

**United States Court of Appeals  
For the First Circuit**

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No. 15-1506

SMALL JUSTICE LLC; RICHARD A. GOREN;  
CHRISTIAN DUPONT, d/b/a Arabianights-Boston Massachusetts

Plaintiffs and Appellants

v.

XCENTRIC VENTURES LLC  
Defendant and Appellee

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On Appeal from the United States District Court  
for the District of Massachusetts  
The Honorable Denise J. Casper  
Case No. 13-11701-DJC

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BRIEF OF APPELLANTS SMALL JUSTICE LLC; RICHARD A. GOREN;  
CHRISTIAN DUPONT, d/b/a Arabianights-Boston Massachusetts

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to FED. R. APP. P. 26.1, Appellant Small Justice LLC hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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**I. JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of the United States District Court for the District of Massachusetts (Casper, J.), entered March 27, 2015 Ad.1. The district court had jurisdiction under 28 U.S.C. § 1331 and § 1332. In their notice of appeal filed on April 24, 2015 (App. 34) plaintiffs-Appellants specified an appeal from the "judgment (Paper 104) entered in accordance with the Memorandum and Order dated March 27, 2015 granting defendant's motion for summary judgment."Ad.19. This Court has jurisdiction under 28 U.S.C. § 1291 over both the March 2014 order dismissing certain claims and March 2015 grant of summary judgment dismissing the balance of plaintiffs' claims.

**II. STATEMENT OF THE ISSUES**

1. Whether in its March 24, 2014 dismissal of claims, the District Court erred in holding defendant internet service provider (ISP) immune under the Communications Decency Act (CDA) from tort claims arising out a defamatory work first published under color of the ISP's claimed copyright where—according to the ISP—it is impossible for the work, composed by an independent third-party content provider, to be posted on its

website without the contributor first granting the ISP all the exclusive rights of copyright ownership.

2. Whether in its March 24, 2014 dismissal of claims, the District Court erred in holding Appellee immune under the CDA from claims arising out of the display or publication of copies of the libelous work on the servers of Google and other search engines where the ISP chose to re-publish the defamatory work on Google and other search engines, with each copy-view prominently featuring "Copyright © 1998-[date of view] Ripoff Report. All rights reserved."

3. Whether the District Court erred in finding that the ISP's browsewrap agreement effectively transferred all the content-provider's ownership of the exclusive rights of copyright in the defamatory work despite the fact that the terms of such transfer were not necessarily apparent to the content provider prior to submitting his work.

4. Whether the District Court erred in holding the nonexclusive license to be enforceable in accordance with its terms despite the fact Xcentric's reservation of the right to amend its terms was not expressly limited to prospective modifications.

5. Whether the District Court erred in ruling that the CDA precluded application of ordinary contract law defenses and hence held the nonexclusive license was enforceable in

accordance with its terms when the facts of the case overwhelmingly demonstrate the nonexclusive license to be unenforceable on public policy grounds.

6. Whether the District Court erred in holding that the transfer of copyright to Goren was barred as an involuntary transfer pursuant to 17 U.S.C. §201(e) despite the fact that the author of the work never challenged such transfer, and the transfer was effected by his attorney-in-fact.

7. Whether the District Court erred in granting Xcentric summary judgment on Goren's claim pursuant to M.G.L. c. 93A, et seq. reasoning that Goren failed to demonstrate a causal connection between the ISP's conduct and his harm.

### III. STATEMENT OF CASE

#### *A. Statement of Facts*

Goren practices law in Boston. The plaintiff Small Justice is a Delaware limited liability company with its principal office in Massachusetts. The plaintiff DuPont is an individual who had been a defendant in a case prosecuted by Goren on behalf of a plaintiff and against whom in 2011 Goren's client had obtained a judgment.

The defendant Xcentric is an Arizona limited liability company that owns and operates the Ripoff Report, an interactive website. The Ripoff Report holds itself out as an online

consumer advocacy forum that allows users to submit to Xcentric reports about companies or individuals who they feel have wronged them in some manner. App. 70.

"When a user wishes to submit a report to the Ripoff Report...[he is] required to create a free user account before ...being] allowed to post anything." Ap. 246, ¶4. After registering "a user [who] wants to create a report...[is] guided through a five step process." *Id.* After providing necessary introductory information, including obtaining a "screen name," step 3, captioned "Write your Report" presents a screen in which the user "enters the actual text" of his proposed posting. Ap.249, 260. Step 5 in the process presents the user with a screen captioned "Submit your Report" beneath which is a sub-caption "Terms and Conditions:" below which is some text alongside which is a box which must be checked in order to submit the report. Ap. 249, 264. The visible words in the box are those set forth on Exhibit A to the FAC. On the step 5 screen on the right hand margin of the box in which the Exhibit A words appeared, is an unidentified scroll bar which if dragged down reveals additional words of the Ripoff Report TOS. The complete TOS, including both the revealed screenshot and the portion only revealed if the viewer found the unidentified scroll down button and then scrolled completely through, is set

forth on Exhibit B to the FAC. The material terms which without scrolling are not disclosed include:

(i) this is a legal agreement between you and Xcentric. Please read the Agreement carefully before registering for ROR. By registering for ROR, you agree to be bound by the terms and conditions of this Agreement... If you do not agree to the Terms, you are not permitted to use ROR.

(ii) the user agrees prospectively and broadly to indemnify Xcentric for costs, liabilities and expenses "relating to or arising out of" his "use of" the website and/or breach of...[this] Agreement;

(iii) that Xcentric reserved the right to change the terms of the contract at any time without notice by posting a link to the changed terms on Xcentric's website; and,

(iv) By posting information or content to any public area of [www.RipoffReport.com](http://www.RipoffReport.com), you automatically grant, and you represent and warrant that you have the right to grant, to Xcentric an irrevocable, perpetual, fully-paid, worldwide exclusive license to use, copy, perform, display and distribute such information and content and to prepare derivative works of, or incorporate into other works, such information and content, and to grant and authorize sublicenses of the foregoing.

Ap. 88-90. See Ad.49-51.

It is undisputed that: "[I]f the user refuses to check this [step 5] box...[his] report cannot be submitted to the site[.]"Ap.

249, 264. There is no explicit requirement that users read Xcentric's TOS, nor were users required to check a box confirming that they had done so. Add. 23.

Every user-generated submission to the site is screened and reviewed by a staff of monitors who are authorized to make minor editorial changes in order to redact certain types of content (primarily offensive language, profanity, threats, etc...After a report has been reviewed by the staff, it is posted to the site... [Once posted, the report] contains some "original" content from the author and some generic content created by...[Xcentric]

Ap. 249. Each and every work published on Xcentric's website bears a footer proclaiming: "Ripoff Report has an exclusive license to this report. It may not be copied without the written permission of Ripoff Report." Ap. 45, ¶ 78.

In early 2012 DuPont registered for a free account on the Ripoff Report website and on the step 3 screen created a writing<sup>1</sup> alleging that Goren routinely commits crimes in his practice of law, defrauds both his clients and others, routinely commits perjury and has a history of violent crimes in his personal life. Each allegation is completely baseless and false. It is undisputed on the last step 5 screen DuPont checked the box, and that Xcentric published the defamatory report on the Ripoff Report website.

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<sup>1</sup> On January 31, 2012, and February 2, 2012, DuPont made essentially identical postings. Because Small Justice possesses a certification of registration of copyright ownership of the January content and because it is undisputed DuPont repeated the same process a few days later, we address the initial publication.

Xcentric contends it owns all the exclusive rights of copyright to the work that DuPont created pursuant to paragraph 6 of its TOS. According to Xcentric a user cannot post a report without affirmatively accepting and agreeing to the TOS. Ap. 106, 116-117. According to Xcentric by the undisputed act of clicking yes to the step 5 box DuPont "signed a written transfer of the exclusive rights of copyright ownership in" his work. Ap.108.

The FAC contends that as a matter of basic offer and acceptance contract principles and Copyright law, the act of clicking the step 5 box cannot not constitute a writing signed by DuPont transferring the exclusive rights of copyright. Ap.73-74, ¶¶28-31. Plaintiffs contend that as a matter of law: the website failed to give a reasonable user sufficient notice of the existence and terms of a contract constituting a transfer of copyright ownership; that a reasonable user is not made aware that by accepting a free offer he is thereby assenting to a transfer of his copyright ownership; that the website failed to give a reasonable user a meaningful opportunity to review paragraphs 2 -12 of the TOS; and, there could be no meeting of the minds as to the material terms of the TOS for a number of reasons, including but not limited to, the offeror retained the right to change the TOS at any time by mere posting on its

website where that power is not expressly limited to a prospective modification. Id.

Effective March 7, 2012 Xcentric obtained a registration of copyright at the United States Copyright Office for a "Group Registration for an automated database titled Ripoff Reports from January 7, 2012 to March 7, 2012." Ap. 55.

