

13-5946

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SARAH JONES,

Plaintiff/Appellee,

v.

DIRTY WORLD ENTERTAINMENT RECORDINGS, LLC,
et al.,

Defendants/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CASE No. 2:09-CV-219-WOB
HON. WILLIAM O. BERTELSMAN

APPELLANTS' REPLY BRIEF

David S. Gingras, Esq.
Gingras Law Office, PLLC
4802 East Ray Road, #23-271
Phoenix, AZ 85044
Tel: (480) 264-1400
Fax: (480) 248-3196
Email: david@gingraslaw.com

Alexander C. Ward, Esq.
Alexis B. Mattingly, Esq.
Huddleston Bolen, LLP
855 Central Avenue, Suite 301
Ashland, KY 41105
Tel.: (606) 329-8771
Fax: (606) 324-4651
award@huddlestonbolen.com
amattingly@huddlestonbolen.com

Attorneys for Appellants
DIRTY WORLD, LLC AND
NIK LAMAS-RICHIE

TABLE OF CONTENTS

INTRODUCTION 1

I. PREFATORY REMARKS..... 1

II. ARGUMENT..... 4

 A. The Correct Standard For Development Is Making A “Material Contribution” To The Unlawful Nature Of Content, Not “Encouragement” Or “Totality Of The Circumstances” 4

 B. Mr. Richie Did Not *Materially* Contribute To The Unlawful Content 7

 C. This Court Should Follow *Hill v. StubHub* 14

 D. To Preserve Clarity In The CDA, This Court Must Reject Either “Encouragement” Or “Totality Of The Circumstances” As A Proper Test For Development..... 21

III. CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES

Ascentive, LLC v. Opinion Corp.,
842 F.Supp.2d 450 (E.D.N.Y. 2011) 30

Asia Economic Institute, LLC v. Xcentric Ventures, LLC,
2011 WL 2469822 (C.D.Cal. 2011)..... 30

Barrett v. Rosenthal,
40 Cal.4th 33, 146 P.3d 510 (Cal. 2006)..... 25

Batzel v. Smith,
333 F.3d 1018 (9th Cir. 2003)..... 3, 4

Brown v. Gilmore,
278 F.3d 362 (4th Cir. 2002)..... 23

Carafano v. Metrosplash.com, Inc.,
339 F.3d 1119 (9th Cir. 2003)..... 10, 26

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,
521 F.3d 1157 (9th Cir. 2008)..... *passim*

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,
666 F.3d 1216 (9th Cir. 2012)..... 29

FTC v. Accusearch, Inc.,
570 F.3d 1187 (10th Cir. 2009)..... *passim*

Gavra v. Google, Inc.,
2013 WL 3788241 (N.D.Cal. 2013) 30

Gentry v. eBay, Inc.,
99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (Cal.App. 4th Dist. 2002) 10

Global Royalties, Ltd. v. Xcentric Ventures, LLC,
544 F.Supp.2d 929 (D.Ariz. 2008) 26, 30

GW Equity v. Xcentric Ventures, LLC,
2009 WL 62173 (N.D.Tex. 2009)..... 30

Hill v. StubHub, Inc.,
727 S.E.2d 550 (N.C.App. 2012)..... *passim*

Hill v. StubHub, Inc.,
2011 WL 1675043 (N.C.Sup. 2011)..... 17

Jurin v. Google, Inc.,
695 F.Supp.2d 1117 (E.D.Cal. 2010)..... 13, 21

Klayman v. Zuckerberg,
2012 WL 6725588 (D.D.C. 2012) 30

Nasser v. WhitePages, Inc.,
2013 WL 6147677 (W.D.Va. 2013) 23

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,
591 F.3d 250 (4th Cir. 2009)..... 23, 26

Reno v. ACLU,
521 U.S. 844, 177 S.Ct. 2329 (1997)..... 26

Shiamili v. The Real Estate Group of New York, Inc.,
952 N.E.2d 1011, 17 N.Y.3d 281 (N.Y. 2011)..... 6, 7, 8, 11

Universal Comm. Sys., Inc. v. Lycos, Inc.,
478 F.3d 413 (1st Cir. 2007)..... 5, 26

Zeran v. America Online, Inc.,
129 F.3d 327 (4th Cir. 1997)..... 3, 5, 25

STATUTES

47 U.S.C. § 230..... *passim*

INTRODUCTION

I. PREFATORY REMARKS

Appellants' initial brief focused largely on a single word: "development". As previously explained, this word is critical because the CDA's protection does not extend to any material that a website provider creates *or develops*.

In her response, Ms. Jones also focuses on the meaning of development. In a nutshell, she argues the term *develop* is synonymous with the term *publish*. According to Ms. Jones, a website owner who acts like a publisher or an editor, for example by choosing which material to publish and which to reject, thereby "develops" such content and is thus never protected by the CDA. This is the same circuitous logic applied by the district court when it found the CDA only applies to those who do *not* screen (and thus do not develop) content.

