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Plaintiff seeks to extend a temporary restraining order (“TRO”) barring “all statements . . . of a factual nature regarding Houlihan Smith [or any of its staff].” The TRO is a prior restraint, was obtained ex parte in violation of *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), and is sought to protect plaintiff’s reputation. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), held that an injunction against distributing leaflets that criticized a local real estate company was an impermissible prior restraint, stating, “No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants the use of the injunctive power of a court.” *Id.* at 419. Moreover, the injunction is against the operator of an interactive message board, over comments posted by third parties, even though federal law, 47 U.S.C. § 230, protects such web hosts against being sued for such content. *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist*, 519 F.3d 666 (7th Cir. 2008). Plaintiffs have tried to evade section 230 by dressing up some of their claims in trademark garb, but their claims are really defamation claims within the heartland of section 230 immunity. To the extent that plaintiffs charge Forte with placing their trademarks in the meta tags and HTML script, their claims are factually false as well as legally untenable.

The original TRO was extended for seven days by Judge Dow so that this Court could hear the motion. DN 14. However, a TRO may only be extended once, absent consent of all parties, *Chicago United Indus. v. City of Chicago*, 445 F.3d 940, 943 (7th Cir. 2006), and a TRO issued without notice cannot be extended. Rule 65(b)(3). Thus, any further extension of the TRO would be a preliminary injunction. As we show in this brief, no temporary relief is warranted.

#### **FACTS AND PROCEEDINGS TO DATE**

This case arises from two web sites operated by Julia Forte. Forte is a North Carolina resident who, with her husband, runs the sites 800notes.com and whocallsme.com. Forte Aff. ¶¶ 2-

3.<sup>1</sup> No employees help operate the sites. *Id.* ¶ 32. Apart from a few news articles and essays about telemarketing that have nothing to do with plaintiffs or the allegations in this case, the web sites are message boards where the public can discuss marketing phone calls and those who make them. *Id.* ¶¶ 4-10 and attached exhibits. Forte neither authors the postings nor chooses the marketers about which comments are made. *Id.* ¶ 11. Rather, after a member of the public receives a marketing call, he can search the site for information about the telephone number from which the call was placed, and, if so motivated, put his own comments about that telephone number on the site. *Id.* ¶ 10. If no comments have yet been posted about that telephone number, the viewer is given the option of posting about that number and hence creating a new message board about the number. *Id.* ¶ 14. All forms for posting comments warn each poster to provide only truthful information and to avoid offensive language. *Id.* ¶¶ 12, 14, 26 and Exh. I, J. Although the site's Terms of Service forbid knowingly false postings, they also make clear that the web host "does not monitor the content and takes no responsibility for such content," and is not "in a position to investigate, censor or otherwise ensure the accuracy of any comments, remarks or other information." *Id.* ¶ 9 and Exh. F. An additional page on the site informs Internet users about 47 U.S.C. § 230 and explains that, because the "content on 800notes.com is authored by users of the site," the site host cannot be sued over that content. The page urges dissatisfied targets of criticism to reply to such criticism explaining their own side of the story. *Id.* Exh. H.

When a viewer posts new content to the web site, including content about a new phone number not previously discussed there, the web site's software automatically and instantaneously places it on the message board without any human review or intervention. *Id.* ¶ 13. Forte looks at

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<sup>1</sup>Plaintiffs have also sued Jamon Silva over a separate web site that he operates, whocalledus.com. Undersigned counsel do not represent Silva and do not address his circumstances.

individual messages only when a viewer marks them as abusive; she may edit out vulgar language, or remove a message in its entirety. The most common reasons why messages are removed is because they are spam, contain advertising, or include vulgar language. *Id.* ¶ 16.

800Notes is supported by advertising, which is placed on the site under contracts with California and New York companies. *Id.* ¶ 18. However, the site does not sell goods or services; the site has no e-commerce functions; and advertising cannot be bought through the site. *Id.* ¶¶ 17, 19. Forte and her LLC have no contacts with Illinois; indeed, Forte has never been to Illinois. *Id.* ¶ 12.

Houlihan Smith & Co. and Houlihan Smith Advisors (together, “Houlihan”) is an investment banking company based in Chicago but with offices elsewhere in the United States and abroad. Since 2007, roughly 250 messages have been posted on pages on Forte’s sites about the telephone number 312-499-5900 by persons claiming to have received calls from Houlihan and discussing the company, generally in unflattering terms, although other posters have defended Houlihan and condemned its critics. *Id.* ¶ 20; Complaint Exh. B. Forte did not know that Houlihan was being discussed on her sites, and she did not even know what Houlihan was or that it is located in Illinois, until she received a demand letter from plaintiff’s counsel on April 12, 2009. Forte Aff. ¶ 21.

Although the complaint alleges, largely on information and belief, that Forte embedded either Houlihan’s name or content about Houlihan from the posts in the title tags, description meta tags, or otherwise in “hidden code” on her web site, those allegations are false. *Id.* ¶¶ 22-30. In fact, the source code for a web site is easily viewed from a web browser, and can be downloaded and printed. Houlihan itself attached such code to a **prior** lawsuit (discussed in the next paragraph), and Forte has attached such code to her affidavit as well. Forte Aff. ¶ 23 & Exh. K, L. Not only Forte’s affidavit, but also even a document that plaintiff attached to its original suit against Forte, show that the title and description tags on Forte’s web pages about the phone number 312-499-5900 contain that

number but neither Houlihan's name nor any content about Houlihan. *Id.* ¶¶ 22-23 & Exh. J, K.

On March 2, 2010, Houlihan filed a petition for discovery in Cook County Circuit Court, alleging that several specified posts had been posted on Forte's web sites by unidentified third parties, and asking that Forte be ordered to provide information that might lead to their identification.<sup>2</sup> Levy Affidavit Exh. P. Attached to the petition were a series of messages which, according to a legend at the bottom of each printed page, were printed from the Internet on February 23, 2010, as well as the downloaded source code from one of those pages. The petition asserted, as the current complaint does, that the source code showed Forte's misuse of Houlihan's name and her inclusion of defamatory statements about Houlihan in the "tags" that the web operators placed on the page; but the petition never specified the piece of code that showed this. The petition was never sent to Forte, Forte Aff. ¶ 33 (Undersigned counsel learned of the suit only by looking for **this** case on Cook County's electronic docket, Levy Aff. ¶ 2 & Exh. N). And although the case was assigned to Judge Billik, Houlihan did nothing to move the discovery petition forward for over one month. Houlihan filed a motion for discovery on April 8, then withdrew it on April 9. *Id.* Exh. N.

