IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JOHN GIORDANO and
G & G ADDICTION TREATMENT, INC.

Case No. 3D11-707
Lower Case No. 09-68539

Appellants,

v.

DONNA ROMEO
and XCENTRIC VENTURES, LLC

Appellees.

On Appeal from the Circuit Court of the
Eleventh Judicial District, in and for
Miami-Dade County, Florida
The Honorable Peter Adrien, presiding

BRIEF OF PUBLIC CITIZEN AND ERIC GOLDMAN AS AMICI CURIAE SUPPORTING APPELLEE XCENTRIC IN SEEKING AFFIRMANCE

Lyrissa C. Barnett Lidsky
Florida Bar No. 0022373
University of Florida Fredric G. Levin
College of Law
Box 117625
Gainesville, Florida 32611
(352) 273-0941
lidsky@law.ufl.edu

Paul Alan Levy
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

June 17, 2011

TABLE OF CONTENTS

Table of Authorities.. ii

Interest of Amici Curiae. 1

ARGUMENT.. 3

I. THE LANGUAGE OF 47 U.S.C. § 230, AS CONSISTENTLY CONSTRUED BY BOTH STATE AND FEDERAL COURTS, FORBIDS THIS ACTION AGAINST XCENTRIC. 3

II. THE PURPOSES OF THE STATUTE, AND CONSIDERATIONS OF SOUND PUBLIC POLICY, ALSO SUPPORT AFFIRMANCE OF THE JUDGMENT.. 6

Conclusion.. 20

TABLE OF AUTHORITIES

CASES

Austin v. CrystalTech Web Hosting,
211 Ariz. 569, 125 P.3d 389 (2003).. 3

Barrett v. Rosenthal,
40 Cal. 4th 33, 146 P.3d 510 (2006). 7

Barron v. Florida Freedom Newspapers,
531 So. 2d 113 (Fla. 1988). 17

Ben Ezra, Weinstein & Co. v. America Online,
206 F.3d 980 (10th Cir. 2000).. . . . . 3, 5

Carafano v. Metrosplash.com. Inc.,
339 F.3d 1119 (9th Cir. 2003).. . . . . 3, 6

Chase Nat'l Bank v. Norwalk,
291 U.S. 431 (1934). 4

Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc.,
519 F.3d 666 (7th Cir. 2008).. . . . . 3, 6

Doe v. AOL,
783 So. 2d 1010 (Fla. 2001). 3

Doe v. Friendfinder Network,
540 F. Supp. 2d 288 (D.N.H. 2008). 3

Donato v. Moldow,
374 N.J. Super. 475, 865 A.2d 711 (2005). 3

Gertz v. Robert Welch,
418 U.S. 323 (1974). 15

Green v. America Online,
318 F.3d 465 (3d Cir. 2003). 3, 6

Hay v. Independent Newspapers,
450 So. 2d 293 (Fla. App. 2 Dist. 1984). 15

Marczeski v. Law,
122 F. Supp. 2d 315 (D. Conn. 2000). 3

Miami Herald Public Co. v. Tornillo,
418 U.S. 241 (1974). 18

Moore v. City Dry Cleaners & Laundry,
41 So. 2d 865 (Fla. 1949). 5

New York Times v. Sullivan,
376 U.S. 254 (1964). 15

Nixon v. Warner Communications,
435 U.S. 589 (1978). 17

Schneider v. Amazon.com,
31 P.3d 37 (Wash. App. 2001). 3

Shiamili v. Real Estate Group of New York,
— N.E.2d —, 2011 WL 2313818 (N.Y. June 14, 2011). 3