This reply explains this position is wrong. It is a *non sequitur* which ignores both the language and the purpose of the CDA. The meaning of development cannot be based on acts of publishing because "§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). As such, "'development of information' ... means something more substantial than merely editing portions of [third party content] and selecting material for publication." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

In light of the CDA’s intended purpose—to prevent plaintiffs and courts from treating website owners as *publishers*—the question of what constitutes “development” simply cannot turn on whether the website acts like a publisher. The CDA’s *raison d’être* is to give website owners the freedom to perform editorial and publisher functions like reviewing and screening content *without* facing liability as publishers or speakers; “the exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.” *Batzel*, 333 F.3d at 1031. In short, in the context of the CDA, publishing can never constitute development. Never.

As the district court did, Ms. Jones seems to disregard this rule entirely, arguing that Mr. Richie “develops” unlawful material by choosing to *publish* it:

Richie acted as an information content provider by encouraging the development of the offensive content about Ms. Jones. Specifically, Richie fully controlled the dirty.com website: 1) he acted as the editor and selected small percentage of submissions to be posted, 2) he reviewed submissions without verifying accuracy, and 3) decided if postings should be removed, if he received an objection to a post.

Resp. at 8. If this Court holds that a person “develops” content by choosing which material to publish and which to reject, the CDA will literally swallow itself whole and disappear, along with countless websites the law was intended to protect. This is why the district court’s denial of immunity cannot stand.

In addition to discussing that point, this reply brief concludes with a new word—clarity. Above all else, the CDA’s value derives from one thing: its clarity. Clarity in the CDA is essential because the law was not merely intended to shield websites from liability; it was also intended to protect them from “having to fight costly and protracted legal battles.” *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1177 (9th Cir. 2008). To ensure this benefit has real meaning, “courts that have addressed these issues have generally interpreted Section 230 immunity broadly, so as to effectuate Congress’s ‘policy choice ... not to deter harmful online speech through the ... route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (quoting *Zeran*, 129 F.3d at 330–31).

In short, there is a direct correlation between the CDA’s value and its clarity. Standards which are vague or ambiguous (such as the “encouragement” test advocated by Ms. Jones) would convert this essential law into something akin to a screen door on a submarine. Any such attempt to dilute the CDA with ambiguity must be firmly rejected, “lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.” *Roommates*, 521 F.3d at 1174 (emphasis added).

II. ARGUMENT

A. The Correct Standard For Development Is Making A “Material Contribution” To The Unlawful Nature Of Content, Not “Encouragement” Or “Totality Of The Circumstances”

As explained in Appellants’ principal brief, the district court erroneously held that if a website owner does anything to “encourage” the submission of “offensive” content, then it has “developed” such content and is no longer immune. This rule was based entirely on dicta taken from *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009) and *Roommates*.

As noted by Appellants and various *amici*, the district court simply misapplied both *Accusearch* and *Roommates*. Although both cases certainly mention the concept of “encouragement”, neither case actually used that standard to deny immunity.

Rather, both cases applied a very different rule—that “a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.” *Accusearch*, 570 F.3d at 1200 (emphasis added) (quoting *Roommates*, 521 F.3d at 1168). Far from adopting an “encouragement” test, the Ninth Circuit in fact rejected the idea that generalized encouragement will affect immunity; “Such weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter.” *Roommates*, 521 F.3d at 1174.

These points are perhaps best summarized by a single case; *Shiamili v. The Real Estate Group of New York, Inc.*, 952 N.E.2d 1011, 17 N.Y.3d 281 (N.Y. 2011). This case was already discussed at length in Appellants' principal brief so a full analysis will not be repeated here except to note that whatever Mr. Richie did to "develop" content in this case was far less substantial than in *Shiamili*.

Both cases involved websites with mildly derogatory names.¹ Both cases involved allegations that the website owner "encouraged" the posting of negative material which defamed the plaintiff. In both cases, the website operators added their own comments which were offensive but not actionable. In both cases, the plaintiffs cited *Roommates* and *Accusearch* as support for their position, and in both cases the trial court initially denied CDA immunity.

However, this case differs from *Shiamili* in at least two important ways. First, in *Shiamili*, the plaintiff and the defendant were direct competitors; both were involved in the highly competitive New York real estate industry. See *Shiamili*, 17 N.Y.3d at 284. This fact (which gave serious concern to the lone dissenting judge) is not present in this case. Here, it is undisputed that Mr. Richie and Ms. Jones were complete strangers who had never met or spoken prior to this case. See ECF Doc. #64–2 at Page ID 483 (Richie Aff. ¶ 20).

¹ The name of the website at issue in *Shiamili* was www.ShittyHabitats.com. The website name is not mentioned in the court's opinion, but it is referenced in the appellate briefs, 2009 WL 8073983, *5 and in the Complaint, 2008 WL 8980579.