On April 12, Houlihan's counsel sent Forte a demand letter, attaching ninety messages criticizing Houlihan and insisting that all be removed from her sites and that future postings be blocked. Complaint Exh. I. Forte responded on April 13 that Houlihan should defend itself online, but refused to identify any alleged defamers without a valid subpoena, and then only if the standard *Doe* procedure were followed. Complaint Exh. K. On April 16, more than six weeks after its

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<sup>2</sup>Generally speaking, the web server on which a message board is hosted captures the "Internet Protocol" address of those posting messages, which, in turn, can be used to identify the computers that the posters were using. *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005). Courts generally require a showing of wrongdoing, notice to the anonymous speakers and an opportunity for the Does to respond before ordering such disclosure. *Id.*; *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009)

original petition for discovery was filed, Houlihan filed a verified complaint in Cook County Circuit court, alleging multiple counts of defamation and interference with business caused by the allegedly defamatory statements about itself and its employees. Houlihan also characterized those criticisms as trademark misappropriation, dilution and right of publicity violations, asserting that use of its name, and its employees' names, to identify the subjects of criticism violates its trademark and the employees' publicity rights. Finally, based largely on "information and belief" allegations about meta tags, title tags and other features, Complaint ¶¶ 31-38, Houlihan alleged that Forte's own content violates its trademarks. Houlihan did not show that the two investment bankers who verified the complaint had expertise to testify about how a Google search works or what HTML tags do.

Houlihan moved for a TRO. To create the illusion of a claim that had only recently appeared, it cited a criticism that had been posted on April 6, which, it said, it had only learned about on April 9, followed by an April 12 demand letter and its April 16 lawsuit. Houlihan's papers nowhere acknowledged that it had known about similar criticisms since February 23, or explained why it sued Forte on March 2, failed to send her a copy of that lawsuit, and did nothing to move the case forward.<sup>3</sup> Houlihan emailed the papers to Forte at 1:12 PM CDT, less than ninety minutes before the TRO hearing was scheduled to begin in Chicago at 2:30 PM CDT. Forte Aff. ¶ 36. The

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<sup>3</sup>Houlihan came to the April 16 ex parte hearing with additional "evidence" – two anonymous Internet postings to an Internet message board called Xcomplaints.com, accusing Forte of asking for money to take down posted criticisms. The postings, dated April 4 and 13, 2009, are false. Forte Aff. ¶ 38. For example, the posting most heavily quoted by Houlihan was from someone who claimed to be a former employee of 800Notes.com, even though Forte and her husband have no employees. *Id.* Moreover, given the hundreds of thousands of different telephone numbers discussed on Forte's sites, *id.* ¶ 10, the scenarios described by the two anonymous posts would be impossible for a two-person operation like Forte's. Houlihan appears not to notice the irony of its position. In a lawsuit complaining that Houlihan was falsely maligned by anonymous criticisms on the Internet, Houlihan seeks a prior restraint of speech based on anonymous postings that criticize its adversary. Because anonymous Internet postings are not evidence of the truth of the matters stated, and hence cannot support a TRO, we do not address these documents further.

court granted the TRO that Houlihan had drafted. Although Houlihan's complaint identified only 13 statements as defamatory, the TRO (a) forbade "all statements of a factual nature, or which appear to be of a factual nature, about Houlihan" or any of its staff (not just statements found to be false and defamatory), (b) ordered Forte to "block all reference to the defamatory statements" (a vague and imprecise term) and any future postings "by individuals and/or entities who originally posted the defamatory postings," and (c) authorized the issuance of subpoenas to identify the posters of "the defamatory materials." The TRO set a status hearing for eleven days later, on April 27, 2010.

On April 19, Forte removed the case to this Court. DN 1. The initial TRO was extended for seven days by Judge Dow so that this Court could decide the issue. DN 14.

## ARGUMENT

For the following five independent reasons, the Court should not extend the TRO.

**A. The Requested Injunction Is a Prior Restraint on Free Speech That Is Forbidden by the First Amendment and Contrary to Principles of Equity.**

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). A court order prohibiting publication constitutes such a prior restraint. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions — *i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints."); *United States v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000); *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987). Indeed, injunctions prohibiting speech pose an even greater threat to fundamental rights than do statutes that have an equivalent effect, because injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center*, 512 U.S. 753, 764-65 (1994); *see also In re Providence Journal Co.*, 820 F.2d 1342, 1352 (1st Cir. 1986)

(holding a temporary restraining order prohibiting publication of a newspaper until a hearing could be held several days later to be a “transparently invalid prior restraint on pure speech”).

Because of the seriousness of a prior restraint, a preliminary injunction prohibiting speech is justified only when publication would “threaten an interest more fundamental than the First Amendment itself.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996). In *Procter & Gamble*, the district court entered successive injunctions that prohibited publication of a magazine for a total of three weeks. *Id.* at 221. The Sixth Circuit held the injunctions to be unconstitutional prior restraints, concluding that “[e]ven a temporary restraint on pure speech is improper absent the most compelling circumstances.” *Id.* (internal quotation omitted). As the court noted, only a “grave threat to a critical government interest or to a constitutional right” can justify restraint of publication, and even then only when the threat “cannot be militated by less intrusive measures.” *Id.* at 225; see *Nebraska Press Ass’n*, 427 U.S. 539 (rejecting a prior restraint issued to guarantee a criminal defendant’s Sixth Amendment right to a fair trial); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (declining to enjoin newspapers from publication despite the government’s claim that publication could threaten national security).

Houlihan’s claims of defamation and injury to reputation cannot justify a prior restraint on speech because “private litigants’ interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint.” *Procter & Gamble*, 78 F.3d at 226-27. As the Supreme Court held in *Organization for a Better Austin v. Keefe*, 402 U.S. at 419-20, “No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court.”