The Copyright Act recognizes two distinct copyrighted works: "Copyright in *each separate contribution to a collective work* is distinct from copyright in *the collective work as a whole* ....' § 201(c) .... Copyright in the separate contribution "vests initially in the author of the contribution"... Copyright in the collective work vests in the collective author ... and extends only to the creative material contributed by that author, not to "the preexisting material employed in the work," § 103(b). ... [C]opyright in "compilation"—a term that includes "collective works," 17 U.S.C. § 101—is limited to the compiler's original "selection, coordination, and arrangement").

*New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 493-94 (2001).

XCENTRIC holds itself out to Google and other search engines as the copyright owner of the reports posted on its Ripoff Report website. Ap.75, ¶36.

Google, like other search engines, uses an automated program... to continuously crawl across the Internet, to locate and analyze available Web pages, and to catalog those Web pages into Google's searchable Web index. As part of this process, Google makes and analyzes a copy of each Web page that it finds, and stores the HTML code from those pages in a temporary repository called a cache. Once Google indexes and stores a Web page in the cache, it can include that page, as appropriate, in the

search results it displays to users in response to their queries.

*Field v. Google*, 412 F. Supp. 2d 1106, 1110-1113 (D. Nev. 2006).

To protect its exclusive right to publish copies of its copyright works, Xcentric can instruct the search engines that "it does not want [their] robots to crawl the... [Ripoff Report] Web site." *Id.* Xcentric also has the option of precluding or permitting Google to make cached copies. *Id.* Xcentric then has the option of requiring Google to direct a searcher to Xcentric's Web site rather than permitting Google to allow a searcher to access the cached copy on Google's servers. *Id.*

Xcentric notified Google and the other search engines, among other reasons for purposes of 17 U.S.C. § 512, that it is owner of the copyright rights to the works at issue, and that the search engine may make and maintain cached archival copies of the material that Xcentric so transmits for periods consistent with the so-called safe harbor provisions of 17 U.S.C. §512. Xcentric chose to enable Google and the other search engines to publish and/or display on their servers—rather than directing a searcher to the Ripoff Report web site—copies of the two works. Ap.482.

It is undisputed as copyright owner Xcentric has authorized Google and other search engines to store on their servers "cached" versions of DuPont's content and instead of solely

providing a link to Ripoff Report website, Google displays on its servers cached copies of Xcentric's copyrighted work. Ap. 480-484, ¶¶73, 77. It is undisputed that when a searcher stays on the Google website and is shown the most recent copy of the work on Google's server; and each such cached copy bears the copyright notice: "Copyright © 1998-[year of view] Ripoff Report. All rights reserved." Ap. 484-485, ¶77.

In November 2012, Goren filed suit against DuPont in the Massachusetts Superior Court at law seeking damages for libel and interference with advantageous relations and in equity to redress the continuing threat of irreparable harm from the continued republication of the defamation. Ap. 76, ¶40. Goren obtained a preliminary injunction enjoining DuPont and "any person or entity in active concert or participation" with DuPont from republishing the defamation. *Id.* ¶42. After satisfying itself of actual notice to DuPont that Goren would waive his claim to damages upon entry of decree in equity, the Superior Court determined that the continued republication of the defamation presented a substantial risk of irreparable harm to Goren that could not be remedied by an award of damages and entered a permanent injunction. Ap. 26, 157-160, 191-192. The

Superior Court's final decree included a number of stand-alone orders, requiring DuPont to prevent the re-publication of his calumny. To effectuate its decree the Superior Court appointed Goren attorney-in-fact, coupled with an interest to execute an assignment of DuPont's copyrights and to bring legal action in DuPont's name seeking retraction or takedown of the defamation. *Id.* The Superior Court entered a separate decree that all rights of ownership of copyright

is hereby transferred to the plaintiff Richard A. Goren, meaning and intending to convey, transfer and assign by this Order and Judgment the full and exclusive ownership of copyright in and to that work so as to qualify as a transfer of ownership under 17 U.S.C. §201 (d) and/or under 17 U.S.C. §204.

Ap. 181.

In May 2013 after being served with the Superior Court decree Xcentric refused Goren's demand to take down the report. Ap. 78, ¶¶49, 50.

As the copyright owner Xcentric publishes on its website the defamatory content and then licenses Google to republish on Google's servers copies of its copyrighted content. At the same time Xcentric advertises to Goren that because it was not the "original author," it did not own the work and had no legal responsibility for injury to his reputation. Xcentric informs the world that under no circumstances will it remove works that have been adjudged defamatory. Ap.485, ¶ 79. But as the owner of

the copyright of the libel, Xcentric advertises that if Goren and any other defamed subject of a Ripoff Report would only pay Xcentric a fee, Xcentric will "make your search engine listings change from a negative to a positive... [and] no matter how you search your name on search engines, it will all look as it should. Positive." Ap.486, ¶ 81.

What Goren and other victims are not told is that as the owner of the copyright, Xcentric can preclude Google and the other search engines from listing the Ripoff Report libel on the search engine index. Because search engines will not keep cached copies beyond a few weeks, Xcentric also can cut off all further publication by the search engines of the copies it had authorized the search engines to make. 17 U.S.C § 512.

In his capacity as attorney in fact for DuPont Goren executed a written assignment transferring to himself and his assigns all right (whether or not now known), title and interest in and to the content he created. Ap.142. Goren then executed an assignment of the copyright to Small Justice. Id. Each written assignment was acknowledged by a Massachusetts notary. Id. The US Copyright Office issued a certificate of registration that pursuant to a written assignment Small Justice was the owner of DuPont's initial January 31, 2012 work. Ap.200.

In July 2013 having applied for registration of ownership Small Justice and Goren filed suit against Xcentric for

copyright infringement. Ap.16. Supported by an affidavit Xcentric moved to dismiss contending that pursuant to its TOS it owned the work and in all events the written assignment to Small Justice was void as a matter of law. Ap.39-67.

*B. Procedural History*

In their September 2013 First Amended Complaint ("FAC") DuPont and his assignees, Goren and Small Justice LLC ("Small Justice") sued Xcentric for copyright infringement seeking declaratory relief and damages. Their essential contention was that the Ripoff Report website's process for posting a work did not create an enforceable grant of an exclusive license in his work. Invoking diversity jurisdiction under 28 U.S.C. § 1332 Goren sued Xcentric for libel, unfair and deceptive practices and intentional interference with prospective advantageous relations and sought damages and equitable relief for past and continuing injury to his reputation as a lawyer as a result of Xcentric's repeated publication under color of its claimed ownership of copyright of DuPont's *per se* libel of Goren and separately, regardless of who owned the posting, for violation of Chapter 93A.

1. The Motion to Dismiss FAC

Xcentric filed a Motion to Dismiss the FAC pursuant to arguing that Goren lacked standing to assert a claim for copyright infringement because it held the exclusive rights to

DuPont's defamatory work, not Goren. It also filed sought dismissal pursuant to of Goren's state law tort claims and M.G.L. c. 93A claims based, in part, on a claim of immunity under the CDA as a "neutral intermediary" vis-à-vis the publication of the defamatory speech. Goren, opposed the motion to dismiss and cross-moved pursuant to to strike Xcentric's affirmative defenses of copyright ownership and immunity pursuant to the CDA.

Following oral argument, and a review of multiple affidavits in addition to the FAC and its exhibits, the District Court issued its Memorandum of Decision dated March 24, 2014, dismissing Goren's state law tort claims, all but one aspect of his M.G.L. c. 93A claim, and denying dismissal as to the counts and defenses requiring a determination of the parties' respective claims to copyright in the DuPont works. Ad. 18. In its decision on the motion to dismiss, the District Court held that Xcentric was entitled to immunity under the CDA despite its claim of copyright in the defamatory content, and despite its alleged re-publication of that content on search engines like Google. Ad. 14-15. With respect to the M.G.L. c. 93A claims, the District Court ruled that excepting only the claim based on Xcentric's operation of its reputation restoration business and its solicitation in Massachusetts of victims of defamatory reports to participate in its fee-based reputation restoration

business, the claims must be dismissed for failure to state a claim. Ad. 15-16.

2. Motion for Summary Judgment

The claims surviving the Court's March 24, 2014 decision on the Motion to Dismiss were Goren's claim seeking a declaration that Small Justice (the assignee of DuPont) owned the exclusive rights to DuPont's two defamatory postings, and his claim that Xcentric's practices relative to its reputation repair services were unfair and deceptive, and therefore in violation of M.G.L. c. 93A. Xcentric moved for summary judgment seeking dismissal of these remaining claims.