Second and more importantly, in *Shiamili* the defendant did far more than Mr. Richie to “develop” the defamatory comments but the court still found the CDA applied because none of these acts were material. Specifically, the offending speech in *Shiamili* was initially found in a user-submitted comment about an existing discussion thread. *See Shiamili*, 17 N.Y.3d at 285. After seeing the comment about Mr. Shiamili and his company, Ardor Realty, the website operator moved it to a stand-alone post with a new heading entitled: “*and now it’s time for your weekly dose of hate, brought to you unedited, once again, by ‘Ardor Realty Sucks’. and for the record, we are so. not. afraid.*” *Id.* (all emphasis in original). Because the post accused Mr. Shiamili of being racist and anti-Semitic, the website owner added an image of Jesus Christ with the plaintiff’s face superimposed on top with the words: “Chris Shiamili: King of the Token Jews.” *Id.*

Clearly, the website operator in *Shiamili* did far more to “develop” and “adopt” the third party content than Mr. Richie did. In this case (like in *Shiamili*), Mr. Richie reviewed the third-party content containing the actionable material, selected it for publication, and he made a brief sarcastic quip about it. However, unlike in *Shiamili*, Mr. Richie did nothing more to enhance or augment the statements about Ms. Jones; he passively displayed them exactly as they were submitted to the site. Clearly, if the website operator’s conduct in *Shiamili* was insufficient to qualify as “development”, the same must be said here.

This is so because the correct standard for “development” is *not* the vague “encouragement” test applied by the district court. Rather, the correct test is whether the website owner “contributes materially to the alleged illegality of the conduct.” *Roommates*, 521 F.3d at 1168. In *Shiamili*, none of the website operator’s actions materially contributed to the defamatory nature of the third party statements, therefore the CDA still applied. The same is true here.

B. Mr. Richie Did Not *Materially* Contribute To The Unlawful Content

As reflected below, the main post at issue, ECF Doc. #64–2, Page ID #509, contained *some* content from a third party and *some* content from Mr. Richie:

Content From Third Party

The Dirty Bengals Cheerleader t f di su

Posted in Cincinnati, Dirty Cheerleaders, The Dirty | December 7th, 2009



THE DIRTY ARMY: Nik, here we have Sarah J, captain cheerleader of the playoff bound cinci bengals.. Most ppl see Sarah has a gorgeous cheerleader AND highschool teacher.. yes she’s also a teacher.. but what most of you don’t know is.. Her ex Nate.. cheated on her with over 50 girls in 4 yrs.. in that time he tested positive for Chlamydia Infection and Gonorrhea.. so im sure Sarah also has both.. whats worse is he brags about doing sarah in the gym.. football field.. her class room at the school she teaches at DIXIE Heights.

Content From Mr. Richie

Why are all high school teachers freaks in the sack?- nik

REMOVE POST Like Tweet 0

As explained in paragraphs 19–22 of Mr. Richie’s first summary judgment affidavit, all of the content which Ms. Jones alleged to be defamatory was submitted to the site by a third party. ECF Doc. #64–2, Page ID #483. Mr. Richie did not create, alter, or modify this content in any way; he merely added his one-line rhetorical “freak in the sack” remark after the fact.

In this posture, the question is *not* whether Mr. Richie created or developed *something*. The issue is whether he created or developed the specific content that Ms. Jones claimed was false. *See Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 833 n.11, 121 Cal.Rptr.2d 703, 717 n.11 (Cal.App. 4th Dist. 2002) (holding, “The critical issue is whether [the website operator] acted as an information content provider with respect to the information that ... is false or misleading.”); *see also Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (explaining, “even assuming [defendant] Matchmaker could be considered an information content provider, the statute precludes treatment as a publisher or speaker for ‘any information provided by *another* information content provider.’ The statute would still bar [plaintiff] Carafano’s claims unless Matchmaker created or developed the particular information at issue.”) (emphasis in original) (quoting 47 U.S.C. § 230(c)(1)).

Here, every word that Ms. Jones claimed was defamatory is found solely in the content from the third party author which Mr. Richie neither created nor

changed. If false, that speech would be actionable even without Mr. Richie's after-the-fact remark, and Mr. Richie's "freak in the sack" comment "was obviously satirical and, although offensive, it cannot by itself support [a] claim of defamation." *Shiamili*, 17 N.Y.3d at 293, 952 N.E.2d at 1020. As such, Mr. Richie's rhetorical quip did not *materially* contribute to the actionable content.

The only remaining conduct which might be seen as "development" is limited to Mr. Richie's decision to select and publish the post in the first place without verifying its accuracy, and his failure to immediately remove the post after Ms. Jones notified him it was false. This conduct *per se* cannot qualify as "development" because this is exactly what the CDA protects; "The claim against the website was, in effect, that it failed to review each user-created profile to ensure that it wasn't defamatory. That is precisely the kind of activity for which Congress intended to grant absolution with the passage of section 230." *Roommates*, 521 F.3d at 1171-72. The Ninth Circuit repeated the same admonition over and over multiple times in *Roommates*; "Section 230 requires us to scrutinize particularly closely any claim that can be boiled down to the failure of an interactive computer service to edit or block user-generated content that it believes was tendered for posting online, as that is the very activity Congress sought to immunize by passing the section." *Id.* at 1172 n.32 (emphasis added).