The traditional rule is that “equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.” *Lothschuetz, Carpenter*, 898 F.2d 1200, 1206 (6th Cir.



1990) (Guy, J., dissenting as to this issue) (internal quotation omitted); see *Metropolitan Opera Ass'n v. Hotel and Rest. Employees Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (“[A]bsent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases.”). The Seventh Circuit has declined to reach this question, *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 605-606 (7th Cir. 2007), but the Illinois Supreme Court ruled that equity will not enjoin a libel. *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees*, 400 Ill. 38, 51, 79 N.E.2d 46, 53 (1948).

Even in jurisdictions that allow an injunction against the repetition of a libel that has been found false and defamatory after a full trial, or in which that issue remains open, injunctions may not issue against speech that has **not** been thus finally determined. *Lothschuetz*, 898 F.2d at 1208-09 (limiting a preliminary injunction to “statements which have been found in this and prior proceedings to be false and libelous”); *Balboa Island Village Inn v. Lemen*, 40 Cal.4th 1141, 1149-1154, 156 P.3d 339, 344-348 (Cal. 2007); *Metropolitan Opera*, 239 F.3d 172 (preliminary injunction against picketing and statements made in labor dispute reversed where there was no prior determination of falsity); *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991). For this reason, courts have rejected attempts to obtain preliminary injunctive relief against Internet speech. *New Net v. Lavasoft*, 356 F. Supp. 2d 1071 (C.D. Cal. 2003) (holding that a preliminary injunction is improper when there has been no prior adjudication of falsity); *Bihari v. Gross*, 119 F. Supp.2d 309, 324-327 (S.D.N.Y. 2000) (holding that the First Amendment prohibited a preliminary injunction against an allegedly defamatory website criticizing a home design company); *Ford Motor Co. v. Lane*, 67 F. Supp.2d 745, 749-753 (E.D. Mich. 1999) (holding that a preliminary injunction prohibiting publication of a web site alleged to divulge trade secrets would be an unconstitutional prior restraint on speech).

Finally, giving the name of some other cause of action to a tort whose gist is false statements that cause injury to reputation does not evade First Amendment limits on defamation claims. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Tierney v. Vahle*, 304 F.3d 734, 743 (7th Cir. 2002); *Desnick v. American Broadcasting Companies*, 44 F.3d 1345, 1355 (7th Cir. 1995). Similarly, here, the fact that plaintiffs have added counts for injury to their business reputation (trademark dilution and “common law misappropriation of trademark”), or their employees’ right of publicity, does not avoid the application of standard prior restraint principles to forbid a preliminary injunction.

Five other considerations militate against turning the TRO into a preliminary injunction. The first is that plaintiffs dawdled so long before seeking a TRO. Some of the comments enjoined were posted to Forte’s web site as early as 2007, and the record reflects that plaintiffs had a printout of the criticism as of February 23, 2010; but it was not until nearly two months later that they rushed into court, pointing only to the most recent of the criticisms as a reason for granting a TRO without notice. Plaintiffs who sleep on their rights show that there is not really such serious irreparable harm that the Court should to issue orders on less than full consideration. *Dahl v. Swift Distribution*, 2010 WL 1458957 (C.D. Cal. Apr. 1, 2010 ), \*4; *Crow Creek Sioux Tribal Farms v. Internal Revenue Service*, — F.Supp.2d —, 2010 WL 55318 (D.S.D. Jan. 12, 2010),\*4; *Wangson Biotechnology Group v. Tan Tan Trading Co.*, 2008 WL 4239155 (N.D. Cal. Sept. 11, 2008),\*6.

Second, even apart from the prior restraint doctrine, in light of the Supreme Court’s ruling in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), courts should no longer presume that there is irreparable injury in intellectual property cases even if it concludes that plaintiff has a likelihood of success on the merits. Rather, the plaintiff must make an affirmative factual showing of irreparable injury, and that showing must be strong enough to overcome the significant public interest in avoiding limitations on free speech. *Salinger v. Colting*, — F.3d —, 2010 WL 1729126

(2d Cir.), at \*10-\*12. The conclusory, boilerplate paragraphs in the Botchway and Smith affidavits, attesting to the impact of unspecified “statements” on the web sites, provide no support for a finding that any particular statement has caused sufficient injury to meet the *Salinger* standard for injunctive relief against speech, even in intellectual property cases. *Ebay* held that traditional requirements for preliminary injunctions are not replaced by a presumption that patent infringement must necessarily be remedied by an injunction, and the Second Circuit recently held that *eBay*’s analysis applies to copyright cases. *Id.* Like the copyright statute, trademark law makes the issuance of injunctions permissive, not mandatory, and then “subject to the principles of equity.” 765 ILCS 1036/65(a).

Third, the TRO that plaintiffs sought and obtained is vastly overbroad, extending to every comment posted about plaintiffs or any member of plaintiffs’ staff, no matter whether the comments are defamatory or whether they are true. Fourth, the TRO is vague, in that the term “of a factual nature, or appearing to be of a factual nature” leaves it to Forte to guess, on pain of contempt sanctions, whether she must remove a particular statement. Forte Aff. ¶ 41. Fifth, the requirement of blocking postings by “the individuals or entities” who originally posted the banned postings is also vague and unreasonable; Forte can only block individual IP addresses, but cannot be sure which individuals and entities are using them. Her only alternative, therefore, was to close the entire pages on which Houlihan’s phone number 312-549-9500 was discussed. *Id.* ¶¶ 42-43. Nothing in plaintiffs’ papers justified relief that placed them above public commentary of any kind.