Universal Communications Systems v. Lycos,
478 F.3d 413 (1st Cir. 2007). 3

Weiss v. Weiss,
5 So. 3d 758 (Fla. Dist. Ct. App. 2009). 5

Zeran v. America Online,
129 F.3d 327 (4th Cir. 1997). 3, 4, 7

CONSTITUTION AND STATUTES

First Amendment. 2, 16

28 U.S.C. § 4102(c). 7

47 U.S.C. § 230. . . . . *passim*

47 U.S.C. § 230(c)(1). 3

47 U.S.C. § 230(3)(3). 3, 5

WEBSITES

http://www.ripoffreport.com/ healthcare-centers/g-g-holistics-addict /g-g-holistics-addiction-trea-y622f.htm. 1

http://www.ripoffreport.com/remove-a-report /vip-arbitration-program/ed-magedson-explains-7ad2e.htm. 13

http://www.ripoffreport.com/CorporateAdvocacyProgram/Why-Corporate -Advocacy.aspx. 14

John Giordano on Big Idea with Donny Deutsch, http://www.youtube.com/watch?v= ond7ueD9AZc (minutes 5 to 7). 19

After Donna Romeo had a bad experience at John Giordano's drug rehabilitation clinic, she wrote a scathing review on the "Ripoff Report" web site and included a single mistake. Assuming that the John Giordano whose conviction she found reported online was the same individual as clinic's founder, she said that Giordano was a "convicted fellon." [sic] http://www.ripoffreport.com/health care-centers/g-g-holistics-addict/g-g-holistics-addiction-trea-y622f.htm. Trying to force the removal of Romeo's criticism from the Internet,Giordano sued both Romeo and Xcentric Ventures, the operator of Ripoff Report. Giordano recognized that Congress enacted 47 U.S.C. § 230 to give absolute immunity to the operators of interactive web sites like Ripoff Report, leaving them discretion to remove or retain allegedly offensive content. But Giordano went through the motions of securing an injunction against Romeo, Romeo consented because her main interest was to avoid paying damages. Giordano now claims that, having secured an injunction against Romeo, he may enforce the injunction against Xcentric, on the theory that Congress barred legal relief but not equitable relief. But the text of the statute is squarely against Giordano, and public policy is best served by preserving the discretion that Congress accorded to interactive web site operators. Consequently, the judgment of the Circuit Court should be affirmed.

INTEREST OF AMICI CURIAE

Public Citizen, Inc., is a public interest organization based in Washington,

D.C. It has more than 225,000 members and supporters nationwide, about 14,000 of them in Florida. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debates. *See* http://www.citizen.org/litigation/briefs/internet.htm. Its experience representing consumers who criticize companies and politicians has persuaded Public Citizen that the broad discretion afforded interactive web site operators best preserves consumers' right to criticize; it has represented the operators of several consumer-oriented web sites in opposing litigation seeking to circumvent their section 230 immunity. Public Citizen also hosts blogs, such as Consumer Law and Policy, http://pubcit.typepad.org, and CitizenVox, http://www.citizenvox.org/, that allow viewers to post comments. Consequently, Public Citizen has an interest in the case on that basis as well.

Eric Goldman, Associate Professor of Law at the Santa Clara University School of Law and Director of its High Tech Law Institute, is the nation's leading scholar on section 230. His Technology & Marketing Law Blog, blog.ericgoldman.com, analyzes all cases related to section 230, and has repeatedly been listed in the ABA Journal's "Blawg 100." Before teaching, Professor Goldman was General Counsel of Epinions, a consumer review site.

ARGUMENT

I. THE LANGUAGE OF 47 U.S.C. § 230, AS CONSISTENTLY CONSTRUED BY BOTH STATE AND FEDERAL COURTS, FORBIDS THIS ACTION AGAINST XCENTRIC.

A federal statute, section 230 of the Telecommunications Act of 1996, 47 U.S.C. § 230 (also called section 230 of the Communications Decency Act), makes Xcentric absolutely immune from the filing of this action. Section 230(c)(1) states:

> No 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.

Section 230(e)(3) 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.