Although the district court relied almost entirely on *Roommates* and *Accusearch* as support for its decision, Ms. Jones offers essentially no discussion or analysis of *Roommates*, and she mentions *Accusearch* just twice in her brief devoting less than a single page to it. *See* Resp. at 16. In that discussion, Ms. Jones admits that “The *Accusearch* court held that one is not responsible for ‘developing’ allegedly actionable content only ‘if one’s conduct was neutral with respect to the offensiveness of the content[.]’” *id.* (quoting *Accusearch*, 570 F.3d at 1199), and she concedes that under *Roommates*, “the word develop does not include an action as innocuous as the inclusion of a [blank] text box for additional comments.” Resp. at 18. Ms. Jones then argues these points “only help to strengthen the argument that Richie did develop the culpable content.” *Id.*

Ms. Jones simply misunderstands the meaning of these observations and how they apply to the facts of this case. In other words, Ms. Jones seems to be making a *res ipsa loquitur*-type argument—i.e., that because TheDirty.com contains *some* offensive content, the site as a whole is not neutral and therefore Appellants must have “encouraged” all such offensive content because no website would contain offensive content without encouragement from the site’s operator.

This argument fails as a matter of both fact and law. Legally, the question of whether a website’s conduct is “neutral” does not focus on the nature or type of content submitted by users. Rather, the focus is on whether the site itself creates or

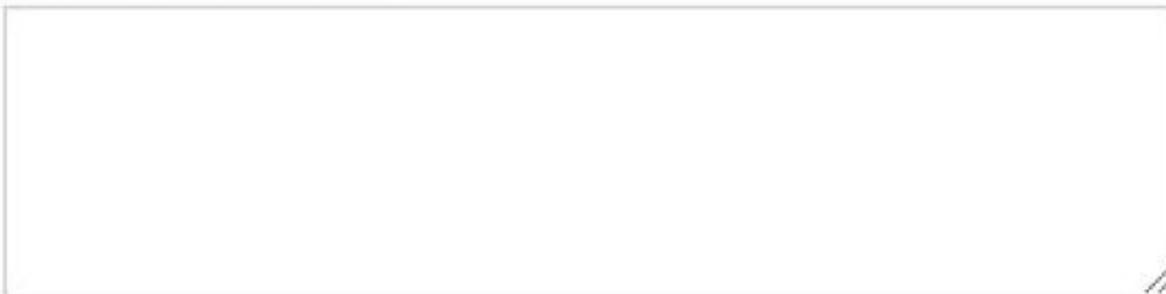
requires unlawful content (as in *Accusearch* and *Roommates*) or whether it is merely *possible* that unlawful content might be submitted. In the latter scenario, “if the tools provided by a website may be used to generate either lawful or unlawful content depending on decisions made by the user, these tools are ‘neutral’ and do not implicate the website in the development of unlawful content.” *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 559 (N.C.App. 2012) (citing *Jurin v. Google, Inc.*, 695 F.Supp.2d 1117 (E.D.Cal. 2010)).

Factually, the undisputed evidence showed Appellants did not and do not require users to submit unlawful content, nor are users required to submit only negative or offensive content. On the contrary—the site provides entirely content-neutral tools such as the blank form visitors use to upload new posts which may cover any topic whatsoever such as news, sports, politics, sex, NFL cheerleaders, or any combination thereof.

TheDirty.com Post Submission Form
ECF Doc. #64-2 at Page ID 505

Your Hot Tip:

Tell us what's happening. Remember to tell us Who, What, When, Where, Why.



Although the website's form generically suggests that users may wish to "submit dirt", there is nothing inherently unlawful about "dirt", nor does the form *require* users to submit false or unlawful content. Rather, the only guidance offered is neutral; i.e., "tell us Who, What, When, Where, Why."

This blank box is identical to the "Additional Comments" feature described in *Roommates* which "prompts subscribers to 'take a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate.' The subscriber is presented with a blank text box, in which he can type as much or as little about himself as he wishes." *Roommates*, 521 F.3d at 1173 (emphasis added). Although the plaintiff in *Roommates* argued that some people might use this feature to include unlawful material in their profiles, the Ninth Circuit found even if that was true, the website owner was not responsible for "developing" any such material:

Roommate publishes these comments as written. It does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences. Roommate is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate. Without reviewing every essay, Roommate would have no way to distinguish unlawful discriminatory preferences from perfectly legitimate statements. Nor can there be any doubt that this information was tendered to Roommate for publication online. This is precisely the kind of situation for which section 230 was designed to provide immunity.

Roommates, 521 F.3d at 1174 (emphasis added).

Although this language could not be clearer, the Ninth Circuit repeatedly emphasized that merely allowing users to submit *something* is *per se* insufficient to qualify as development; “It’s true that, under a pedantic interpretation of the term ‘develop,’ any action by the website—including the mere act of making a text box available to write in—could be seen as ‘develop[ing]’ content. However, we have already rejected such a broad reading of the term ‘develop’ because it would defeat the purpose of section 230.” *Id.* at 1174 n.38 (emphasis added).

It is simply impossible to square these points from *Roommates* with the district court’s holding in this case. Here, the uncontroverted evidence shows that Appellants’ website provides exactly the same type of blank box which a third party may use to input either *lawful* content or *unlawful* content. Decisions regarding *what* to say and *how* to say it are made solely by third parties, not by Appellants. For that reason, even if some people choose to post defamatory or unlawful content, the CDA still applies because “if the tools provided by a website may be used to generate either lawful or unlawful content depending on decisions made by the user, these tools are ‘neutral’ and do not implicate the website in the development of unlawful content.” *Hill*, 727 S.E.2d at 559 (emphasis added).

