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Orange County, CA
Pittsburgh, PA
Portland, OR
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The Honorable Judge Buddie Hahn
801 W. Division Ave.
Orange, Texas 77630-6364

Re: Cause No. D 130,018-C, *Hollie Toups, et al. v. GoDaddy.com, et al.*

Dear Judge Hahn:

I am writing in response to the third item raised in the correspondence sent to you yesterday by Plaintiffs' counsel, John Morgan.

During oral argument, and again in his letter yesterday, Mr. Morgan repeatedly misstates the "narrow exception" to the broad immunity afforded by Section 230 of the Communications Decency Act. Contrary to Mr. Morgan's representation to Your Honor, the court in *Milo v. Martin* did not find that any state court claim is exempted from Section 230's immunity simply because the federal statute does not pre-empt all state law. Rather, Section 230 bars any state law claim that would impose liability on an Internet Service Provider, such as Go Daddy, for the actions committed by third parties. *See* 47 U.S.C. § 230(c). That is precisely what the Plaintiffs attempt to do with each of their claims against Go Daddy.

The fact that Plaintiffs dress up their claims as "intentional" torts does not necessarily render Section 230 immunity inapplicable. As the *Milo* court explained, "in the absence of extreme and outrageous circumstances . . . Congress chose to protect internet service providers [such as Go Daddy] from their potential liability for . . . content **when that content is created by third parties and when the interactive computer service has not acted as an information content provider.**" *Milo v. Martin*, 311 S.W.3d 210, 218 (2010) (emphasis added). Here, Plaintiffs have not plead facts demonstrating "extreme and outrageous" conduct by Go Daddy. Moreover, Plaintiffs admit in their pleadings that the content at issue was created by the individual defendants and that Go Daddy did not create, develop, or post that content. Thus, under *Milo*, Go Daddy is immune from liability under Section 230 for each of the claims asserted by Plaintiffs.

Even if, however, the *Milo* opinion can be read to move *any* claim for intentional tort outside the reach of Section 230 immunity, Mr. Morgan admits in his letter to Your Honor that Plaintiffs claims are not limited to intentional torts. Instead, at least two of the nine claims are for gross negligence. Gross negligence does not constitute the malice required to meet the bad faith exception to Section 230's immunity. Thus, Plaintiffs' negligence claims must be dismissed against Go Daddy.

Finally, even assuming a blanket rule that all intentional torts fall outside the scope of Section 230's immunity, Plaintiffs simply have not, **nor can they**, state facts that, if true, would state a claim

against Go Daddy. While Mr. Morgan repeatedly states that this is not a summary judgment motion, what he ignores is Plaintiffs' obligation to allege *facts* sufficient to state a claim in order to survive Go Daddy's motion to dismiss. Mr. Morgan appears to take the position that simply because he has labeled claims as intentional torts, the claims automatically survive dismissal. Labels are irrelevant; it is the facts alleged that dictate Go Daddy's dismissal. For example, Mr. Morgan identifies the claim "intentional invasion of privacy," but he does not address how Go Daddy could have intentionally invaded any of the Plaintiffs' privacy given Plaintiffs admission in their pleadings that Go Daddy did not own, control, create, develop, or post any of the content that allegedly invaded Plaintiffs' privacy. The same is true for the remainder of Plaintiffs' claims – "intentional public disclosure of Plaintiffs' private facts," "intentional intrusion of Plaintiffs' right of seclusion," "wrongful appropriation of Plaintiffs' names and likeness," "false light invasion of privacy" and "civil conspiracy" to commit these torts – all of which require control over the content at issue, control which Plaintiffs admit in their pleadings Go Daddy did not have.

Nor can Plaintiffs amend their pleadings to cure this fatal defect. The undisputed admitted facts alleged by Plaintiffs conclusively demonstrate that Go Daddy did not create, develop, or post the offending content. Absence such allegations, Go Daddy cannot be liable under any of Plaintiffs' asserted intentional tort theories. Accordingly, Go Daddy respectfully requests that the Court grant its motion and dismiss each of Plaintiffs' claims against Go Daddy.

Sincerely,



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cc: John Morgan
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