten development of the online industry as a medium for new forms of mass communication and simultaneously create

disincentives to self-regulation of such content by responsible service providers. As a result, Congress determined that liability should rest with the actual wrongdoers—the originators of illegal and harmful content—and not intermediary services, like Go Daddy, whose systems are sometimes abused by such wrongdoers.

As demonstrated below, the plain language of Section 230, supported by a legion of cases from courts across the country that have broadly construed the statute, require the conclusion that Go Daddy is immune from liability in this case. That result is also entirely consistent with Congress’s policy choice to (1) hold wrongdoers such as Defendant Taylor and the unidentified individuals who uploaded the sexually explicit photographs of Plaintiffs to the TEXXXAN.com website liable for unlawful content that they originate, while (2) protecting entities like Go Daddy from suits such as this one.

I. SECTION 230 BROADLY IMMUNIZES ENTITIES LIKE GO DADDY FROM LIABILITY FOR THIRD-PARTY CONTENT.

The key operative provision of Section 230 states:

No provider or user of an interactive computer service¹ shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1).

No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Id. § 230(e)(3).²

¹ “The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. §230(f)(2).

² Section 230(c) recognizes only a handful of exceptions to its wide-ranging immunity. Prosecutorial enforcement of criminal laws is outside the ambit of Section 230(c), as are civil claims for violation of federal trademark, copyright and patent rights, and claims for alleged violation of federal wiretapping laws. *See* 47 U.S.C. § 230(e)(1),

As explained by the Texas State Court of Appeals in *Milo v. Martin*, in the nearly 20 years since Section 230 was enacted, federal and state courts in jurisdictions across the country “have applied [S]ection 230 broadly in addressing how the statute operates to protect interactive computer services from suits based on an injury caused by the computer-service provider’s making third-party-provided content publicly available on the internet.” *Milo*, 311 S.W.3d at 215, discussing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir.2008) (en banc) (defining the term “development” in 47 U.S.C.A. § 230(f)(3) “as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness”); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008) (upholding summary judgment because Section 230 prevented Craigslist from being held liable as a “messenger” of posts containing allegedly discriminatory sales and rental notices that pertained to housing); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 416–22, 427 (1st Cir.2007) (affirming dismissal of claims against internet service provider that were based on defamatory posts by an anonymous user that appeared on the provider’s message boards); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1027–28 (9th Cir. 2003) (“Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.”); *Green v. Am. Online (AOL)*, 318 F.3d 465, 469, 471 (3rd Cir.2003) (holding that AOL could not be held liable for an alleged negligent failure to police its network for content provided by its users); *Ben Ezra, Weinstein, and Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 984–85 (10th Cir.2000) (“47 U.S.C. § 230 creates a federal immunity to any state law cause of

(2), (4). None of these exceptions are applicable to the claim asserted against Go Daddy in the Complaint.

action that would hold computer service providers liable for information originating with a third party.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997) (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”).

As recognized by the Court in *Milo*, in enacting Section 230, “Congress apparently made a choice not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries[.]” *Milo*, 311 S.W.3d at 215. As explained in a number of opinions interpreting Section 230, Congress was concerned about the chilling effect on accessibility to the free flow of information on the Internet if interactive service providers were held liable for content created by others. *See, e.g., Zeran*, 129 F.3d at 330 (“The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”). Thus, for policy reasons, Congress decided that *only* those who originally authored allegedly harmful content may be held liable for any harm caused by the availability of such content on the Internet. *Id.*

For the same reasons set forth in *Milo* and the numerous other cases applying Section 230, the claims contained in the Amended Complaint, each of which would impose liability on Go Daddy for harms allegedly caused by third-party content, are barred by Section 230.

II. EACH OF THE STATUTORY ELEMENTS OF IMMUNITY IS APPARENT FROM THE FACE OF THE AMENDED COMPLAINT.

Under the plain language of the statute, Section 230 immunity applies whenever (1) the defendant claiming immunity is “a provider... of an interactive computer service,” (2) the

plaintiff's claims seek to "treat[]" the defendant as the "publisher or speaker" of the allegedly harmful information at issue, and (3) that information was "provided by another information content provider." 47 U.S.C. § 230(c)(1); *see generally Ben Ezra, Weinstein, & Co.*, 206 F.3d at 984-85; *Zeran*, 129 F.3d at 330. Each of these elements is satisfied on the face of the Amended Complaint.