Appellants provide nothing but neutral tools for users to create content. As such, *Roommates* fully supports Appellants’ position and does not justify the denial of immunity.

C. This Court Should Follow *Hill v. StubHub*

As noted in Appellants' initial brief, since 1996 there have been hundreds of reported CDA cases and only a tiny handful resulted in a denial of immunity. In fact, Appellants' research suggests this is the first case since the CDA was adopted in 1996 in which a website operator has endured trial (not once, but twice) and was held liable for defamatory content posted by a third party.²

While the outcome in this case is literally unprecedented, it is not entirely unique. For instance, in addition to *Shiamili*, there has been at least one procedurally similar case—*Hill v. StubHub*—where a trial court erroneously denied CDA immunity only to have that ruling reversed on appeal. Like in *Shiamili*, an immediate interlocutory appeal followed in *Hill* and the lower court's denial of immunity was reversed. See *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C.App. 2012). This posture makes *Hill* highly instructive, particularly because the plaintiff's legal arguments (which the trial court initially accepted) are strikingly similar if not identical to the arguments Ms. Jones makes here.

² The two best-known exceptions are *Roommates* and *Accusearch*. However, neither case involved a trial and neither case involved defamation claims. The defendant in *Roommates* ultimately prevailed on the merits and thus the plaintiff was awarded nothing. See *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) (*Roommates II*). Similarly, *Accusearch* was not a defamation case; it was an unfair business practice case in which the plaintiff (the Federal Trade Commission) obtained the disgorgement of \$199,692.71 in profits earned by the defendant from the sale of unlawful phone records.

Hill was a class-action lawsuit filed against the owner of a website called www.StubHub.com. As the name suggests, the site allowed third party users to buy and sell tickets to concerts and sporting events. The facts of the case were simple—the plaintiff purchased four tickets to a Miley Cyrus concert and was charged more than face value for each ticket. *See Hill*, 2011 WL 1675043, *1. The plaintiff was also charged a service fee in excess of \$3.00. Both acts were facial violations of North Carolina’s anti-scalping statute. In addition to suing the third party scalper, the plaintiffs also sued StubHub, arguing that it was liable for the scalper’s unlawful conduct.

The website argued that it was protected by the CDA because it merely offered a marketplace in which third parties bought and sold tickets. Thus, if a particular seller chose to offer tickets above face value (in violation of North Carolina law), the seller was responsible for that choice but StubHub itself was not.

As occurred here, the trial court rejected this argument and found the CDA did not apply because the website owner took various steps to “encourage” the posting of unlawful content (tickets priced above face value). The trial court began its analysis by correctly observing, “It is clear that the CDA is an immunity statute designed to protect website operators from liability for content posted by others.” *Id.* at *2. The court also initially noted that the appropriate standard was the “material contribution” test from *Roommates*. *See id.*

After these initial points, the court veered far off the beaten path, blazing a trail paved with familiar dicta from *Roommates* and *Accusearch*. The court's analysis sounds strikingly similar to the district court's conclusions in this case:

A review of the cases below leads this court to conclude that an internet service provider crosses the line and becomes liable for content on its website when the internet service provider (“ISP”) materially contributes to and/or specifically encourages the offending content. To “materially contribute” in this context means to influence the offending content in a way that promotes the violation of law that is represented by the offending content. To “specifically encourage” means to elicit and make aggressive use of the offending content in the business of the internet service provider. Each case must be decided on its own facts, giving deference to the public policy embodied in the statute. Cases in which the offending content is unlawful require a heightened degree of materiality and specificity. Intent to violate the law is not required. Conscious disregard by an internet service provider of known and persistent violations of law by content providers may impact the courts’ determinations of the service provider’s claim to immunity, especially where the ISP profits from the violations.

Id. at *3 (emphasis added).

Based on this mélange of rules cobbled together from *Roommates* and *Accusearch*, the court found the CDA did not apply because the website owner did various things to “specifically encourage” (and thus develop) acts of scalping. For example, the court noted that StubHub’s content was not neutral with respect to the types of tickets sold. Specifically, the site only allowed users to sell tickets to the most popular events which were thus more attractive to scalpers: “StubHub screens out low-demand listings. It actively monitors its inventory for each selected event.

Its business model is thus focused at the outset on sales of tickets to events with a high probability of garnering premium prices above the face value of the event ticket.” *Id.* at *9. This point is comparable to the assertion that Appellants’ website encourages the posting of only “dirt”; i.e., material that *might* be unlawful.

In addition to limiting the types of tickets available, StubHub also used pricing tools and strategies to ensure that tickets were sold at the highest price. This encouraged unlawfully overpriced tickets because “by focusing on [sellers] who are in business to make a profit on re-sales, assisting them in pricing, and generating a significant portion of its revenue from them, StubHub creates a pricing process that assures that the market price of a ticket will exceed the face value with respect to at least 30% to 50% of its sales.” *Id.* at 11.