By its Memorandum and Order dated March 27, 2015, the District Court granted Xcentric's Motion for Summary Judgment terminating all of Goren's claims. With respect to the Parties' respective claims of copyright to DuPont's defamatory works, the Court held that a "DuPont transferred copyright ownership [of his works] to Xcentric by means of an enforceable browsewrap agreement...[and] even if the browsewrap agreement were considered invalid and DuPont retained ownership of the copyrights to the Reports, he nonetheless granted a non-exclusive license to Xcentric and, therefore, he waived his right to sue Xcentric for infringement where its use did not exceed the scope of that license." Ad. 28-29. In its March 27<sup>th</sup> Memorandum and Order, the District Court further explained that since DuPont had

transferred his copyright ownership to Xcentric prior to Goren obtaining his copyright interest in the works through proceedings in the Suffolk Superior Court, Goren held no rights to the defamatory works as Dupont had no rights left to transfer. Ad. 29-30. Further, the District Court held that even if DuPont still held his copyright to the defamatory works after his execution of the browsewrap agreement, the transfer to Goren with the aid of the Suffolk Superior Court was ineffective as an involuntary transfer in violation of 17 U.S.C. §201(e).

The District Court likewise dismissed the surviving M.G.L. c. 93A claim holding that Goren has failed to present any evidence of harm caused to him by way of Xcentric's reputation repair program and its methods of solicitation of customers for such program. Ad. 32.

On April 24, 2015, well within the thirty day limitation provided by Fed. R. App. P. 4(a)(1)(A), Appellants filed their Notice of Appeal (Ad 34) of the March 27, 2015 Judgment(Add.1) entered in accordance with the Court's Memorandum and Order granting Xcentric summary judgment.

3. Amendment to March 27, 2015 Memorandum and Order

Following a post-judgment motion by Xcentric for an award of costs and attorney's fees, and a motion by Goren to amend its Notice of Appeal to include a reference to the District Court's

March 24, 2014 Memorandum and Order granting and part and denying in part Xcentric's Motion to Dismiss, on May 22, 2015, the District Court *sua sponte* issued an order (Add.36-37) that it contemplated adding a footnote to its March 27, 2015 summary judgment decision and invited the parties to file a brief (paper 100). The proposed footnote indicated that

even [though] the judgment entered for Xcentric, D. 104, would not change...[assuming's requirement of a written and signed conveyance applies] Xcentric did not acquire an exclusive license to the Reports...and DuPont, as the author..., retained copyright ownership...[But because he did] convey [] a nonexclusive license [whereby] Xcentric may display them in perpetuity...summary judgment still enters in Xcentric's favor.

Both parties filed briefs. In addition pursuant to the plaintiffs moved for an indicative ruling pursuant to requesting that the District Court indicate whether it would vacate its dismissal of the Parties' competing claims for declaratory relief in the event this Court were to remand the case for such purpose (hereinafter "Motion for Indicative Ruling"). In his Motion for Indicative Ruling, Goren argued that because the District Court has found, as expressed in its subsequently added footnote, that the browserwrap agreement was not a sufficient writing to satisfy 's signed writing requirement, DuPont still held his copyright at the time the transfer of the same was effectuated with the aid of the Suffolk Superior Court to Goren and on to Small Justice. Goren urged

the District Court to vacate its dismissal of the declaratory judgment count so that the Plaintiffs could pursue a declaration that DuPont was the rightful holder of the copyright, and therefore could preclude Xcentric from licensing the content to Google and other search engines. In addition, and for the same substantive reasons, Dupont (through Goren) sought leave to amend the FAC in order request a declaration that he remains the holder of the copyright to the works.

In its Memorandum and Order dated September 30, 2015, the District Court denied Goren's Motion for Indicative Ruling reasoning that the Plaintiffs never sought a declaration in the FAC that "DuPont owns the copyrights at issue. The prayer for relief as to Count I of the Plaintiffs' first amended complaint sought 'a declaration that Small Justice [] is the lawful owner of the copyright ownership of each of the' Reports.'" Add. 42. In addition, the District Court denied Goren's Motion to Amend Notice of Appeal, DuPont's Motion to Amend Complaint, allowed Xcentric's Motion Dismiss Counterclaim, denied Xcentric's Motion for Sanctions Against Goren and denied Xcentric's Motion for Fees and Costs (without prejudice). Add. 48.

#### **IV. SUMMARY OF ARGUMENT**

The plaintiff Goren was defamed by a work composed by the plaintiff DuPont and published on the defendant's Ripoff Report website. An interactive computer service provider, or ISP, that

adopts content created by a third party as its own is also an information content provider of that content and hence not entitled as a matter of law to immunity pursuant to 47 U.S.C. § 230 for state law causes of action that treat the ISP as the publisher or speaker of that information. Therefore the District Court erred in holding that as a matter of law Xcentric cannot be sued for Goren's state law tort claims both for the continuing publication on the Ripoff Report and Xcentric's publication on Google pursuant to its copyright ownership.

An ISP cannot bind a reasonable user of its site to its Terms of Service (TOS) without providing clear, unavoidable and inevitable disclosure of its TOS. Because DuPont did not enter into an enforceable browsewrap contract, at a very minimum he retained ownership of his copyrights and Goren, as DuPont's attorney in fact, has the right to stop Google from continuing to publish the libel.

The nonexclusive license DuPont granted to Xcentric to post the defamation is not enforceable both for lack of consideration and on grounds of public policy.

Finally under the Massachusetts Unfair Practices Act a plaintiff need only demonstrate a causal connection to the unfair or deceptive business practices. It is undisputed that as a result of Xcentric's operation and advertisement in Massachusetts of its reputation restoration business Goren has

suffered a loss of property and money. Therefore his claims under G.L. c. 93A should proceed to trial.

**V. ARGUMENT**

*A. Standard of Review*

The March 24, 2014, Order is reviewed by this Court de novo accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. 214 F.3d 216, 220 n. 2 (1st Cir. 2000).

The March 27, 2015 summary judgment rulings dismissing plaintiffs' claims are reviewed by this Court de novo accepting the "relevant facts in the light most favorable to the plaintiffs." *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 38 (1st Cir. 2010).

*B. Immunity Under the CDA*

The District Court erred in dismissing the tort claims because the undisputed relevant facts demonstrate that Xcentric was not merely a neutral intermediary but that a) it was a material information content provider when as the copyright owner it first caused the defamatory statement to be published on its website, and b) it was the sole information content provider when it licensed Google and other search engines to publish on their websites copies of Xcentric's copyrighted content.

A publisher of a libel authored by a third party is generally subject to tort liability. In enacting the CDA, Congress has granted broad immunity to entities... that facilitate the speech of others on the Internet." *Universal Comm'n Systems, Inc. v. Lycos*, 478 F. 3d 413, 415 (1st Cir. 2007). The broad immunity intended by Congress for "companies that serve as intermediaries for other parties' potentially injurious messages" (*id.* at 418) is predicated on the legislatively specified policy to promote a vibrant free market of ideas on the internet. *Id.* at 418-19 citing *Zeran v. Am. Online, Inc.*, 129 F. 3d 327, 331 (4th Cir. 1997). The CDA has "two parallel goals. The statute is designed at once 'to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material'." *Carafano v Metrosplash.com. Inc.*, 339 F3d 1119, 1122 (9th Cir 2003).

Understandably ISPs would be reluctant to provide the invaluable First Amendment benefit of a freely accessible, interactive bulletin board if to avoid legal liability they had to conduct a fact based review of each posting before publishing. *Zeran*, *supra*.

Explaining that an ISP that is itself the "content provider" is not shielded from liability, in *Lycos*, this Court

affirmed the district court's allowance of the ISP's motion to dismiss, ruling that:

Taking...[the plaintiff's] allegations as true, Lycos has done nothing in this case that might make the misinformation at issue its own, rather than that of 'another information content provider.'"

*Id.* at 419, 421. The CDA

establishes that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"... and it preempts any state law—including imposition of tort liability—inconsistent with its protections... A defendant is therefore immune from state law liability if (1) it is a "provider or user of an interactive computer service"; (2) the complaint seeks to hold the defendant liable as a "publisher or speaker"; and (3) the action is based on "information provided by another information content provider."

*Shiamili v. Real Estate Grp. of New York, Inc.*, 17 N.Y.3d 281, 286-87, 952 N.E.2d 1011 (2011) "Creating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects." at 290-91. An "information content provider" is "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). "Any piece of content can have multiple providers." *Shiamili, supra*. See *FTC v. Accusearch, Inc.*, 570 F. 3d 1187, 1197-99 (10th Cir.