A. The Amended Complaint Establishes that Go Daddy Is a "Provider" of an "Interactive Computer Service."

Under Section 230, an "interactive computer service" includes "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2).

Based on Plaintiffs' own allegations, Go Daddy hosts the website at TEXXXAN.COM. Am. Comp. ¶ 10. As a hosting provider, Go Daddy permits its customers to purchase space on its servers for the customers' data, so that the data can be served to Internet users who are redirected to any website hosted by Go Daddy. Indeed, web-based service provider such as Go Daddy are routinely held to be interactive computer service providers for purposes of Section 230. *See Kruska v. Perverted Justice Found. Inc.*, CV08-0054-PHX-SMM, 2008 WL 2705377 (D. Ariz. July 9, 2008) ("GoDaddy, as a web host, qualifies as an interactive computer service provider under [Section 230]"); *see also, Smith v. Intercosmos Media Group, Inc.*, No. Civ. 02-1964, 2002 WL 31844907 (E.D. La. Dec. 17, 2002) (domain name registrar qualifies as an interactive computer service provider under Section 230).

In light of Plaintiffs' allegations and the definition of "interactive computer service provider" under Section 230, there can be no dispute that Go Daddy is a provider of an "interactive computer service" and is therefore entitled to immunity under Section 230.

B. The Images at Issue Were “Information Provided By Another Information Content Provider.”

Each of the claims alleged against Go Daddy is based on harms that allegedly have been caused by material that was provided by “another information content provider.” Section 230 defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3) (emphasis added). There is no allegation, nor could there be, that Go Daddy originated any of the images at issue or had any other role in their “creation or development.” Nor is there any allegation that Go Daddy was responsible for uploading the allegedly offending content on the TEXXXAN.COM website.

The Amended Complaint concedes that it was the individual defendants and other unidentified individuals who uploaded the photographs to the Internet and made them available at TEXXXAN.COM. Am. Comp. ¶¶ 11, 12. Accordingly, all of the allegedly harmful information at issue in this case plainly constitutes “information provided by another information content provider.” *Zeran*, 129 F.3d at 330 (bogus and defamatory bulletin board postings created by unauthorized users of the AOL service were “information provided by another information content provider”); *Green*, 318 F.3d at 469 (content sent through chat rooms deemed information provided by another information content provider); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121, 1124 (9th Cir. 2003) (bogus online profile, including photographs of plaintiff, held to be information provided by another information content provider).

C. The Amended Complaint Seeks to Treat Go Daddy as the “Publisher or Speaker” of the Third-Party Information.

As the case law confirms, a lawsuit that would impose liability on an interactive service provider for allegedly harmful or unlawful third-party information necessarily “treats” the service provider as the “publisher or speaker” of that information in contravention of Section 230. *See, e.g., Milo*, 311 S.W.3d at 215; *Zeran*, 129 F.3d at 332-33; *Ben Ezra, Weinstein & Co.*, 206 F.3d at 986. Thus, Section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran*, 129 F.3d at 330 (emphasis added).

Courts have unanimously recognized that causes of action based on third-party content are attempts to treat the service provider as a publisher of that content regardless of the particular label placed on the claim. Indeed, courts have applied Section 230 to the very tort claims at issue here: negligence,³ invasion of privacy,⁴ and infliction of emotional distress.⁵ Claims for equitable relief also are barred by the CDA. *See, e.g., Noah v. AOL Time Warner, Inc.*, 26 1 F. Supp. 2d 532, 540 (E.D. Va. 2003) (“[G]iven that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief.”), *aff’d*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004); *Smith v. Intercosmos Media Group, Inc.*, No. Civ.A. 02-1964, 2002 WL 31844907, at *5 (E.D. La. Dec. 17, 2002) (“[A]ny claim made by the plaintiffs for damages or

³ *See, e.g., Carafano*, 339 F.3d at 1122; *Ben Ezra, Weinstein & Co.*, 206 F.3d at 984-85; *Zeran*, 129 F.3d at 332; *Doe*, 783 So. 2d at 1013-17; *Green*, 318 F.3d at 468.