Finally, the court also noted various other ways in which StubHub was directly involved in each transaction:

StubHub is involved in the process between the buyer and seller in numerous other ways. It controls payment and delivery, prohibiting contact between buyer and seller. It profits from its delivery charges. It serves as a guarantor to both the buyer and seller.

...

These activities standing alone do not make StubHub a content provider, but they demonstrate that StubHub is in total control of the transaction. The only thing it does not do is enter the actual price or make the final price decision for most sellers. It is the party conducting the transaction even though it is not setting the price.

Id. at *13 (emphasis added).

Again, this argument is essentially the same as Ms. Jones's position. According to Ms. Jones, "It is not just the name of the site, or just the use of a tagline that makes the CDA inapplicable to Richie. It is all of these items, taken together, which demonstrates that Richie is responsible for developing the tortious content on the website and specifically the content relating to Ms. Jones." Resp. at 14 (emphasis added). In other words, Ms. Jones contends "development" should be measured by a vague "totality of the circumstances" approach rather than focusing on any discrete acts which materially contributed to the specific actionable content.

This is the same logic applied by the trial court in *Hill*. After considering the site as a whole, the court found StubHub was not entitled to immunity:

StubHub encouraged, materially contributed to, and made aggressive use of the pricing content on its website. It profited from tickets sold at prices higher than face value. It was consciously indifferent and willfully blind to the illegal prices being posted, knowing that the predictable consequences of its pricing model would be the generation of illegal prices. It is not entitled to immunity. It does not qualify as a Good Samaritan.

Id.

After rejecting immunity, the trial court permitted the defendant to immediately appeal, noting the "denial of immunity affects a substantial right of StubHub and that an immediate review of the denial of immunity would promote judicial economy and efficiency." *Id.* On interlocutory review, the Court of Appeals unanimously reversed the denial of immunity. *See* 727 S.E.2d 550.

To begin, the Court of Appeals found the trial court erred by considering broader aspects of the site rather than focusing on the specific content at issue; “a proper inquiry into the extent to which Defendant is entitled to claim immunity from liability pursuant to 47 U.S.C. § 230 must focus upon the specific content at issue in this case, which is the price at which [the scalper] sold the tickets to Ms. Hill” *Hill*, 727 S.E.2d at 555 (emphasis added). The Court of Appeals rejected the trial court’s decision to evaluate the defendant’s website *as a whole*; “instead of focusing upon the specific content at issue in this case, the trial court determined that Defendant’s website, considered as a whole, was not entitled to immunity from liability pursuant to 47 U.S.C. § 230 We conclude, however, that the trial court’s ‘entire website’ approach was fatally flawed in a number of respects.” *Id.* at 562. After reviewing *Roommates* and *Accusearch*, the Court of Appeals reiterated: “As a result of the general acceptance by other federal and state courts of the rubric deemed appropriate in *Roommates*, the appellate cases addressing immunity claims arising under 47 U.S.C. § 230 have analyzed the specific content alleged to be unlawful rather than examining the entire website on a more generic basis.” *Id.* at 558 (emphasis added).

After analyzing the law and accepting the “material contribution” test from *Roommates*, the *Hill* court explained that “if the tools provided by a website may be used to generate either lawful or unlawful content depending on decisions made

by the user, these tools are ‘neutral’ and do not implicate the website in the development of unlawful content.” *Id.* at 559 (emphasis added) (citing *Jurin v. Google, Inc.*, 695 F.Supp.2d 1117 (E.D.Cal. 2010)). The court further noted that although the Ninth Circuit found that certain aspects of the *Roommates* website fell outside the CDA’s protection, immunity still applied to the “Additional Comments” section of that site; “since the users had the unlimited ability to determine the content of the material that was posted in that location.” *Hill*, 727 S.E.2d at 558.

Based on these standards from *Roommates*, the Court of Appeals concluded that StubHub was immune because the only unlawful content—the price at which the tickets were sold—was controlled by the seller. Thus, even if the website “encouraged” higher prices, immunity still applied; “in order to lose the benefit of the exemption from liability granted by 47 U.S.C. § 230 based upon content actually posted by third parties ... a website must effectively control³ the content posted by those third parties or take other actions which essentially ensure the creation of unlawful material.” *Hill*, 727 S.E.2d at 561 (emphasis added).

³ In this context, phrase “effectively control” clearly did not refer to *editorial control* such as selecting which material to publish and which to reject. Instead, the Court was referring to the sort of control discussed in *Accusearch* in which the website owner directly controlled the buying and selling of content which the site knew was “inherently unlawful”.

Because the ultimate decision to offer unlawfully overpriced tickets was a choice made by the seller, not the website operator, the Court of Appeals found the website remained immune under the CDA even assuming the site “encouraged” higher prices. This Court should adopt this logic and reach the same conclusion.