2009)("An ...[ISP] that is also an information content provider of certain content is not immune from liability arising from publication of that content"). The CDA does not explicitly inform a court how to construe the terms "development" or "responsible." *Id.*

This Court should broadly construe these undefined terms and determine an ISP to be ineligible for immunity "if it contributes materially to the alleged illegality of the conduct." *Fair Hous. Council of San Fernando Valley v. Roomates.Com, LLC*, 521 F. 3d 1157, 1168 (9<sup>th</sup> Cir. 2008). For then the ISP is not a mere intermediary for the speech of others but a principal whose alleged wrongdoing is the proximate cause of the injury. See *Accusearch*, 570 F. 3d at 1197-99 ("to be 'responsible' for the development of offensive conduct,...[ISP] must be more than a neutral conduit" and by its actions "actually make available... something previously only potentially available"). See also *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir.2008)("§230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts..."). The CDA only "protects certain internet-based actors from certain kinds of lawsuits." *Barnes v. Yahoo!, Inc.*, 570 F. 3d 1096, 1099 (9th Cir. 2009). There is no general immunity from liability from publishing

libel that is derived from third party content. *Id.* at 1100 (“neither...subsection [§230(c)(1)] nor any other declares a general immunity from liability derived from third-party content”).

Because the affirmative defense of immunity under the CDA is to be judicially determined on a case by case basis with an eye toward advancement of the general public policy statements of the CDA, Supreme Court decisions on official immunity are instructive. The doctrine of immunity attempts to balance two competing, equally vital considerations.

Where the injury is caused by action taken in good faith, for example, by a public official in the exercise of her official duties, the protection of the public interest warrants shielding her from liability. And so, there is no “fixed invariable rule of immunity but...[this court must make] a discerning inquiry into whether the contributions of [the] immunity...[to the public interest it shields] outweigh the... harm to individual citizens...” *Doe v. McMillan*, 412 U.S. at 320. Immunity does not automatically lie based on the status or title of the actor. See *Kilbourn v. Thompson*, 103 U.S. 168 (1880). See also *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

The immunity doctrine whether for government officials or neutral interactive websites provides no shield unless the

volitional publication is sufficiently connected with the proper functioning of the public purpose being served. *Doe v. McMillan*, 412 U.S. at 317, 319-20. "The scope of immunity has always been tied to the scope of authority." *Doe v. McMillan*, 412 U.S. at 320.

There is a fundamental difference between a passive publisher who permits authors to post their works on its interactive website and the same actor publishing its own work on the same website. The First Amendment benefit lies in passively providing an internet bulletin board freely accessible to anyone with wireless or hard wired internet access. When as in this case the ISP requires the creator or author of the content to transfer ownership to the ISP as condition of the posting, the ISP is no longer a passive publisher.

The FAC presents two independent theories of recovery against Xcentric each asserting that Xcentric's tortious conduct was undertaken outside of the scope of immunity intended by the CDA. First where in the exercise of ownership of the exclusive rights of copyright Xcentric—and not DuPont—initially published, and continues to publish, the defamation on its Ripoff Report website, there is no immunity under the CDA. Ap. 82, ¶72. Second even assuming the initial publication to be immune, Xcentric authorizes and directs Google and other search engines to make copies of its copyrighted work; and therefore when pursuant to a

license from Xcentric the search engines display copies of the defamation on their servers to potential clients of Goren, Xcentric is the information content provider and bereft of immunity under the CDA. Ap.82-83, ¶78.

*C. The District Court's dismissal of tort claims.*

The District Court's rejection of both theories and dismissal of the two alternative claims was error as a matter of law. Add.13-15.

As to the initial publication by Xcentric on its website, the District Court determined that because DuPont had composed the content, the defamation claim was necessarily predicated on information provided by DuPont. As to the impact of copyright ownership the District Court ruled

Xcentric's acquisition of an exclusive license to the content (if the record ultimately shows that it did acquire such a license) is an insufficient level in involvement in the development of the content to nullify CDA immunity.

Add. 13-14. On those two legs the District Court held Goren failed to state a claim in tort for publication of the libel on Xcentric's website. That dismissal constitutes error for a number of independent reasons.

First, that DuPont composed the content standing alone is not determinative, as a matter of law, of Xcentric's affirmative defense. *F.T.C v. LeanSpa, LLC*, 920 F. Supp.2d 270, 275 (D.

Conn. 2013); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 544, 550 (E.D. Va. 2008) aff'd, 591 F.3d 250 (4<sup>th</sup> Cir. 2009).

The initial unlawful conduct targeted by the FAC is not DuPont's composing and then typing the content onto the step 3 screen but Xcentric's initial and continued publication of its copyrighted work on its website. That but for DuPont's step 3 keystrokes no "content" could have been created should not be determinative. *Roomates*, supra; *Accusearch*, supra. According to Xcentric it alone could make DuPont's words actually available to be published for the very first time on its website and then subsequently licensed to Google; as the owner of the exclusive rights of copyright Xcentric was "responsible for the development of the specific content that was the source of the alleged liability." *Id.*

It is more than plausible that Xcentric is an information content provider of the libel posted on the Ripoff Report website. DuPont composed a series of words and communicated the expression of his ideas to Xcentric. Whether or not of any literary value, DuPont and his representatives "possess the sole and exclusive copyright therein." *Folsom v. Marsh*, 2 Story 100, 9 F. Cases 342, 346 (Circuit Court, D. Mass. 1841). The right of an author to publish or suppress unauthorized publication by the

recipient of his communication is absolute; and, in the absence "of implications raised by the law from the circumstances," the author or his court appointed representative may obtain an injunction preventing the recipient from publishing or copying his work. *Id;* , 210 Mass. 599. These fundamental principles of the author's presumptive rights are reflected in the Copyright Act. ("Initial Ownership"). Only the owner of the copyright has the right to make the first public display of his work. . Therefore Xcentric was an information content provider of the libel it posted on its website under color of its exclusive ownership of copyright.

According to Xcentric while Dupont had composed the content, prior to its posting<sup>2</sup> he ceased to have any ownership of the content before it ever became visible to the public. According to Xcentric no content composed by a third party can be submitted for the website's publication unless and until that individual first agrees to all of Xcentric's TOS including the paragraph six grant of all rights of copyright ownership in and to the content. If Xcentric is correct that all users

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<sup>2</sup> It is undisputed on the summary judgment record that the keystrokes entered on the step 3 are never recorded and the content constituting the defamation is reduced to a fixed copy for the first time when it is posted on the Ripoff Report website. Therefore the first publication of the work was upon posting on the Ripoff Report website. 17 U.S.C. §101("a work is created when it is fixed in a copy ... for the first time");§106.

necessarily agree to its TOS, it acquired the right "to display the copyrighted work publicly" ( ) as a condition of DuPont's checking the step 5 box before the posting. According to Xcentric it was the owner of the content prior to its posting. So concurrent with his checking of the step 5 box, DuPont could have no content to provide.

According to Xcentric it was only after DuPont's submission and review by Ripoff Report staff that the speech appeared on its website. The content was initially posted, and continues to be posted, on Xcentric's website as the copyrighted work of Xcentric. If checking the step 5 box was the proximate cause of the posting, that act belongs at least equally to Xcentric as the owner of the content as to DuPont. Cf. *Roomates*, 521 F. 3d at 1166-67 ("The projectionist in the theater may push the last button before a film is displayed on the screen, but surely this doesn't make him the sole producer of the movie").

Moreover, it is plausible that Xcentric—and not DuPont—is the creator of the content or work. According to Xcentric there is no record, no fixed copy of either the step 5 process or the step 3 process where the user's keystrokes on Xcentric's server the words that later become the content. There is no fixed copy of content until the user checks the step 5 box. Ap.469-470, ¶ 43. Only after DuPont had checked the step 5 box were the communication of his ideas first reduced to a fixed copy.

Before then there is no content in the nature of a copyrightable work. 17 U.S.C. §101 (work is created when it is "fixed in a copy... for the first time"). Therefore Xcentric was the owner of the content, when the copyrightable "work" was first created upon Xcentric's initial public display of its copyrighted content in a fixed copy.

As to Goren's alternative theory (Ap. 82-83, ¶78), apparently because Xcentric did not "change[] the content in any way" the District Court held "the alleged conduct does not rise to the level of the 'creation or development of information' that would render Xcentric an 'information content provider' under the CDA." Add. 14-15). This was error because whether or not DuPont was the operative "content provider" on the Ripoff Report website, it is Xcentric that under color of its ownership of the exclusive rights of copyright is the information content provider of the content displayed on Google's servers. 17

U.S.C. §512.

The FAC alleges that Xcentric instructed Google's robot crawler periodically to visit the Ripoff Report website and take snapshots of the defamation. It is undisputed that under color of its proclaimed copyright ownership Xcentric instructs Google to keep those snapshots or copies on Google's servers. Ap. 484-

485. While Xcentric might have required that a search engine user be directed to its Ripoff Report website to read the original work, Xcentric chose to have its licensees publish on their servers snapshot copies of the defamation that were taken by Google long after the original Ripoff Report publication. [*id.*] So even assuming it to be immune from liability for publication of the libel on its website, Xcentric is the "information content provider" of copies of the libel that it directs to be published on the search engine servers. Therefore, the District Court erred in its finding that Xcentric was immune pursuant to the CDA.