⁴ *See, e.g., Carafano*, 339 F.3d at 1122; *Barrett*, 799 N.E.2d at 920; *Roskowski v. Corvallis Police Officers' Ass'n*, No. Civ. 03-474-AS, 2005 WL 555398 (D. Or. March 9, 2005).

⁵ *See, e.g., Donato v. Moldow*, 865 A.2d 711, 713 (N.J. Super. Ct. 2005); *Jane Doe One v. Oliver*, 755 A.2d 1000, 1002 (Conn. Sup. Ct. 2000).

injunctive relief with regard to either defamation and libel, or negligence and fault[], are precluded by the immunity afforded by Section 230(c)(1), and subject to dismissal.”); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, No. 97-485 LH/LFG, 1999 WL 727402, at *3 (D.N.M. Mar. 1, 1999) (“[T]he Plaintiff seeks injunctive relief from the Defendants continued publication of inaccurate stock information. AOL is again entitled to Section 230 immunity and this claim will be dismissed as well.”), *aff’d*, 206 F.3d 980, 983-86 (10th Cir. 2000), cert. denied, 531 U.S. 824 (2000).

Plaintiffs’ attempt to circumvent Section 230 by alleging “civil conspiracy,” likewise is unavailing. A claim for civil conspiracy requires an agreement to commit a tort, and “[a]bsent the underlying tort, there can be no liability for civil conspiracy.” *Bank One, Texas v. Stewart*, 967 S.W.2d 419, 446 (Tex. Ct. App. 1998). Because each of the alleged torts themselves require treating Go Daddy as a publisher, any civil conspiracy claim based on those torts amounts to the same claim.

Like other claims against interactive computer service providers discussed in the case law, the allegations in the Amended Complaint here seek to “treat” Go Daddy as the “publisher or speaker” of third party content in at least three ways. First, the Amended Complaint demonstrably seeks to treat Go Daddy as the “publisher or speaker” of third-party content because it would “cast [Go Daddy] in the same position as the party who originally posted the offensive” material.” *Zeran*, 129 F.3d at 333. In particular, Plaintiffs seek to hold Go Daddy liable on the same basic theory of harm and causation that they assert in their complaint against the various individual defendants--the third parties who, according to Plaintiffs, uploaded the illegal photographs to the TEXXXAN.COM website, which have caused them harm. Plaintiffs essentially allege that (i) sexually explicit images of them were made available to others online,

and that (ii) they suffered damages as a result. *See* Am. Comp. ¶¶ 11, 14-17. This is precisely the type of claim that should be brought against the originators of the content in question, and indeed, *is* brought against the originators of the content in question in this case. Plaintiffs' claims therefore "treat" Go Daddy the same as the original publishers of the harmful information.

The Fourth Circuit in *Zeran* relied on precisely this reasoning in holding that Section 230 barred claims that aimed to make an Internet service provider liable for tortious content that a user had repeatedly posted on one of its electronic fora:

According to *Zeran's* logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, *Zeran* certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran, 129 F.3d at 333.

Second, Plaintiffs' claims would explicitly impose on Go Daddy the "quintessential duties" of a publisher, including the duties to block, screen, warn against, or edit the allegedly harmful material, in violation of Section 230's prohibition on "publisher" liability. As the Fourth Circuit held in *Zeran*, any claim based on a service provider's alleged failure to "exercise . . . a publisher's traditional editorial functions," such as monitoring or screening other parties' transmissions or deciding whether to withdraw or delete content, necessarily and impermissibly treats the provider as a publisher of that information. *Zeran*, 129 F.3d at 330; *see also Ben Ezra, Weinstein & Co.*, 206 F.3d at 986 ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its . . . self-regulatory functions.").