D. To Preserve Clarity In The CDA, This Court Must Reject Either “Encouragement” or “Totality Of The Circumstances” As A Proper Test For “Development”

As explained above and in Appellants’ principal brief, the CDA was not intended to merely shield website owners (and users) from final liability. Like other forms of immunity, the CDA serves a more practical purpose—it shields websites owners from the *cost of litigation*. See *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (explaining, “immunity is an *immunity from suit* rather than a mere defense to liability’ and ‘it is effectively lost if a case is erroneously permitted to go to trial.’ We thus aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ‘ultimate liability, but also from “having to fight costly and protracted legal battles.”’ (emphasis in original) (quoting *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002); *Roommates.com*, 521 F.3d at 1175); *Nasser v. WhitePages, Inc.*, 2013 WL 6147677, *2 (W.D.Va. 2013) (same).

The economic importance of protecting website owners from incurring \$100,000.00 or more in legal fees defending the accuracy of third party speech is obvious enough. However, in the context of the CDA this protection is especially significant for reasons which may not be immediately apparent to anyone who is not involved in the daily operation of an interactive website.

The issue relates to the “heckler’s veto”. In short, the heckler’s veto works like this—a person sees online speech they do not like or do not agree with. The unwanted speech can be anything such as:

- A negative review of a restaurant on Yelp.com;
- A negative review of a hotel on TripAdvisor.com or Expedia.com;
- A *positive* review about a competitor’s product on Amazon.com;
- A negative review of a judge on TheRobingRoom.com;
- An opinion doubting the existence of God on DebatingChristianity.com;
- A comment expressing support for gay marriage or Edward Snowden in response to an article on CNN.com.

Rather than pursuing litigation against the *author* of the offensive material (which may be futile if the statements are true or merely the author’s opinion), the heckler does something different—he or she threatens to sue the website owner unless the objectionable content is immediately removed. Of course, the website owner did not create the content and is thus powerless to defend its accuracy.

At that point, the website operator faces a daunting choice—comply with the heckler’s demand by removing material which may be entirely lawful or refuse to comply and risk years of costly litigation. But for the CDA, the only viable business choice would be immediately comply with all such removal requests regardless of merit. *See Roommates*, 521 F.3d at 1163 (noting, “In passing section 230, Congress sought to spare interactive computer services this grim choice”)

Congress specifically intended the CDA to protect online speech by eliminating the heckler’s veto with not just *immunity* but also *clarity*. This point was discussed extensively in *Zeran* as the Court considered whether immunity was affected by “notice” that material was false. The Fourth Circuit found that liability upon notice was inconsistent with the CDA’s intent:

[N]otice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply “notify” the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran, 129 F.3d at 333 (emphasis added).

This same concern has been discussed extensively in other cases. *See Barrett v. Rosenthal*, 40 Cal.4th 33, 57, 146 P.3d 510, 525 (Cal. 2006) (expressing concern that “[t]he volume and range of Internet communications make the ‘heckler’s veto’ a real threat The United States Supreme Court has cautioned against reading the CDA to confer such a broad power of censorship on those offended by Internet speech.”) (citing *Reno v. ACLU*, 521 U.S. 844, 880, 177 S.Ct. 2329 (1997)).

To reduce the damage caused by hecklers, “CDA immunity has been interpreted very broadly.” *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929, 931 (D.Ariz. 2008) (citing *Carafano*, 339 F.3d at 1122–23); *see also Nemet Chevrolet*, 591 F.3d at 254 (concurring, “To further the policies underlying the CDA, courts have generally accorded § 230 immunity a broad scope.”) (citing *Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007)). Indeed, even in one of the rare cases in which immunity was partially denied—*Roommates*—the court recognized this concern and warned that doubts must be resolved in favor of immunity and that “section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.” *Roommates*, 521 F.3d at 1175.

Ms. Jones ignores these points and seeks to breathe new life into the heckler’s veto by asking this Court to ratify the vague and standardless

“encouragement” test used by the district court. Making matters even worse, rather than focusing on any specific content or specific acts, Ms. Jones suggests that encouragement should be determined based on the “totality of the circumstances”. Specifically, on page 14 of her response, Ms. Jones argues, “It is not just the name of the site, or just the use of a tagline that makes the CDA inapplicable to Richie. It is all of these items, taken together, which demonstrates that Richie is responsible for developing the tortious content on the website and specifically the content relating to Ms. Jones.” Resp. at 14 (emphasis added). Accepting this argument would annihilate the CDA’s clarity.

With the benefit of nearly six years since the en banc decision in *Roommates*, the time has come to learn from the Ninth Circuit’s mistakes and to repair the loss of clarity that case produced. As noted above, the Ninth Circuit mentioned terms such as “encourage” and “solicit” as having some relevance to the issue of “development”, but immunity in *Roommates* was not actually denied on that basis. Rather, after adopting a “material contribution” standard, immunity was primarily denied because the website owner materially contributed to the unlawful content by *creating* questions which were alleged (incorrectly) to violate the Fair Housing Act. Because CDA immunity may be lost when a website either *creates* or develops unlawful content, the court’s discussion of *development* was largely superfluous and ultimately far more ambiguous than necessary.

As discussed in *Roommates*, the plaintiff argued that there were actually three different unlawful aspects of the site: 1.) questions about sex/race, etc. which users were required to answer; 2.) a “search” and “email notification” system “which directs emails to subscribers according to discriminatory criteria,” 521 F.3d at 1167, and 3.) the ability of users to add “Additional Comments” to their profiles. The Ninth Circuit found the CDA applied to the “Additional Comments” feature, and it also found the CDA did not apply to the allegedly discriminatory questions which the website itself created. As such, the only aspects of the case which really involved development or encouragement were the search and email notification features.