The Florida Supreme Court held that these provisions immunize web hosts from tort claims based on materials placed on their sites by third persons. *Doe v. AOL*, 783 So. 2d 1010, 1013-1017 (Fla. 2001). Every state and federal appellate court system to reach the question agrees with the Supreme Court on this point.[1]

---

[1] *E.g.*, *Chicago Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Universal Communications Sys. v. Lycos*, 478 F.3d 413 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465, 468 (3d Cir. 2003); *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Doe v. Friendfinder Network*, 540 F. Supp.2d 288, 294-295 (D.N.H. 2008); *Shiamili v. Real Estate Group of New York*, —

Giordano argues that injunctive relief can be awarded without running afoul of section 230. But the operator of an interactive computer service ("ICS") is no less being treated as the "publisher . . . of . . . information provided by another" when the action seeks injunctive relief instead of damages. The trial judge's remarks during one of the hearings below made clear his recognition that an injunction was intended to prevent an ICS operator from performing certain functions of a publisher. Xcentric's lawyer asked the judge whether his injunction allowed Xcentric to simply redact Romeo's post to eliminate the parts that the judge had decided were false—the reference to Giordano as a "convicted fellon" as well as the contention that his clinic illegally dispenses medication, December 28 Tr. at 85-86—while leaving the remaining material, including a variety of criticisms of the way that Romeo had been treated as a patient. Judge Adrien refused, saying that such editing would be

> getting into the business of drafting someone's statement to make it say something other than what they wanted it to say. . . . If a lady puts a statement on and it has inaccurate facts in it, remove the statement. For me to go now and craft out what should actually go in or out makes me the one that is actually changing whatever idea [it] was that she wanted to post and making it something else. I think the best thing, especially given the fact that the Court has determined that he

---

N.E.2d —, 2011 WL 2313818 (N.Y. June 14, 2011); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 394, 211 Ariz. 569, 569 (2003); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711(2005); *Marczeski v. Law*, 122 F. Supp.2d 315, 327 (D. Conn. 2000); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001).

> is not a criminal and that that is part of the posting, just remove the posting.
>
> Transcript of January 3 hearing, at 57, 58.

What Judge Adrien is discussing here are publisher functions—deciding whether a report is salvageable even though a mistake has been discovered, and if so how the report should be salvaged—and it is precisely the function that Congress decided to allow ICS operators to perform without facing liability, or even the burdens of litigation, through the enactment of section 230. *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir.1997) ("[L]awsuits 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—are barred . . .").

Moreover, section 230(e)(3) forbids a "cause of action" from being "brought" against the operator of an interactive computer service, thus making the operator immune from suit as well as immune from liability. If anything, the protections against injunctive relief are even stronger than the protections against legal relief, because Florida, like several other jurisdictions, follows the longstanding principle that "equity will not enjoin a libel." *Moore v. City Dry Cleaners & Laundry*, 41 So. 2d 865, 873 (Fla. 1949); *Weiss v. Weiss*, 5 So. 3d 758, 760 (Fla. Dist. Ct. App. 2009).

Moreover, the statute bars "liability" from being "imposed" under any law

that is inconsistent with section 230. An injunction is a form of relief against a defendant who has been determined to have been liable for a legal wrong; it cannot issue against "persons who act independently and whose rights have not been adjudged according to law." *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 437 (1934). Because Xcentric was not found liable—nor could it have been, given Xcentric's immunity—Xcentric could not be subjected to an injunction. Indeed, a number of the cases applying section 230 involved claims for injunctive relief as well as damages, and none of those cases dismissed the damages claims while allowing the claims for injunctive relief to stand. *E.g.*, *Ben Ezra,* 206 F.3d at 983; *Green*, 318 F.3d at 470.

Consequently, the language of the statute bars this action against Xcentric.