#### **B. The Court Lacks Personal Jurisdiction Over Forte.**

Under the Seventh Circuit’s recent decision in *Tamburo v. Dworkin*, — F.3d —, 2010 WL 1387299 (7th Cir. Apr. 8, 2010), personal jurisdiction over an out-of-state defendant who has been sued for an intentional tort depends on whether the defendant intentionally directed tortious activity at a party in Illinois, **expressly aiming** at Illinois. *Id.* at \*10. In order to obtain the prior restraint

that they are seeking, the burden is on plaintiffs to prove such intentional targeting of Illinois. The application of this test is well illustrated by the facts of *Tamburo*. The authors of the allegedly defamatory comments criticized Tamburo and called for a boycott of his Illinois-based business, including his Illinois address in some of their comments and urging readers to harass him. Those defendants were held subject to personal jurisdiction. But the defendant that was accused only of facilitating the posting of the tortious comments, but that did not know that Tamburo was in Illinois, was dismissed. *Accord ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 714-715 (4th Cir. 2002) (Georgia web hosting company on whose servers another defendant violated Maryland company's copyright could not be sued in Maryland).

On the record in this case, there is no personal jurisdiction over Forte in Illinois. As Forte's affidavit shows, the placement of comments on her web sites is effected by the web site's software, without any manual intervention. Forte Aff. ¶ 13. Similarly, the addition of a given phone number to the list of those on which comments may be made is automated, taking effect when a user searches for that number and it is not already the subject of comments on the site. *Id.* ¶ 14. And even if there were the slightest grain of truth to the contention that title or description meta tags included either Houlihan's marks or defamatory content — and the record shows that there is not — those tags are also added without manual intervention. *Id.* ¶ 22. Thus, until she received Houlihan's demand letter, Forte did not even know that Houlihan was discussed on her site, let alone know that Houlihan is in Illinois. *Id.* ¶ 21. But all allegedly tortious conduct of which Forte is accused occurred **before** that demand letter. Consequently, *Tamburo* bars personal jurisdiction here.<sup>4</sup>

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<sup>4</sup>Before *Tamburo* was decided, the consistent rule in this District was that personal jurisdiction over claims of intentional torts on web sites depended on application of the so-called *Zippo* sliding scale, *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997), under which personal jurisdiction depends on the degree of commercial interactivity on the site. *E.g.*, *First*

**C. Forte Is Immune From Suit and Immune From Liability for Content Posted to Her Web Site by Unknown Third Parties.**

The third independent reason why the TRO should not be extended is that, as the operator of web sites where third parties may post comments about companies that place marketing calls, Forte is completely immune from liability for content that others place on her sites. This immunity is provided by the Telecommunications Act of 1996, 47 U.S.C. § 230(c)(1): “No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.” Section 230(e)(3) further provides, “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” Every court to consider this issue, including the Seventh Circuit and an Illinois court, *Chicago Lawyers’ Committee For Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 671-672 (7th Cir. 2008), *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1191-1196, 799 N.E.2d 916, 922-927 (5th Dist. 2003), has ruled that § 230 prohibits any law, federal or state, from imposing liability on an internet provider for content supplied to a web site by a different person. Section 230

bars ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone, or alter content.’ *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997); *see also, e.g., Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 986 (10th Cir. 2000) (“Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”)

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*Financial Resources v. First Financial Resources Corp.*, 2000 WL 1693973 (N.D. Ill. Nov. 8, 2000); *Berthold Types Ltd. v. European Mikrograf Co.*, 102 F. Supp.2d 928 (N.D. Ill. 2000). Footnote 7 in *Tamburo* suggests that the Seventh Circuit rejects the sliding scale. Although Illinois courts have used sliding scale analysis, no state court has addressed the issue since *Tamburo* was decided. Under the sliding scale approach, there would be no personal jurisdiction because users cannot use Forte’s sites to place orders or otherwise engage in commercial transactions with her.

*Green v. America Online*, 318 F.3d 465, 471 (3rd Cir. 2003).<sup>5</sup>

Moreover, Section 230(e)(3) provides not just an immunity from liability but immunity from suit: “No **cause of action may be brought** and no liability may be imposed.” (emphasis added). See *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Ben Ezra*, 206 F.3d at 983.

Plaintiffs acknowledged this immunity in their TRO memorandum but sought to evade the immunity on grounds that are inapplicable. First, they argued that section 230 immunity applies only to content provided by others but not to content provided by the web host. Consistent with the statutory purpose, the definition of interactive computer service is construed broadly, while the definition of information content provider is construed narrowly. *Carafano*, 339 F.3d at 1123; *Stayart v. Yahoo!, Inc.*, 651 F. Supp.2d 873, 884 (E.D. Wis. 2009); *Atlantic Recording Corp. v. Project Playlist*, 603 F. Supp.2d 690, 699-700, 701 (S.D.N.Y. 2009). In suggesting that Forte is an information content provider, plaintiffs never specify content that Forte allegedly provided (other than hidden code, an issue addressed below). These vague hints are not even sufficient to survive a motion to dismiss on immunity grounds under *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), much less concrete enough to justify a TRO.

Indeed, throughout the complaint, as in the March 2 pre-litigation petition, plaintiffs acknowledged that the disparaging postings of which they complain were posted by third-party, anonymous posters whom they seek to identify. Only after they decided to sue Forte personally did they change their tune, making vague references to content allegedly provided by Forte. But even

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<sup>5</sup>See also *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008); *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018, 1026 *et seq.* (9th Cir. 2003); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006); *Donato v. Moldow*, 865 A.2d 711(N.J. Super. 2005); *Austin v. CrystalTech Web Hosting*, 211 Ariz. 569, 569 (Ariz. 2003); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001); *Doe v. AOL*, 783 So. 2d 1010, 1013-1017 (Fla. 2001).

in that regard, their papers never identify any **specific** content provided by Forte, not to speak of providing admissible evidence showing that specific comments were authored by Forte. But an injunction against speech, even if permissible, must be narrowly tailored to bar only those statements conclusively determined to be unlawful and hence not constitutionally protected. *CPC Int'l v. Skippy, Inc.*, 214 F.3d 456, 463 (4th Cir. 2000); *Anheuser-Busch v. Balducci Pubs.*, 28 F.3d 769, 778 (8th Cir. 1994); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982). Because there is no such evidence here, the TRO cannot be extended in **any** respect.