*D. DuPont did not transfer exclusive rights to Xcentric.*

The District Court erred in holding that DuPont had transferred all exclusive rights of copyright to Xcentric by an enforceable browsewrap agreement. As a matter of law on the undisputed material facts a reasonably prudent website user is not charged with inquiry notice of the TOS paragraph six transfer of copyright ownership; and, DuPont retained ownership of the exclusive rights of copyright to the defamatory postings.

The District Court erred in determining that "a reasonably prudent user was on inquiry notice of"..."[Xcentric's TOS] and therefore the transfer of copyright ownership was valid." Add. 26. Implicitly ruling that the mere underlining of text is sufficient to inform a user that such text is a hyperlink, the

District Court determined that the presence on the bottoms of the step 5 screen and "at least two of the other [posting process] screens of "blue" underlined text constituted conspicuously visible links to the TOS. *Id.* Ruling that the conspicuous presence of the blue underlined text coupled with the undisputed necessary steps of the five step process constituted inquiry notice, the District Court held DuPont had entered into an enforceable contract and had thereby transferred all his exclusive rights of copyright to the defamatory postings. The Court held Xcentric was entitled to summary judgment on the copyright infringement claims.

After registering for his free account DuPont was guided through the five step process outlined at the outset of this brief. Ap. 343-344, ¶¶ 6-9. In order to proceed from each step to the next, DuPont had to have clicked on a button captioned in bold "Continue." Step five, entitled "Submit your Report" sets forth the offer by Xcentric which was accepted by DuPont when he checked the step 5 box and then clicked the Continue button. All that was visibly offered in the box is the following:

**Ripoff Report Membership Terms & Conditions**

To use this service, you must be at least 14 years old.  
www.RipoffReport.com ("ROR") is an online forum created to help keep consumers informed. ROR is operated by Xcentric Ventures, LLC located at: [address and phone listed]

To indicate his acceptance of Xcentric's offer DuPont then clicked on a box alongside which in its entirety was the following text:

By posting this report/rebuttal, I attest this report is valid. I am giving Rip-off Report irrevocable rights to post it on the website. I acknowledge that once I post my report, it will not be removed, even at my request. Of course, I can always update my report to reflect new developments by clicking on UPDATE. Further, I agree that by posting the report/rebuttal that the State of Arizona has exclusive jurisdiction over any disputes between me and the operators of Rip-off Report arising out of this posting.

Ap. 460, ¶ 17.

On the right vertical rectangular margin of this step 5 box was a square figure, a so-called scroll bar. Ap. 460, ¶¶15-16. There is no marking or identification of the function as a vertical scroll bar. Id. There is no direction, explicit prompt or even suggestion to use the scroll bar to view any additional disclosures. There is no notice regarding "important terms" below. Id. Beneath this step 5 box were two buttons captioned in bold "**Continue**" and "**Back.**" Ap. 459-60, ¶14. It is undisputed DuPont clicked on the step 5 box above and then clicked on the "**Continue**" button. Ap. 469-70, ¶¶42, 43. Beneath the "**Continue**" button were a number of underlined terms or phrases:

(i)Home; (ii) File a Report; (iii) Consumer Resources; (iv) Search; (v) Link to Ripoff Report; (vi) Privacy Policy; (vii) Terms of Service; (viii) FAQ; (ix) About Us; (x) Contact

Us; and, (xii) Why Ripoff Report will not release author information!.

None of these underlined terms or phrases are explicitly labeled as hyperlinks. Ap. 461, ¶ 18. The font size of the underlined terms is not larger than the font size of the words in the box to be checked. Id.

It is undisputed that only by using the unlabeled scroll bar and scrolling down is there possible disclosure of a 12 numbered paragraph document bearing a title: "About us: Terms of Service." Ap. 461, ¶ 24.

Without using the unlabeled scroll bar to find and read the TOS a user is not informed of Xcentric's request to "please" read the "Agreement" and is not informed of the importance of the "Agreement" *i.e.*, "[i]f you do not agree to the Terms, you are not permitted to use ROR," or that Xcentric can unilaterally amend the Terms of Service and that such power is not expressly limited to prospective modifications. Without scrolling there is no disclosure that a user's act of clicking constitutes his signature to a transfer of all his exclusive rights under copyright of his work. Ap. 464-65, ¶¶33,34. Without scrolling there is no disclosure that the user accepting the free offer agrees to broadly indemnify Xcentric for any expenses and losses arising out of or relating to the posting.

It is undisputed there is no direction or prompt in the step 5 process to scroll before checking the step 5 box; nor any direction to do so before clicking on the "Continue" button. Ap. 461, ¶¶ 19-20. And a user can check the step 5 box and then click on the "Continue" button without scrolling. Ap. 461, ¶ 21. Xcentric does not have a record of DuPont's electronic checking of the step 5 box or the "continue" button. Ap. 469-70, ¶ 43. There is no visible notice to a user nor any prompt to take any affirmative action to demonstrate assent to the TOS. Therefore Xcentric has no direct evidence that DuPont had actual notice of Xcentric's twelve paragraph TOS or that that as part of the undisputed five step process he affirmatively accepted and agreed to the TOS. Ap. 470, ¶ 44.

1. The property rights

Under long-established copyright principles, DuPont is the presumptive owner of his work. 17 U.S.C. § 201(a) "Initial Ownership" ("Copyright in a work...vests initially in the author"). The United States has thereby granted to DuPont the right to control the exploitation of his work. 17 U.S.C. §106 provides that "an owner of copyright under this title has [specified] exclusive rights." The Act's definition of a "transfer of copyright ownership" includes a grant of an "exclusive license" but specifically excludes a nonexclusive license. 17 U.S.C. §101.

Any of the "exclusive rights comprised in a copyright...may be transferred" in whole or in part by an instrument of conveyance "signed by the owner of the rights conveyed or such owner's duly authorized agent" or by operation of law. 17 U.S.C. §§201(d) and 204(a). Only an owner "of any particular exclusive right is entitled, to the extent of that right, to all of the protections and remedies accorded the copyright owner by this title." 17 U.S.C. §201(d)(2). A grant of a nonexclusive license does not require a signed writing. See *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F. 3d 26, 40 (1st Cir. 2003).

By checking the step 5 box, DuPont accepted the offer presented to him. The visible words in the box provide that Xcentric has the irrevocable right to post the defamation on the Ripoff Report website. As a matter of law those words facially constitute a grant of a nonexclusive license without the inclusion of any right to exclude others or authorize other to exercise any rights in the works. See *Craigslist Inc. v. 3Taps Inc.* 942 F. Supp. 2d at 973-74.<sup>3</sup> See *Folsom v. Marsh*, 2 Story 100, 9 F. Cases 342, 346 (Circuit Court, D. Mass. 1841).<sup>4</sup>

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<sup>3</sup> "The language assigning rights to the content did not use the phrase 'all rights,' and did not specify that the rights granted were "exclusive." *Id.* at 974.

<sup>4</sup> If this Court determines there was no transfer of exclusive rights, DuPont by his court appointed attorney will be able to

2. Offer and Acceptance Contract Principles

There can be no acceptance of an offer the material terms of which are not disclosed. See *Goren v. Royal Investments Inc.*, 25 Mass. App. Ct. 137, 140-41 (1987). That the purported contract was entered into online does not alter "the pertinent legal principles." *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. 565, 575 n. 12 (2013). Xcentric has the burden of establishing on undisputed facts that the provisions of the...[contract it seeks to enforce including in particular the conveyance of the author DuPont's ownership in his copyrights] were reasonably communicated and accepted. *Id.* at 575 citing *Specht v. Netscape Communications Corp.*, 306 F. 17, 35 (2d Cir. 2002); *Craigslist Inc.*, *supra* (same). This burden requires proof by clear evidence that (i) Xcentric had provided "[r]easonably conspicuous notice of the existence of [the] contract terms;" and, (ii) the author had "unambiguously manifest[ed his] ... assent" to all the material terms of Xcentric's offer including the conveyance of all rights of exploitation of his work. *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. at 574-75. See RESTATEMENT (Second) of CONTRACTS §19(2)(1981) and Illustration b.

"There are two types of contracts formed online: 'clickwrap' and 'browsewrap' agreements." Add.24. Because

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contest Xcentric's continued licensing of his work to third parties.

Xcentric has no evidence that DuPont checked a box "affirmatively indicat[ing] his agreement to" to all of Xcentric's TOS, the District Court properly rejected Xcentric's contention that DuPont had entered into a click wrap agreement binding himself to all the terms of Xcentric's TOS. Add. 24-25. The District Court found that "by checking the box, the user agrees only to the terms accompanying the checkbox." Ad. 24. As set forth above those terms constituted only a nonexclusive license and included none of the exclusive rights of copyright.