II. THE PURPOSES OF THE STATUTE, AND CONSIDERATIONS OF SOUND PUBLIC POLICY, ALSO SUPPORT AFFIRMANCE OF THE JUDGMENT.

The notion that a plaintiff who is unhappy about third-party material being posted may sue the ICS operator for injunctive relief runs counter to the design of Section 230. The statute was enacted because Congress recognized that ICS operators may host thousands or millions of statements. *Carafano*, 339 F.3d at 1123-1124. Generally speaking, ICS operators are paid very small sums for hosting services, or they offset the costs of hosting by selling advertising on the

site for pennies per page-view or per click. Not only can they not police the content in advance, but even when particular comments are challenged, it is unrealistic to expect the operators to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove or leave them posted, not to speak of hiring lawyers to litigate such cases. The cost of making intelligent assessments of the risks of litigation, not to speak of the cost of participating in the litigation, far outstrips the money that can be earned from hosting challenged comments. *Chicago Lawyers Committee*, 519 F.3d at 668-669.

The costs are no less if only an injunction is sought. If ICS operators could be subjected to the expense of litigation—wholly apart from the risks of being held liable for damages—the result is likely to be that as soon as any comment is challenged, the operator will remove it rather than take the risk of being dragged into the litigation. *See Zeran*, 129 F.3d at 331; *Barrett v. Rosenthal*, 40 Cal.4th 33, 146 P.3d 510, 524-525 (2006). Thus, without the protection of section 230, online speech would be subject to the heckler's veto—speech would likely be removed just because somebody objects to it, regardless of the merits of the objection.

And only critical speech is subject to such removal. Nobody threatens to sue over overstated online praise or undeserved online compliments. Section 230

thus protects the marketplace of ideas from consistent removal of one side of the debate, and protects consumers from a falsely one-sided portrayal of businesses and others that may, indeed, merit criticism. As a result, the powerful immunity provided to ICS operators has become a vital aspect of our system of free speech online—so central that when Congress enacted a ban on libel tourism last year, preventing the enforcement of foreign defamation judgments in the United States that would run afoul of our constitutional protections, it included the protection for ICS operators in that protection. 28 U.S.C. § 4102(c).

Moreover, once an injunction is issued forbidding an ICS operator to allow a given statement to remain on its web site, the operator risks further exposure given the possibility of being cited for contempt if, for example, somebody else deliberately posts that statement, or a very similar statement, on another page of its web site. Such a contempt proceeding could lead to additional legal expense to defend the contempt proceedings and even to the imposition of monetary contempt sanctions including attorney fees. Once faced with the prospect of contempt proceedings, ICS operators would have assess their exposure especially carefully when future statements that might violate the injunction are posted to their sites; they might even have to find a way to monitor their sites to avoid the risk of contempt proceedings. Yet section 230 was intended to protect ICS operators

from just that sort of consequences from possible postings. Consequently, it is important to web site operators to avoid injunctive relief even if they otherwise have no stake in whether a particular statement remains on their site or is removed.

Instead of subjecting ICS operators to suit over the removal of objectionable material, section 230 tells plaintiffs: sue the speaker, not the host. In that way, the litigation is filed against the party who is best situated to evaluate the circumstances about which she was speaking, and who has the greatest interest in defending her right to make the statements. If the speaker is found liable, then the court can assess damages against the wrongdoers. Additionally, if, unlike Florida, the jurisdiction allows an injunction against defamatory speech, the court can order the speaker to use her best efforts to remove the statement found to have been false and defamatory. Some ICS operators, in fact, empower their users to remove their own statements. Yelp, for example, which runs a review service about local businesses, leaves its members in charge of their own comments, so that they can remove them at will. Similarly, Facebook users and the owners of blogs on the Google and Typepad blogging platforms retain the power to remove any content that they post. If, therefore, such a user is subject to an injunction and the comment remains online, the user would be subject to contempt sanctions for violating the court's command to remove the comment.

Some ICS operators, however, do not leave control in the hands of the original speaker, but rather provide that, by posting a comment, the user gives the ICS operator a perpetual license to use and display the posted material. The fact that the user committed some wrong against the plaintiff in making the posting, and has been found liable for that wrong, does not give the plaintiff any right to force the ICS operator to give up its license to continue to display even content that has been determined by a court to have violated the plaintiff's rights.