In arguing against the application of section 230, plaintiffs cited *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), for the proposition that section 230 does not bar a breach of contract claim. Mem. 5. But although plaintiffs made some arguments about the significance of Forte's Terms of Service, plaintiffs have not pleaded any claims for breach of contract, and in any event courts consistently **refuse** to allow claims by the targets of content posted by another on the servers of a section 230 provider based on the failure to remove that content as allegedly required by Terms of Service. *Goddard v. Google, Inc.*, 640 F. Supp.2d 1193, 1199-1201 (N.D. Cal. 2009); *Noah v. AOL Time Warner*, 261 F. Supp.2d 532 (E.D. Va. 2003), *aff'd for reasons stated by district court*, 2004 WL 602711 (4th Cir. 2004). Indeed, *Barnes v. Yahoo!* itself did not enforce Yahoo!'s Terms of Service — it only held that a specific promise to the plaintiff in that case, that it would remove offensive content about her, made after a local television station was set to run a story on the controversy, was enforceable through promissory estoppel because Barnes stopped pursuing her media strategy in reliance on Yahoo!'s promise. There is no such promise and no such reliance here.

Finally, plaintiffs argue that Forte is not immune from suit on all of its causes of action because it has pleaded three supposed intellectual property claims — right of publicity, trademark dilution, and common-law misappropriation of trademark. We explain in the next section of this

brief why Houlihan's claims do not justify a TRO on their own terms, but for the present section, the important point is that these three claims are not intellectual property claims at all. The gist of Houlihan's objection is to the impact on its business reputation, in that its potential customers and the friends and relations of its staff think less of it and them, and hence are less likely to do business with them. But as the First Circuit held in *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007), "any injury to [Houlihan Smith] ultimately arises from its being criticized on the [800Notes] site. . . . [W]hile such an allegation might be relevant to a defamation claim, it is not determinative of whether [Houlihan's] allegations can support a trademark claim. **If the injury alleged is one of critical commentary, it falls outside trademark law, whether the criticism is warranted or unwarranted.**" *Id.* at 423 (emphasis added). Just as a defamation plaintiff cannot evade the strictures of the First Amendment by changing the name of the tort, *Hustler v. Falwell*, 485 U.S. 46 (1988), a defamation plaintiff may not evade the limits of section 230 by claiming that an injury to reputation is damage to intellectual property. Indeed, if a defamation plaintiff could escape the limits of section 230 immunity by adding a trademark count (if the plaintiff were a business) or a right of publicity count (if the plaintiff were an individual), then section 230 immunity would be a nullity in defamation cases, even though that is the very cause of action that prompted Congress to enact section 230 to protect the providers and users of interactive computer services. *Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997). In sum, plaintiffs have not shown that they can surmount Forte's section 230 immunity; hence, their TRO should not be extended.<sup>6</sup>

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<sup>6</sup> Although plaintiffs cite a district court decision and a treatise for the proposition that the right of publicity is an intellectual property claim, TRO Mem. 4, the Supreme Court consistently called it a tort in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).



**D. Neither the Law nor the Evidence in the Record Justifies a TRO Based on Plaintiffs' "Intellectual Property" Claims.**

Even if plaintiffs' claims were truly "intellectual property" claims instead of just re-labeled defamation claims that are subject to Forte's section 230 immunity, plaintiffs neither have any legally tenable trademark or right of publicity claims, nor have they submitted any evidence justifying a prior restraint based on those claims.

**1. Plaintiffs' Claims Based on Forte's Supposed Use of Houlihan's or Its Staff's Names in Title Tags, Meta Tags, or Other Hidden Code Are Both Factually False and Legally Insufficient to Support the Prior Restraint.**

Plaintiffs' main basis for charging Forte with trademark and right of publicity violations is that she allegedly placed either the names of Houlihan and its staff, or derogatory characterizations of Houlihan and its staff, in the title tags, description meta tags, and other hidden code on her web pages. These claims cannot support extension of the TRO factually or legally.

First, there is no admissible evidence supporting plaintiffs' arguments in this regard. There are, to be sure, allegations on these subjects in plaintiffs' verified complaint, but the allegations are largely made on information and belief, and to the extent that they purport to be made on personal knowledge, there is nothing in plaintiffs' verifications that shows that they have any personal knowledge or expertise about how to read HTML code. The complaint was verified by investment bankers, after all, not computer experts or software writers.

Moreover, Forte's affidavit, exhibits to her affidavit, and indeed, exhibits that **plaintiffs** attached to their own papers and to correspondence with defendants' counsel, show that their claims are factually false. Title tags and description meta tags can be found at the beginning of the source code of any web page, after the HTML code "<title>" and "<meta name='description' content=''", respectively. Forte Aff. ¶ 22. Forte attached such source code to her own affidavit, and plaintiffs

attached such source code to the pre-discovery lawsuit that they filed against Forte on March 2; in every one of those documents, the source code reveals that **none** of the title tags or description meta tags contains either Houlihan's name, nor the name of any staff member, nor any of the derogatory content posted by the users of Forte's web site. *Id.* ¶¶ 22-23 and Exh. K, L; Levy Aff. Exh. Q.

Plaintiffs sought to bolster their intellectual property claims by citing Google search results and reasoning backwards that, because Houlihan's name and some of the derogatory terms appeared in the search results, it must have been Forte's hidden code that put them there. Complaint ¶¶ 32, 35. But the complaint never makes the causal connection between the hidden code and the results — it never alleges any basis for believing that Google always uses hidden code for the text shown in its search results. To the contrary, as Forte's affidavit shows, ¶ 24, Google says only that it “sometimes” uses the contents of a description meta tag as the text in search results. Nor have plaintiffs provided any reason to believe that the two officials who verified the complaint — both of them investment bankers — have any expertise to testify about HTML code and what affects Google search results. Moreover, a review of documents provided by plaintiffs themselves shows that the same page shows up with **different** contents in the search result, depending on what search strings were used. Forte Aff. ¶¶ 25-27 and Exh. L; *see also* Levy Affidavit ¶ 6 and Exh. S (Google search strings for different search terms show same pages with different snippets excerpted). These documents demonstrate that the Google's search results include **text** from the underlying pages that is relevant to the search terms, not the title tags or description meta tags. *Id.*