As to those points, the Ninth Circuit majority awkwardly suggested the CDA did not apply because “Roommate designed its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process.” *Id.* After making this observation and attempting to distinguish the search functions of Roommates from other sites like Google and Yahoo!, the majority retreated back to its original statement that “we interpret the term ‘development’ as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.” *Id.* at 1167–68.

Concerns over the confusing and contradictory analysis employed by the majority were shared by several dissenting judges who warned that “the majority’s

definition of ‘development’ can be tucked in, let out, or hemmed up to fit almost any search engine, creating tremendous uncertainty in an area where Congress expected predictability.” 521 F.3d at 1184 (McKeown, J., dissenting) (emphasis added). After carefully analyzing the majority’s decision and other authority, the dissent concluded, “The CDA does not countenance an exception for the solicitation or encouragement of information provided by users.” *Id.* at 1185.

With the benefit of more than a half-decade of hindsight, it is clear the dissenting judges in *Roommates* were correct on this point. To be sure, Appellants fully embrace the majority’s “material contribution” test which is clear, easy to understand and easily applied, as occurred in *Accusearch*. However, the remaining imprecise aspects of the case involving the “search” and “email notification” functions and the “encouragement” of allegedly unlawful acts by the website owner were ill-conceived both then and now. This is especially true since the defendant prevailed on the merits thus eliminating any further exploration of those allegedly unlawful functions. *See Roommates II*, 666 F.3d 1216 (9th Cir. 2012). As the dissenting judge in *Roommates* wisely noted, “because the decision today will ripple through the billions of web pages already online, and the countless pages to come in the future, I would take a cautious, careful, and precise approach to the restriction of immunity, not the broad swath cut by the majority.” 521 F.3d at 1189 (McKeown, J., dissenting) (emphasis added).

Finally, it is worth noting that in the past six years, the vast majority of courts have interpreted *Roommates* narrowly and in a way that protects websites, as Congress intended. See *Gavra v. Google, Inc.*, 2013 WL 3788241 (N.D.Cal. 2013) (agreeing, “Section 230 of the CDA was intended ‘to protect websites against the evil of liability for failure to remove offensive content.’”) (citing *Roommates*, 521 F.3d at 1174); *Klayman v. Zuckerberg*, 2012 WL 6725588, *6 (D.D.C. 2012) (citing *Roommates* in support of defendant’s immunity claim and rejecting argument that defendant “encouraged” unlawful content by failing to remove offensive material “in a timely manner.”); *Ascentive, LLC v. Opinion Corp.*, 842 F.Supp.2d 450, 476 (E.D.N.Y. 2011) (citing *Roommates* as support for defendant’s immunity claim and noting “there is simply “no authority for the proposition that encouraging the publication of defamatory content makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site”) (quoting *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929, 933 (D.Ariz. 2008)); see also *GW Equity v. Xcentric Ventures, LLC*, 2009 WL 62173, *4–5 (N.D.Tex. 2009); *Asia Economic Institute, LLC v. Xcentric Ventures, LLC*, 2011 WL 2469822, *6 (C.D.Cal. 2011).

With these points in mind, the Court should expressly reject the argument that “development” includes either “publishing” or merely “encouraging” users to submit *something* to a website. A vague encouragement rule cannot stand because

it could be interpreted to include “just about any function performed by a website. But to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides.” *Roommates*, 521 F.3d at 1167.

Instead, this Court should adopt the material contribution test which has been consistently applied by the vast majority of other courts. Such a test preserves the value of the CDA while leaving plaintiffs free to pursue anyone who creates or materially contributes to unlawful online speech in some manner *other than* by merely selecting material for publication.

II. CONCLUSION

For all the foregoing reasons, the judgment of the district court should be reversed and this matter remanded with instructions to enter judgment in favor of Appellants.

Date: January 9, 2014

/s/ David S. Gingras
David S. Gingras, Esq.
Gingras Law Office, PLLC
4802 East Ray Road, #23-271
Phoenix, AZ 85044
Telephone: (480) 264-1400
Email: David@GingrasLaw.com

Alexander C. Ward, Esq.
Alexis B. Mattingly, Esq.
Huddleston Bolen, LLP
855 Central Avenue, Suite 301
Ashland, KY 41105

Tel.: (606) 329-8771

Fax: (606) 324-4651

award@huddlestonbolen.com

amattngly@huddlestonbolen.com

Attorney for Appellants

Dirty World, LLC and

Nik Lamas-Richie

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 6,958 words, excluding the parts 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman font.

Date: January 9, 2014

/s/ David S. Gingras
David S. Gingras, Esq.
Gingras Law Office, PLLC
4802 East Ray Road, #23-271
Phoenix, AZ 85044
Telephone: (480) 264-1400
Facsimile: (480) 248-3196
Email: David@GingrasLaw.com
Attorney for Appellants
Dirty World, LLC and
Nik Lamas-Richie