3. No inquiry notice justifying enforcement of a browsewrap agreement constituting a signed conveyance of DuPont's copyrights.

To determine the enforceability of a standard form contract proffered online requires a record of what was presented or displayed to the viewer and also of what terms and provisions that were not presented but of which a "reasonably prudent offeree would be on notice." See *Schnabel*, 697 F. 3d at 120 (question whether receipt of emailed terms can constitute constructive notice). Without such a record there can be no adjudication "that the terms of any agreement were reasonably communicated or that they were accepted." *Ajemian v. Yahoo!*, 83 Mass. App. Ct. at 576.

That Dupont had "the opportunity to review the Terms of Service... prior to submitting" his work "does not establish that the provisions of... [Xcentric's TOS] were reasonably communicated

to [him]." *Id.* at 575. That a link to Xcentric's TOS was available at the bottom of the page does not satisfy Xcentric's burden to demonstrate the "reasonableness of communicating the... TOS via a link." *Id.* Even assuming the blue colored underlined term to constitute a conspicuously displayed hyperlink, because Xcentric

otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice. ... [C]onsumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.

*Nguyen v. Barnes & Noble, Inc.*, 763 F. 3d 1171, 1178-79 (9th Cir. 2014).

Because scrolling is necessary to view the material terms and because a user can proceed without scrolling through the TOS, disclosure is not inevitable. There simply is no evidence in the record on which a jury could rely to conclude that any user or DuPont was on "actual notice of circumstances sufficient to put a prudent man upon inquiry [notice of the contracting away of his ownership of all copyright and broadly indemnifying Ripoff Report]." *Schnabel*, 697 F. 3d at 120 (citing *Specht*, 306 F. 3d at 30 n. 14).

As in *Specht*, DuPont was "responding to... [a free] offer that did not carry an immediately visible notice of the

existence of [the exclusive] license terms or require unambiguous manifestation of assent to those terms." *Id.* at 31, 32.<sup>5</sup> There was no statement alerting a user to scroll down to see "important terms below." There was no disclosure of any condition to this "free membership" requiring him to contract away his constitutionally impelled property rights. There was no explicit prompt alerting him to the existence of any of the material provisions of the TOS. It is undisputed DuPont was not required to scroll through the not-immediately visible TOS. The scroll bar was not identified as such. Ap. 344-346, ¶¶ 15-26. The underlined phrase "Terms of Service" at the bottom of the page view standing alone does not convey the importance, nature and relevance of the information to which they led. Because scrolling was necessary to view the Terms of Service provisions contracting away all of DuPont's copyright interests as well as broadly indemnifying Xcentric, the disclosure should be unavoidable, *i.e.*, DuPont should have been unable to proceed further with the transaction without scrolling through the disclosure. *Schnabel, supra; Specht, supra; Ajemian, supra.* But it is undisputed DuPont was not required to scroll and the disclosure was not inevitable. Ap. 469-70, ¶ 43.

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<sup>5</sup> "When products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's-length bargaining." *Id.*

Because there was no conspicuous disclosure of any of the material terms of the TOS and/or that Xcentric could unilaterally change the terms, Xcentric's solicitation and advertisement of a free offer accepted by DuPont as a Massachusetts resident was unfair and deceptive under Chapter 93A. See 940 CMR §601.

*E. Involuntary Transfer.*

The District Court's ruling that "Section 201(e) eliminates any ownership interest in the copyrights claimed by Goren and Small Justice" (Add.30) is wrong as a matter of law, for two independent reasons.

The Massachusetts Superior Court entered a judgment in equity to redress the continuing irreparable harm to Goren from republication of DuPont's libel. Ap. 477, ¶ 60. That harm includes the continued display on Google's servers of snapshot copies of the original post at Xcentric's direction pursuant to its claimed copyright ownership. Ap. 482-483, 484-485, ¶¶71, 77. With Goren having waived his claim for damages the Superior Court entered two separate decrees concerning DuPont's copyrights. One decree declared that the copyrights were thereby transferred to Goren, intending the Order and Judgment to constitute a conveyance of the full and exclusive ownership of copyright under 17 U.S.C. §201 (d) and/or under 17 U.S.C.

§204. The Superior Court also entered a separate decree appointing Goren as DuPont's "attorney in fact", coupled with an interest, to bring this lawsuit and also to execute a conveyance by DuPont of all rights in and to the copyrights. The judgment of the Superior Court—which is entitled to full faith and credit (*Durfee v. Duke*, 375 U.S. 106, 109 (1963))—includes that "the acts of said attorney-in-fact shall for all purposes and effects constitute the acts of...DuPont as if done by [Dupont]." *Id.*

1. The separate Order transferring DuPont's copyrights to Goren to effectuate the permanent injunction standing alone is not prohibited by any federal statute and is permitted under both federal and Massachusetts common law.

"[N]o federal statutory law directly address[es] whether copyrights are subject to execution to satisfy a judgment."

*Hendricks and Lewis PLLC v. Clinton*, 766 F. 3d 991, 996 (9<sup>th</sup> Cir. 2014) (affirming a district court's appointment of receiver to sell a recording artist's copyrights to satisfy a money judgment). The Ninth Circuit held that the defendant recording artist and owner of the copyrights was ineligible to claim the protection of §201(e) and that like any other intangible property under applicable state law<sup>6</sup> an owner's copyrights are

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<sup>6</sup> While the Copyright Act recognizes the validity of transfers by operation of law without evidence of a writing signed by the owner to indicate a voluntary transfer (17 U.S.C. § 204(a)), it does not define "what constitutes a transfer by operation of

subject to execution to satisfy a judgment. As a matter of federal common law "copyrights like patents are a form of intangible personal property," and if permitted under state law a court appointed trustee may execute an assignment of the copyright, to satisfy a money judgment against the patent holder or the copyright owner. *Id.* citing *Ager v. Murray*, 105 U.S. 126, 127-29 (1881).<sup>7</sup>

As a matter of Massachusetts law the Superior Court has power in equity to appoint an agent or attorney in fact to transfer the author's copyright to effectuate a Massachusetts judgment. See *Wilson v. Martin-Wilson Automatic Fire-Alarm Co.*, 151 Mass. 515, 518-520 (1890) (A court in equity having jurisdiction over an owner of a patent may validly authorize a court appointed master to execute an assignment of the patent to satisfy a judgment).

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law." *Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F. 3d 29, 41 (1st Cir. 2012) (the few cases outside of the First Circuit "focus on whether the author of the transfer provided express or implied consent to such change of ownership").

<sup>7</sup> "[T]he provisions of the patent and copyright acts, securing a sole and exclusive right to the patentee [or author], do not exonerate the right and property...from liability to be subjected by suitable judicial proceedings to the payment of his debts." *Id.* at 996.

2. Only the original individual author DuPont is eligible under specified limitations to claim Section 201 (e) protection against a governmental taking; Xcentric does not have standing to assert Section 201(e) protection which is one of the exclusive rights under the Act .

The original individual author DuPont is a plaintiff and real party in interest in this action. That Goren has been appointed as DuPont's attorney-in-fact does "not enable him to bring suit in his own name." *See, e.g., Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17-18 (2d Cir. 1997). Because Xcentric is not an individual, does not even claim to be an entity author of the individual work and possesses only a nonexclusive license, it has no conceivable eligibility for protection under Section 201(e).

Section 201 of the Act specifies certain rights that are adherent solely to individual authors and prescribes other rights for the benefit of entity authors as well as subsequent owners of any of the exclusive rights of copyright. Subsection (d) "Transfer of Ownership" provides in relevant part:

(d)The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law,<sup>8</sup>...

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<sup>8</sup> Excepting only transfers by operation of law, 17 U.S.C. §204(a) provides a transfer of ownership

is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(2) Any of the exclusive rights comprised in a copyright...may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

Subsection (e) proscribes certain involuntary transfers by the individual author of a work.

(e) Involuntary Transfer.--When an **individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author**, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

17 U.S.C. §201(e)(emphasis added). By the statute's unambiguous terms Congress granted protection only to "individual authors" and only in the absence of prior voluntary transfers of any of the exclusive rights under copyright.

The legislative history is clear that the stated purpose of Section 201(e) is to protect individual authors principally from foreign governments, and the Soviet Union in particular, appropriating their US copyrights. *Clinton*, 766 F. 3d at 997. Because Xcentric does not claim that DuPont's reports were "works made for hire" under 17 U.S.C. 101, it cannot contend

that as an entity author it has standing to raise the Section 201(e) affirmative defense. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

3. Small Justice's standing is derived from the written assignment signed by the individual author DuPont's duly appointed attorney in fact and not from a government seizure.