Moreover, even if plaintiffs' claims based on the hidden code had a factual basis, the claims would fail as a matter of law. Just as courts hold that the domain names for gripe sites (or even fan sites) about a trademark holder may use the trademark in the domain name, *Utah Lighthouse Ministry v. Foundation for Apologetic Information & Resch.*, 527 F.3d 1045 (10th Cir. 2008);

*Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003), so too may hosts of “gripe sites” place a trademark in the meta tags as a way of announcing to search engines and their users, “Here is a web site that has something to say about the trademark holder.” *Gregerson v. Vilana Finacial*, 2006 WL 3227762 (D. Minn., Nov. 7, 2006) *J.K. Harris & Company v. Kassel*, 253 F. Supp. 2d 1120, 1127 (N.D. Cal. 2003); *Bihari v. Gross*, 119 F. Supp.2d 309, 321-324 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp.2d 1161, 1165 (C.D. Cal. 1998). *Accord North Am. Med. Corp. v. Aciom Worldwide*, 522 F.3d 1211, 1224 n.10 (11th Cir. 2008) (case cited by plaintiffs to support meta tag claim distinguishes use of trademark in tags for site that explicitly discusses trademark holder); *see also Trans Union v. Credit Research*, 142 F. Supp.2d 1029, 1039-1040 (N.D. Ill. 2001) (defendants could use plaintiff’s mark in meta tags for site on which defendants sold products derived from plaintiff). Thus, plaintiffs’ argument about the hidden code does not support extension of the TRO.

**2. The User Comments Neither Dilute nor “Misappropriate” Plaintiffs’ Marks, nor Violate the Right of Publicity of Any of Plaintiffs’ Staff.**

Plaintiffs also apparently contend that the user comments themselves dilute plaintiffs’ marks, and therefore that section 230 does not immunize Forte from liability for allowing those comments to remain on her web site. This argument is fallacious.

There are two forms of dilution. The first is “blurring,” which means that the use of the mark hurts the “distinctiveness” of the mark as referring only to one source. *Illinois High School Ass’n v. GTE Vantage*, 99 F.3d 244, 247 (7th Cir. 1996). For example, nobody is likely to be confused about whether Google is the maker of an heavy truck called the “Google truck,” but allowing a truck manufacturer to use that brand name could lessen the uniqueness of the “Google” name that associates only the (ever-expanding) product-line offered by the company from Mountain View,

California with that company. However, using a company's trademark to identify it as a subject of criticism, does not "blur" the mark; if anything, it reinforces the association between the trademark and its owner. *Wham-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp.2d 1254, 1262 (N.D. Cal. 2003); 6 McCarthy on Trademarks and Unfair Competition § 31:155 (4th ed. 2010).

Therefore, if there is any trademark claim to be advanced here, it must be a claim for "tarnishment." But applying tarnishment theory here fails for several reasons. First, tarnishment consists of displaying the mark in unsavory circumstances (such as using it on a pornographic movie or poster), or using it as a mark to identify shoddy goods. The use of a mark "to criticize or to ridicule plaintiff's product or its image is not actionable under an antidilution statute, either state or federal." 4 McCarthy on Trademarks and Unfair Competition § 24:90 (4th ed. 2010). "If the antidilution statute were construed as permitting a trademark owner to enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct." *Id.*, quoting *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987) (First Amendment would bar such application of state dilution statute).

Moreover, as amended in 1998, the language of the Illinois anti-dilution statute does not extend to tarnishment claims. Before 1998, the statute allowed relief "if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark." 765 ILCS 1035/15, quoted in *Planet Hollywood (Region IV) v. Hollywood Casino Corp.*, 80 F. Supp.2d 815, 902 (N.D. Ill. 1999). But the new version of the statute, 765 ILCS 1036/65, eliminated the phrase "injury to business reputation," and now allows relief only if the defendant "causes dilution of the distinctive quality of the mark." The significance of this change is shown by Justice Stevens' opinion for the Court in *Moseley v. V Secret Catalogue*, 537 U.S. 418, 432-433 (2003), which

questioned whether the federal anti-dilution statute applied to tarnishment because that statute, unlike many state statutes, included no reference to “business reputation.” Congress promptly responded by amending the federal anti-dilution statute to include “blurring by tarnishment,” 15 U.S.C. § 1125(c). Illinois’ amendment, by contrast, moved the **state** statute in precisely the opposite direction, eliminating the reference to business reputation. Nor have we found a single Illinois state-court case since 1998 applying the state anti-dilution statute to support a claim of tarnishment. Consequently, because plaintiffs assert that they are relying only on **state** trademark law to support the TRO, DN 12, 4 n.1, they cannot make any dilution claim here.

Nor do plaintiffs have any viable right of publicity claims. First, the Illinois right of publicity statute (“RPA”) gives rights only to **individuals**, 765 ILCS 1075/10, but here corporate entities are the only plaintiffs. To be sure, the RPA allows authorized parties to enforce the right of publicity, 765 ILCS 1075/20, but the record shows only that Andrew N. Smith has authorized plaintiffs to enforce **his** right of publicity. Smith Affidavit ¶ 18. Plaintiffs lack standing to bring this claim on behalf of anybody else. Second, the right of publicity is a right to decide “whether and how to use an individual’s identity for commercial purposes,” 765 ILCS 1075/10 — that is, for the purpose of selling goods and services. None of the statements on the web sites uses Smith’s name to promote the sale of goods or services; they use his name to say why the speakers disapprove of him. Plaintiffs argue that Forte’s commercial use is shown by the fact that the site carries advertising. TRO Mem. 19. But if this were so, the Chicago Tribune would be guilty of “commercial exploitation” of Rod Blagojevich’s right of publicity every time it ran a letter to the editor savaging him for corruption, because the Tribune carries advertising and sells copies. Just as “noncommercial use” may be found in a dilution case where the underlying speech is non-commercial, even though the speech is contained in something that is sold, *Mattel v. MCA Records*, 296 F.3d 894, 905-907 (9th Cir. 2005),

so the criticisms that Forte's users have articulated are not "commercial" just because they appear on a web site that carries advertising. Third, the RPA may not be used to suppress criticism, *Hoffman v. Capital Cities/ABC*, 255 F.3d 1180 (9th Cir. 2001), *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), for the same reason that trademark dilution law cannot be used to make criticism actionable, as discussed above.