Plaintiffs in this case explicitly seek to hold Go Daddy liable for failing to engage in these self-regulatory activities to a degree Plaintiffs deem adequate. By treating all of the defendants collectively, the Amended Complaint rests on Go Daddy's alleged failures to fulfill the quintessential duties of a publisher to ensure that the content that is published is not tortious or otherwise unlawful. Section 230, however, forbids the imposition of civil liability on an interactive computer service provider such as Go Daddy for such alleged failures where, as here, the content in question originated with a third party. *See Ben Ezra, Weinstein & Co.*, 206 F.3d at 986

Third, the suit seeks to treat Go Daddy as the publisher of third-party content because the essence of each of the counts asserted against Go Daddy is that it "published" illegal images of Plaintiffs and thereby caused them harm. In the Amended Complaint, Plaintiffs accuse Go Daddy of conspiring to publish the photographs that allegedly appeared on TEXXXAN.COM. *See Am. Comp.* ¶ 13. In spite of this, the Amended Complaint admits that the alleged photographs were actually posted by the individual defendants, i.e., third party content providers, not Go Daddy. *See id.* at ¶¶ 11, 12.

Even Plaintiffs' purported negligence claim—predicated on a "failure to remove" the offending website—falls squarely within the ambit of traditional publisher liability. *See, e.g., Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity."); *Smith v. Intercosmos Media Group, Inc.*, No. Civ. 02-1964, 2002 WL 31844907, at *10-11 (E.D. La. Dec. 17, 2002) ("The defendant is immunized from liability for this state claim of negligence because the defendant meets the three requirements of the CDA immunity."). The Amended

Complaint makes clear on its face that Plaintiffs' claims against Go Daddy seek to treat Go Daddy as the "publisher" of third-party content in contravention of Section 230.

Because the claims against Go Daddy fall squarely within the protections of Section 230(c) immunity as a matter of law, this Court should dismiss such claims with prejudice.

III. THE SINGLE CLAIM FOR CIVIL CONSPIRACY ASSERTED AGAINST GO DADDY FAILS INDEPENDENT OF THE IMMUNITY PROVIDED BY SECTION 230.

Even independent of the broad immunity granted to interactive service providers by Section 230, the sole claim for civil conspiracy asserted against Go Daddy must be dismissed because it has no basis in law or fact.

Plaintiffs assert a single claim for civil conspiracy against Go Daddy. Plaintiffs makes clear that the civil conspiracy claim leveled against Go Daddy is based solely on the provision of automated website hosting services provided to TEXXXAN.com, which they claim allowed the individual defendants to "accomplish the torts" set forth in the Amended Complaint. *See Am. Comp.* ¶ 13.

To establish a claim for civil conspiracy in Texas, a plaintiff must show: (1) two or more persons; (2) an objective to be accomplished; (3) a meeting of the minds on the objective; (4) one or more unlawful, overt acts; and (5) proximate damages. *See Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Yet the Amended Complaint is devoid of any allegations to support these elements as to Go Daddy, let alone any of the other defendants. On this basis alone, the Court should grant Go Daddy's motion to dismiss the Amended Complaint.

More problematic for Plaintiffs, however, is the fact that under Texas law, civil conspiracy is a derivative tort. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). If a

plaintiff fails to state a separate underlying claim on which the court may grant relief, then a claim for civil conspiracy necessarily fails. *Id.* Thus, whether Plaintiffs stated a claim for civil conspiracy rises and falls on whether they stated a claim against Go Daddy on an underlying tort.

Plaintiffs allege that Go Daddy conspired to commit negligence, gross negligence, and the “negligent and grossly negligent commission of Texas state law torts of intrusion on their right to seclusion, public disclosure of their private facts, the wrongful appropriation of their names and likenesses, false light,⁶ invasion of privacy and intentional infliction of emotional distress” Am. Comp. ¶ 15. Texas law, however, prohibits civil conspiracy claims founded on negligence-based claims. *See Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719-20 (Tex. 1995) (holding that given requirement of specific intent in civil conspiracy, parties cannot engage in civil conspiracy to be negligent). As such, Plaintiffs’ conspiracy claim fails as to each of the negligence-based tort claims asserted.