The predicate for subject matter jurisdiction is pursuant to a Certificate of Registration of ownership of the copyright of DuPont's January 31, 2012 posting. *Id.* ¶ 68. That Registration specifies that the author's "Transfer Statement" was by "assignment." *Id.* DuPont's assignment to Goren and his assigns was in writing and was signed by Goren as the attorney in fact for DuPont. In his individual capacity Goren then executed a conveyance in writing of the same exclusive rights to Small Justice LLC. *Id.* ¶ 63. Both assignments were acknowledged by a Massachusetts notary public. 17 U.S.C. § 204(b)(1).

*F. The "Contract" with DuPont is Unenforceable.*

The District Court erred when it ruled that assuming DuPont retained ownership of the copyrights the offer and acceptance of a nonexclusive license was not an unenforceable illusory contract and was not unenforceable on public policy grounds.

1. The "Contract" between DuPont and Xcentric is illusory.

The visible terms which DuPont accepted provided unambiguously that once posted the report will not be removed

even at the author's request. However according to Xcentric this provision is "subject to change by Xcentric, at any time, [and] without [individual] notice" to DuPont. Add. 49. Because the power is not expressly limited to prospective modifications, Xcentric promised nothing; it gave no consideration. *Morrison v. Amway Corp.*, 517 F.3d 248, 254-55 (5<sup>th</sup> Cir. 2008). Moreover it is undisputed that Xcentric will remove provably false statements of fact from posted reports and has removed reports upon the request of the author. Ap. 488-492, ¶¶ 87, 89; Ap. 592, ¶¶ 87, 89. "[A] promise that binds one to do nothing at all is illusory and cannot be consideration." *Graphic Arts Finishers Inc. v. Boston Redevelopment Authority*, 357 Mass. 40, 43 (1970)(dicta).

2. The CDA does not bar or alter application of basic contract principles.

The CDA does not preclude ordinary contract law defenses to Xcentric's contract. On the undisputed facts in its de novo review the Court should hold that the non-exclusive license agreement is unenforceable on public policy grounds.

To do equity on the facts of this case, whether sitting in diversity or under federal question jurisdiction, the District Court should have declared that the provision "once I post my

report, it will not be removed, even at my request" though initially facially valid is unenforceable as applied on public policy grounds. "A... term of an agreement is unenforceable on grounds of public policy if... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such [a] term[]." .<sup>9</sup> There is a strong public policy against *per se* libel. "The State's interest here resides in the private individual's right to the protection of his own good name, for this 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Stone v. Essex Cnty. Newspapers, Inc.*, 367 Mass. 849, 858 (1975). Application of the RESTATEMENT consistent with Massachusetts law

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<sup>9</sup> "A... term of an agreement is unenforceable on grounds of public policy if... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such [a] term[]." .

(2) In weighing the interest in the enforcement of a term, account is taken of

- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied, and
- (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.

requires examination and weighing of specified factors in favor of enforcement of the provision against specified factors of public policy against enforcement. and (3). See also *Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colorado*, 685 F. Supp. 2d 217, 224 (D. Mass. 2010).

The Factors In Favor of Enforcement

(a) ***Xcentric can have no justifiable expectation in enforcement.*** According to Xcentric's TOS it was a condition of his posting that DuPont "warrant and represent that the information is truthful and accurate." Ap.463-64, ¶ 29. The Terms of Service prohibited DuPont from "post[ing] on ROR any defamatory or illegal material." *Id.* Xcentric specifically "reserve[s] the right ... to delete" harmful information. Ap. 463, ¶ 25. And when provided proof the Ripoff Report will remove or redact libelous false accusations of the same criminal conduct of which Goren was falsely accused. Ap. 488-89, ¶¶ 87, 89. And, it is undisputed that upon payment of fees to its reputation restoration business when subjects of defamatory reports demonstrate falsity, Xcentric will remove or redact the defamatory post. Ap. 488. Therefore Xcentric can have no morally or legally justifiable expectation to insist on enforcement of its no-removal term.

(b) ***Xcentric suffers no forfeiture if enforcement is denied.*** The posting was free and so there is no posting fee to

be returned in whole or in prorated part. Moreover, because as a matter of law Xcentric gave no consideration, there can be no loss.

(c) ***There is no special public interest in enforcement of the term.*** On the contrary Section 230 of the CDA specifically provides ISPs with "Good Samaritan" protections for its actions "taken in good faith" to screen or delete objectionable material "whether or not such material is constitutionally protected." And enforcement of state libel law that is consistent with the ISP's Section 230 rights to screen or delete in its exercise of a publisher's traditional editorial functions is patently in line with the CDA. See *Lycos*, 478 F. 3d at 422 (§ 230 shields ISP's "editorial decision" as to defamatory third-party posting).

The Public Policy factors against enforcement.

***(a) The strength of the public policy against libel is manifested in both legislation and case law.***

A public policy against enforcement of ... terms may be derived by the court from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare, as is the case for judicial policies against for example, ... (iii) interference with other protected interests [including "promises to commit [or terms tending] to induce the commission of a tort."]

, 192, illus. 5 (terms tending to induce libel).

The public interest "in the light of the circumstances of...[this] case...[lies] in the prevention of tortious harms." *Cf. Krebiozen Research Foundation v. Beacon Press, Inc.*, 334 Mass. 86, 99 (1956) (*dicta*). There is no public interest in the re-publication of previously published false accusations of crimes. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-246 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation..."); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution").

The Commonwealth has enacted legislation promoting retraction of libel. .

**(b) Refusal to enforce the term will obviously further the public policy.** Here the defamer seeks to cease republication of his libel on the Ripoff Report website and the Ripoff Report's further publication or display of the libel on Google and other search engines under color of Xcentric's claimed copyright.

**(c) Seriousness of the misconduct and its deliberate nature.** There has been an adjudication that the publication constitutes libel and that its continued publication causes injury to Goren. While this factor focuses on the defamer, it is noteworthy that Xcentric is deliberately violating its own

Terms of Service when it insists on enforcement of this no-removal term.

*(d) The directness of the connection between the libel and the term.* While Xcentric presumably was initially unaware of the falsity of the accusations of criminal conduct, it now has proof, a judgment. While Xcentric may be immune under the CDA for its continuing publication, its insistence on enforcement of the no-removal term tends to induce the commission of a tort.

*G. The District Court erred in dismissing the 93A claim.*

Goren's 93A claims focus on Xcentric's unscrupulous use of intellectual property in particular its use of copyright to bait the injury to Goren's reputation in conjunction with the operation of its reputation restoration business. While Xcentric and Goren are not in privity of contract, Xcentric's unfair and deceptive actions were undertaken in the course of its pursuit and/or solicitation of business in the Commonwealth of Massachusetts. While Goren has refused to pay Xcentric to repair his reputation, it is undisputed he has expended money for legal fees and other expenses as a result of Xcentric's practices. Ap. 502, ¶ 105; Ap. 594, ¶ 105.

Rejecting Xcentric's contention that its advertising and offering in Massachusetts of its reputation restoration business constitutes an editorial function that is immune under the CDA,

the District Court granted Xcentric summary judgment on the 93A claim for lack of a causal link between: (i) Goren's undisputed injury to his business good will and/or his undisputed expenditure of approximately \$5,000; and, (ii) the alleged unfair and deceptive practices. (Ad 31-32). The District Court ruled that the "source of Goren's reputational injury...was DuPont's libel]"for which Xcentric is immune under the CDA. Add. 32. The District Court also ruled that because Goren "does not allege that he incurred the cost of participating in...[Xcentric's reputation restoration business] or explain how he suffered a financial loss, other than any loss of business related to the shielded reports," the District Court held the 93A claim had to be dismissed for lack of "any evidence of a loss caused by the programs of which he complains." *Id.*

Dismissing the 93A claim for lack of compensable harm the District Court did not have to address whether Xcentric's false representation of a material fact, namely the visible, and hence operative, word in Xcentric's step 5 box, constituted a bad faith litigation tactic. *Arthur D. Little v. Dooyang*, 147 F. 3d

47, 56 (1st Cir. 1998) (litigation tactics, such as bad faith claims, may constitute 93A violations provided there is a commercial context or solicitation of a contractual relationship). At the February 2014 hearing on its motion to dismiss, Xcentric informed the District Court that Goren had misrepresented to the Court the visible, and hence operative, words of Xcentric's offer. Xcentric informed the Court

Your Honor, Mr. Goren has said that because it's in paragraph 6 and it's down a ways that perhaps there was no meeting of the minds. And one of the things I think the papers do not do a good job of is explaining that the little box that the author has to check to submit not only says that the author is agreeing to the terms of use, but specifically says, I agree to the Ripoff Report terms and conditions and that by posting this rebuttal, this report or rebuttal, I attest this report is valid. I'm giving Ripoff Report irrevocable rights to post it on the website and granting Ripoff Report's operators an exclusive license.