Plaintiffs also have no claim for common law misappropriation of trademark. Under Illinois law, "misappropriation of trademark" must meet the same test as a statutory claim of trademark infringement, including a showing that "the infringer's use of a similar mark creates a 'likelihood of confusion' on the part of the consuming public." *Tarin v. Pellonari*, 253 Ill.App.3d 542, 551, 625 N.E.2d 739, 746 (1 Dist. 1993). And the confusion that matters is confusion about the **source** of the goods or services in question. *Thompson v. Spring-Green Lawn Care Corp.*, 126 Ill.App.3d 99, 113, 466 N.E.2d 1004, 1015 (1 Dist. 1984). Here, plaintiffs neither allege nor prove likelihood of confusion about source, and there is no possibility of such a showing. No consumer visiting Forte's web pages about calls from 312-499-5900 would imagine that the pages are sponsored by plaintiffs; nor would anybody looking at the Google search results attached to plaintiffs' papers think that clicking on those links would take them to Houlihan's own web pages.<sup>7</sup>

Finally, even if state trademark or right of publicity law applied to the facts and claims for injury to reputation on which plaintiffs' TRO turns, the use of the Houlihan name, and of the names of its staff members, is nominative fair use — the use of the names to identify the owners of those

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<sup>7</sup>Because infringement claims under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), are sometimes described as "common law trademark" claims, and because the complaint does not limit the source of the common law being invoked to Illinois law, Forte removed in part based on federal question jurisdiction. "Likelihood of confusion" about source is a necessary element of a section 43(a) claim. Because plaintiffs disclaim any reliance on federal law to support the extension of the TRO, DN 12 at 4 n.1, we do not discuss federal law any further in this memorandum.

names as the subject under discussion. *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005); *Ty, Inc. v. Publications Int'l*, 2005 WL 464688 (N.D. Ill. Feb. 25, 2005); *World Impressions v. McDonald's Corp.*, 235 F. Supp.2d 831, 842-843 (N.D. Ill. 2002). Consequently, none of plaintiffs' "intellectual property" claims justifies extending the TRO.

**E. Plaintiffs' Other State-Law Claims Do Not Support the TRO Against Forte.**

Even if section 230 did not immunize Forte from suit and from liability on plaintiffs' state law claims, and even if the broad relief was not a prohibited prior restraint, the order should not be extended.

First, statements are not defamatory if they are rhetorical hyperbole or employed only in a loose, figurative sense. *Madison v. Frazier*, 539 F.3d 646, 654 (7th Cir. 2008). Some of the derogatory statements on which plaintiffs are suing are factual in nature, such as the statement that an unidentified ex-employee of plaintiffs "was an ex-con who ran a commodity pool scam . . . and spent 51 months in a federal 'condo.'" But the use of the word "scam" by itself is not necessarily actionable — it depends on the context of the rest of the statement. *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996); *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987). Some of the statements identified in the complaint use the word "scam" more vaguely, as rhetorical hyperbole that is not actionable. *See also Lauderback v. ABC*, 741 F.2d 193, 197 (8th Cir. 1984) ("broad brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion").

Second, some of the statements cited in the complaint seem to be taken out of context, and in context, they appear to be statements of opinion based on disclosed facts, which are not defamatory unless the underlying facts are false and defamatory. *Stevens v. Tillman*, 855 F.2d 394, 400 (7th Cir. 1988). For example, the complaint cites a statement from "Caitlin," quoting the words,

“they were not in the business of doing anything other than ripping us off.” DN 6, at 14. But viewing the entire comment from which these words were excerpted (which is quoted in the footnote below), shows that this commenter was reporting on what was said between some of plaintiffs’ representatives and Caitlin’s company.<sup>8</sup> Plaintiffs’ affiants nowhere dispute the concrete facts on which Caitlin’s opinion was based.

Third, it is doubtful that the officials who verified the complaint had personal knowledge of the falsity of each and every statement they attack. For example, the officials who verified the complaint could not have personal knowledge about the conversation discussed by “Caitlin” unless they were among the conversants. And in the statement discussed on the previous page, about the former employee who was allegedly incarcerated, do they really have **personal** knowledge that **none** of their **former** employees has **ever** been in jail? Similarly, Botchway and Smith both aver, ¶ 12, that no employee has ever lied to a customer or to anyone else – how could they possibly have personal knowledge of that?

Fourth, several of the statements cited in the complaint were placed on Forte’s web site more than one year or even more than two years before the complaint was filed on April 16, 2010, but the statute of limitations for defamation in Illinois is one year. 735 ILCS 5/13-201. Yet the TRO

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<sup>8</sup>“I found their demeanor strange from the beginning. I understand the need to mask their intentions from ‘gossipy’ administrative assistants, but the questions they asked and their tone, as well as their unwillingness to review our due diligence materials prior to their coming here and meeting our team face to face, indicated to me that they were not in the business of doing anything other than ripping us off. We have been in discussions with several other investment banking groups, none of whom charge upfront fees and all of whom agreed to review of due diligence prior to a meeting.” DN 6-1, at 8. Similarly, the statement by “Not quite right” is taken out of context: only the words “Houlihan clearly is a scam” are quoted in the complaint, *id.*, but in context this Doe was just replying to several previous commenters, one of whom complained about government subsidies that keep investment banks in business; Doe then added her own observations that showed she was just expressing her opinion: “but you can’t put them in the same class as Goldman or JP Morgan. Not all investment banks are run like angry telemarketing offices.” DN 6, at 58.



enjoins the continued posting of each and every one of these statements, even though they are not actionable. And the TRO is even more overbroad than that — it forbids Forte to leave **any** statements about Houlihan or any of its employees on her web site, not matter how true and even favorable to Houlihan. But, as discussed above at page 14, even when a violation is found and may be enjoined, the injunction should range no more broadly than the illegal conduct found.