With regard to the single claim of intentional conduct asserted in the Amended Complaint—intentional infliction of emotional distress—Plaintiffs again fail to sufficiently allege an underlying tort upon which to base their claim for civil conspiracy against Go Daddy. Under Texas law, intentional infliction of emotional distress “is a ‘gap-filler’ tort, created to permit recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.” *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). As a consequence, Texas courts routinely dismiss intentional infliction of emotional distress claims where, as here, “the gravamen of a plaintiff’s complaint is another tort . . . regardless of whether the plaintiff succeeds on, or even makes the alternate claim.” *Hoffmann-La Roche, Inc.*, 144

⁶ Notably, Texas does not recognize the tort of false light invasion of privacy. *See Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex.1994). Plaintiffs’ purported “false light” claim should be dismissed.

S.W.3d at 448; *see also Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 817 (Tex. 2005) (“As [the plaintiff’s] complaints are covered by other statutory remedies, she cannot assert them as intentional infliction claims just because those avenues may now be barred.”).

Here Plaintiffs’ claim for intentional infliction of emotional distress is predicated on exactly the same conduct underlying their negligence, gross negligence, and negligent invasion of privacy claims. *See* Am. Comp. ¶¶ 10-15. The fact that those claims may ultimately be barred as to Go Daddy does not provide Plaintiffs with this alternative avenue of recourse.

In light of the fact that (1) Plaintiffs cannot maintain a claim for intentional infliction of emotional distress in this action, (2) the remaining claims asserted in the Amended Complaint as a basis for the civil conspiracy claim against Go Daddy are alleged to have been committed on the basis of negligence or gross negligence, and (3) Texas law prohibits use of negligence claims to support a civil conspiracy claim, Plaintiffs’ have failed to state a claim against Go Daddy as a matter of law and thus, their claims against should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, GoDaddy.com, LLC respectfully requests that the Court dismiss Plaintiffs' Amended Complaint pursuant to Rule 91a of the Texas Rules of Civil Procedure with prejudice.

Dated: March 12, 2013
Irvine, California

Respectfully submitted,



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FILED
VICKIE EDGERLY

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ORANGE COUNTY, TEXAS
IN THE DISTRICT COURT OF
Vickie Edgerly

NO. D-130,018-C

HOLLIE TOUPS, MARISSA DEITZ, MARISSA
JEFFCOTT, MARIANNA TASCHINGER,
CAITLYN LaGRONE, MEEGHAN FALLS,
CORINA LUMMUS, KELSI GOOK, KINSEY
STAUDT, JESSICA DUPUY, ASHLEY
MARTIN, JILLIAN HOWARD, MALLORY
PETRY, LARAMIE GILBERT, TAYOR
BARNWELL, PATRICIA HINSON,
MARGARET NOBLE, AND OTHER
SIMILARLY SITUATED PERSONS

Vs.

GODADDY.COM, TEXXXAN.COM,
UNIDENTIFIED DEFENDANTS THAT
INCLUDE, (1) THE PERSONS AND/OR
ENTITIES HOSTING TEXXXAN.COM, AND
(2) ALL SUBSCRIBING MEMBERS

ORANGE COUNTY, TEXAS

260TH JUDICIAL DISTRICT

PROOF OF SERVICE

I, Laura T. Juarez, on March 13, 2013, served the foregoing documents described as:

1. NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULE 91a OF THE TEXAS RULES OF CIVIL PROCEDURE
2. MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GODADDY.COM, LLC'S MOTION TO DISMISS PURSUANT TO RULE 91a OF THE TEXAS RULES OF CIVIL PROCEDURE

on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope and addressed as follows:

**E. Hart Green, Weller, Green, Touns & Terrell,
2615 Calder Avenue,
Suite 400,
Beaumont, Texas 77702**

BY MAIL - As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

STATE - I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct.

Executed on March 12, 2013, at Irvine, California.


LAURA T. JUAREZ