Ap. 210. After the hearing with leave of Court, Xcentric filed an affidavit averring that the visible terms of its offer to DuPont included the specific phrases: "I agree to the Ripoff Report Terms and Conditions," and "I am...granting Ripoff Reports' operators an exclusive license." Ap. 115-141; Ap. 502-506; Ap. 594. This was a knowingly false representation of a material fact; and when the falsity of its representation of the terms of the operative contract offer was revealed, Xcentric

admitted it had been mistaken. *Id.* But for plaintiffs locating the contradictory affidavits filed in other federal district courts by the affiant and by the same counsel in this case, Xcentric would have committed a fraud on the District Court.

DuPont's Ripoff Reports' accusations of criminal conduct by Goren have been adjudged to be completely false, without basis in fact and to impair his reputation as a lawyer. Ap. 470, ¶45. It is undisputed that Goren's reputation is damaged whenever a person or business conducting an internet search about him reads the defamatory reports; (Ap. 475, ¶ 59) and, that the search engine user interested in Goren need not go the Ripoff Report website. Xcentric holds itself out to search engines as the copyright owner of these reports and pursuant to this claim of right Xcentric has authorized Google and other search engines to take a snapshot and create a "cached" copy that may be displayed and published on Google's servers. Ap. 482-83, ¶¶71-73. Whenever an interested party stays on the search engine server and clicks on the cached copy, she reads the most recent snapshot of the defamatory report on the top of which is displayed "Copyright © 1998-2014, Ripoff Report. All rights reserved." Ap. 483, ¶ 77. The Massachusetts judgment enjoined the author DuPont as well as "any person or entity acting as his agent... or any other person or entity in active concert or participation with" the author

from "continuing to publish or to republish" the continued republication of the defamatory reports.

When served with the judgment, Xcentric notified Goren it will not take down or remove the report. Ap. 478, ¶ 61. Instead Xcentric referred Goren to its website's strict non-removal policy. Despite Google's initial efforts to remove from its index the January 31, 2012 defamatory report (Ap. 483-484 at ¶¶ 75,76) Xcentric continues to authorize Google to display on Google's servers the most recent copy of the defamatory report with the notice: "Copyright © 1998-2014, Ripoff Report. All rights reserved." Ap. 482-484, ¶¶ 71, 72, 77.

Xcentric's published policy is that it will not remove a report from its website even if the report is adjudged defamatory or even if the author requests the report to be taken down. Xcentric's policy published in Massachusetts is that any statement posted on its website is a "permanent record." Ap. 485, ¶ 79. However, Xcentric operates a reputation restoration business and offers alternative commercial fee based solutions for the subjects of false and/or defamatory reports posted on its Ripoff Report website. Ap.486, ¶ 80. So Goren visited XCENTRIC's Ripoff Report website and was informed of the opportunity to "join" XCENTRIC's "Corporate Advocacy Program"

whereby for some undisclosed fee Xcentric would "restore his reputation." Ap. 486, ¶81. In its July 2013 online advertisement published in Massachusetts Xcentric stated:

to make your search engine listings change from a negative to a positive all you need to know is this: by becoming a member of the Corporate Advocacy Program, no matter how you search your name on search engines, it will all look as it should. Positive.

Ap. 486, ¶ 81.

In March 2014, the District Court held Goren's allegations of Xcentric's refusal to take down a report that had been adjudged defamatory "while simultaneously advertising services by which Goren can pay Xcentric to restore his reputation," were not barred by the CDA and are to proceed under Chapter 93A. But refusing to make automatic disclosure of the operation of its reputation restoration business (Ap. 39, ¶ 88), Xcentric sought summary judgment contending that the operation of its reputation restoration business was an editorial function shielded by immunity under the CDA. Ap. 335-340.

Despite Xcentric's refusal to provide discovery there was evidence that contrary to its website advertisement Xcentric has deleted or redacted "provably false statements of fact" for those businesses who paid Xcentric. Ap. 488-493, 501. It was also

undisputed that Xcentric failed to disclose to Goren that a person or company who has been falsely accused of criminal conduct and who presents proof of the falsity of such accusation can have the false accusations of criminal conduct redacted or removed without joining the CAP program. Ap. 501. It is open to discovery whether the repair or restoration of one's reputation—by redaction or removal of a defamatory report—under Xcentric's standard form CAP contract would continue for only as long as the monthly payments to Xcentric continued. Ap.501.

To support hearsay allegations that Xcentric has engaged, contracted and/or employed persons to author defamatory posts on the Ripoff Report website (See ECF #70,72,73, 85; Ap. 9-10), Goren served subpoenas on one Darren Meade for documents and to testify at deposition. While Xcentric admitted having made payments to Meade—prolific poster of reports—and having entered into some undisclosed confidential settlement agreement with him, Xcentric and Meade filed motions to quash the discovery. Ap. 9-10. Concurrent with its dismissal of the 93A claims, the District Court denied the motions to quash as moot. Ap.11.

Massachusetts Gen. Laws Ch. 93A, § 11 prohibits “[u]nfair or deceptive acts or practices in the conduct of any trade or commerce.” It “is a statute of broad impact” passed “to aid consumers and others...by making conduct unlawful which was not

unlawful under the common law or any prior statute." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693 (1975). A 93A claim need not be pigeonholed as sounding in contract or tort; some are contract-based others are tort-based and still others "neither wholly tortious nor wholly contractual in nature."

*Kraft Power Corp. v. Merrill*, 464 Mass. 145, 156 (2013).

"[T]echnicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice."

*Leardi v. Brown*, 394 Mass. 151, 159 (1985).

An unfair act or practice is not amenable to a bounded definition because, "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 503 (1979) (quoting H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. (1914)). Following federal decisions under the Federal Trade Commission Act, courts employ the following factors in evaluating whether conduct is unfair: (i) whether the practice is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (ii) whether it is immoral, unethical, oppressive or unscrupulous; and (iii) whether it causes substantial injury to consumers, competitors or other business people. *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975) (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)). A

court must "focus on the nature of challenged conduct and on the purpose and effect of that conduct as the crucial factors in making a G. L. c. 93A fairness determination." *Mass. Employers Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 43 (1995). If it "leaves a rancid flavor of unfairness," it is a violation. *Id.*

[There is] no static definition of the term "deceptive;"...[A] practice is "deceptive,"..."if it 'could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted...[A]dvertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A. ... The criticized advertising may consist of a half truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information... [regardless of] whether it was relied on or resulted in actual deception.

*Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 394-96 (2004).

There need not be a finding of both unfair and deceptive conduct. An act or practice can be unfair without necessarily being deceptive. See *Service Publications v. Gorman*, 396 Mass. 567, 578 (1986). Goren need not prove that Xcentric intended to deceive him or that he relied on the unfair or deceptive act or practice. *Aspinall*, 442 Mass. at 394.

It is the law of the case that the FAC states a cause of

action under 93A for Goren's undisputed injury to his business goodwill and his alleged loss of money both as a result of Xcentric's advertising and operation of its reputation restoration business.

The District Court erred in dismissing the 93A claim based on a lack of reliance damages. It is sufficient if there is a causal relation between the act or practice and some injury to Goren. *Fraser Eng'g Co., Inc. v. Desmond*, 26 Mass. App. Ct. 99, 104 (1988). See *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841 (1983). It is undisputed that but for Xcentric's refusal to take down the defamation Goren's injury to his business goodwill would not have continued and that he would not have expended approximately \$5,000 in legal fees and other expenses. Ap. 52, ¶ 105. Because the continuing injury to goodwill and the out of pocket expenses "stem from" the unfair practice, they constitute section 11 damages. *Dooyang*, 147 F. 3d at 57. Goren's litigation expenses in this case also constitute "actual damages (a 'loss of money')" if caused by a 93A violation. *Columbia Chiropractic Group, Inc. v. Trust Ins. Co.*, 430 Mass. 60, 63 (1999). And Xcentric's bad faith conduct in litigation coupled with pre-suit unfair or deceptive acts constitutes a

violation. *Dooyang*, 147 F. 3d at 56.

The District Court's Order dismissing the 93A claim must be reversed.

**VI. CONCLUSION**

Appellants request the Court grant them relief in accordance with their brief.

Respectfully submitted,

SMALL JUSTICE LLC, RICHARD A.  
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November 9, 2015

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**CERTIFICATE OF COMPLIANCE WITH FED. R APP. P. 32 (a)(7)(B)**

I hereby certify that to the best of my knowledge and belief this brief complies with the Fed. R. App. P. 32 (a) in that as per my word processing system the word count of 13,871.

/s/ Richard A. Goren

**CERTIFICATE OF SERVICE**

I hereby certify that the brief and accompanied Addendum filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on November 9, 2015. I hereby further certify that I have this day mailed five copies of Appellants' Appendix to the Court, and one copy to each of the two counsels for the Appellee to

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