Fifth, plaintiffs' proofs in support of their TRO extension motion also fail because there is no evidence that Forte posted the statements, or left them on the web site, with actual malice — knowledge of falsity or reckless disregard of probable falsity. Because Houlihan Smith's allegations make clear that it is a public figure, the Court cannot find Forte liable for defamation without clear and convincing evidence of actual malice. *Anderson v. Liberty Lobby*, 477 U.S. 242, 244 (1986). Plaintiffs apparently based their claim of actual malice on the fact that they sent Forte an affidavit; hence, they say, she "knows" that the statements are false. But Forte knows only that plaintiffs claim falsity; she has no way of finding out what facts the **posters** may have to support their assertions. Her practice is to let the marketplace of ideas decide these questions; or, in the alternative, she suggests to those offended by comments that they sue the posters, obtain their identities under the standard *Doe* procedures, and then litigate the issues with those who have made the statements. Her policy is to take down statements when falsity is established by a judgment in a contested proceeding in a court with jurisdiction. Forte Aff. Exh. H. There is no proof of actual malice on her part.

Several other state-law claims are insufficient on the face of the complaint. Plaintiffs allege a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* ("ICFA"), which allows one who is injured by fraudulent conduct or deceptive advertising "in the conduct of any trade or commerce" to sue for damages and injunctive relief. Several elements of the ICFA cause of action are absent here. First, Forte's web site does not advertise her

goods or services; it is a message board that allows members of the public to discuss telephone callers. Although the sites carry advertisements, the presence of such advertisements do not make the site commercial for the purposes of the ICFA, any more than a newspaper's advertisements makes it engaged in trade or commerce under the ICFA. On Houlihan's theory, any business that was unhappy about its portrayal in a newspaper article would have a cause of action against the newspaper under the ICFA, which is surely not what the legislature intended. Perhaps a newspaper could be sued under the ICFA if it attracted advertising by misstating its circulation figures; but figures in the news cannot sue a newspaper under the ICFA simply because the newspaper carries ads. Put another way, although defendants' web site has advertising, it is not the **advertising** that is alleged to violate the ICFA, and the Act applies only to the advertising.

Moreover, several decisions of the Illinois Supreme Court require that, to properly plead the element of proximate causation in a private cause of action for deceptive advertising under the ICFA, a plaintiff must allege that he was, in some manner, deceived. *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 153-155, 776 N.E.2d 151, 162-164 (2002), *citing Zekman v. Direct American Marketers*, 286 Ill. App.3d 462, 675 N.E.2d 994 (1 Dist. 1997), *rev'd on other grounds*, 182 Ill.2d 359, 695 N.E.2d 853, 860-861 (1998). Indeed, plaintiffs must allege and prove "the defendant's **intent** that the plaintiff rely on the deception." 201 Ill.2d at 149, 776 N.E.2s at 160. The complaint does not allege, and plaintiffs certainly do not prove, either that Houlihan was deceived by statements about it on Forte's web site or that Forte intended to deceive Houlihan.

Yet another requirement for an ICFA claim is that the plaintiff must show how the allegedly deceptive activity implicates consumer protection concerns. As the Seventh Circuit stated in *Speakers of Sport v. ProServ*, 178 F.3d 862, 864 (7th Cir. 1999),

while a competitor is permitted to bring suit under the Act as a representative of the

consumer interest (an example would be a case in which a multitude of consumers had been deceived by a competitor and their individual losses were too small to warrant the costs of suit), he must “prove, by clear and convincing evidence, how the complained-of conduct implicates consumer protection concerns.” [citations omitted] No effort at proving this was made here. The only consumer in the picture is Rodriguez, and the allegation that he was injured is made by Speakers rather than by him.

178 F.3d at 868.

The verified complaint does not come close to alleging any harm to consumers, and in any event the TRO cannot be extended based on the ICFA because Houlihan has not offered clear and convincing evidence showing how **consumers** are injured by the alleged violation. Indeed, Houlihan is worried about the impact on its own reputation, not deception of consumers.

Finally, Houlihan claims that Forte has violated the Uniform Deceptive Trade Practices Act (“DTPA”), 815 ILCS § 510/1 *et seq.* To the extent that this statute is invoked as another label for trademark claims, it fails for the same reasons that those claims fail. To the extent that Houlihan invokes the DTPA as a false advertising claim, the DTPA does not apply for reasons similar to the flaws in the ICFA claim: Even if there is advertising on the site, it is not the advertising that is alleged to be deceptive; and the DTPA applies only to complaints that are based on “**consumer** confusion or deception,” *Menasha Corp. v. News America Marketing*, 238 F. Supp.2d 1024, 1035 (N.D. Ill. 2003) (emphasis added), *aff’d*, 354 F.3d 661 (7th Cir. 2004), which is not proved here.

There is an additional flaw in the DTPA claim — the courts distinguish between product disparagement, which is barred by the DTPA, and disparagement of the producer, which is governed by defamation law. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983); *Allcare, Inc. v. Bork*, 176 Ill.App.3d 993, 1000-1001, 531 N.E.2d 1033, 1037-1038 (1 Dist. 1988). The Illinois courts have consistently resisted efforts to “blur the distinction between defamation and commercial disparagement” by characterizing the criticism of an company as product

disparagement under the DTPA. *Allcare, supra*, 531 N.E.2d at 1038, and cases cited there. In sum, there is no substantial claim here under the DTPA.

### CONCLUSION

The motion to extend the TRO or to grant a preliminary injunction should be denied. And, because Judge Dow's order extending the TRO for seven days makes the current motion one for a preliminary injunction (and because for the reasons discussed in this memorandum no preliminary injunction can be granted in any event), there is no reason to grant the expedited discovery that plaintiffs also seek.<sup>9</sup>

Respectfully submitted,

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<sup>9</sup>Judge Dow's order setting the briefing schedule also granted Forte leave to file an opposition brief up to 28 pages, the length of the state-court memorandum supporting the original TRO, DN 14. on which plaintiffs substantially rely to support extending that TRO. DN 10, at 3.

Attorneys for Defendants

May 3, 2010

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 3, 2010, I am electronically filing the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document will thereby be served on counsel for plaintiffs. I further certify that on this date a copy of this filing is being emailed to pro se defendant Jamon Silva, and that a copy will be mailed to him by first class mail, postage prepaid, to the following addresses:

Jamon Silva  
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Lexington, Massachusetts 02420  
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/s/ Paul Alan Levy