In those circumstances, a poster who faces litigation over a comment, or who is subject to an injunction to remove specified comment, can submit a request for removal to the site's host. Some hosts will take down material on request from the posters, but many will not. They may demand a good reason for the removal, and they may be concerned about the possibility that posters may want to have a complaint removed for some reason other than recognition that what they said was false. For example, the target of criticism will threaten suit, and posters will remove or seek to remove the criticism because they can't afford to defend against a lawsuit. In those circumstances, maintaining a policy of not removing posts on request can both protect such posters against intimidation, and protect the marketplace of ideas against having valuable contributions removed from the public debate for spurious reasons.

Moreover, operators of interactive web sites pay attention to complaints about maliciously false statements posted to their web sites and often use their section 230 discretion to eliminate offensive matter. Web hosts compete for viewers, and some choose to compete by protecting their site's reputation for allowing only "responsible" commentary. Some hosts moderate comments by allowing them to be posted only after review by a human being, using that mechanism to screen out comments that seem irresponsible; other hosts monitor comments by providing "abuse" buttons for their users. And many hosts choose to remove comments that they deem abusive, sometimes because they are persuaded that a posting is both false and defamatory. Section 230 gives hosts the discretion to compete for viewers by scrutinizing all comments, by leaving all comments posted, or by various intermediate positions.

In amici's experience, hosts also vary enormously in their responses to the issuance of a court order to an alleged defamer. For some hosts, an order finding that a specific post is defamatory and ordering its removal will be a sufficient basis to take down the content no matter the circumstances attending the order. Many ICS operators will remove any statements found by a court to be improper, without second-guessing the court order in any way. But other hosts worry about the fact that it can be too easy for a wealthy individual or company that is the target of

critical speech to secure a court order even if the report is true (or is a nonactionable opinion). For example, the defendant may simply consent to a judgment, or fail to oppose its entry, recognizing that she simply cannot afford to defend herself and hoping that the plaintiff will not pursue further litigation at that point.

In this way, injunctive proceedings can produce the same problems of the heckler's veto as demands to ICS operators could produce without section 230. Thus, just as some hosts will not take down content just because the original poster asks the host to do so, some will not take down the content just because the original poster has consented to a court order requiring its removal. In jurisdictions without an effective statute protecting against SLAPP's—Strategic Lawsuits Against Public Participation—the critic has no way of efficiently financing the defense even of cases in which the criticisms were meritorious. ICS operators are entitled to recognize these financial realities in deciding how they should exercise their discretion under section 230.

Hosts also worry that sometimes a plaintiff may deliberately do very little to try to serve the defendants, and then seek a default judgment, using home court advantage to secure a ruling from a judge who wants to help a local lawyer or local company in litigation against a disgruntled individual, especially if the

alleged defamer is a far-away defendant. Or the plaintiff may deliberately file suit in a court that lacks personal jurisdiction or that is, in any event, too far away for the defendant to effectively mount a defense.

Thus, some hosts choose not to remove content that is the subject of a court order against an information content provider unless they are confident that the order was obtained under circumstances that reflect a considered decision that the content really did violate the plaintiff's rights. They may insist on satisfying themselves that the trial court had jurisdiction, or they may decline to act pursuant to orders obtained by default or by consent; only a case that is litigated on an adversary basis may satisfy such hosts. Or they may apply a variety of other tests of their own devising to determine whether to go along with a court order that is not, after all, binding on them.

Public Citizen itself takes such a stance regarding comments on its blogs. When Public Citizen learns that a court has ordered a member of the public to remove comments that she placed on a Public Citizen blog, it examines the underlying litigation to make sure that the court had personal jurisdiction of the defendant and that the order was the product of contested litigation and not just a default judgment.

Even Xcentric allows for the possibility that some process may be

sufficiently trustworthy to form a basis for the removal of critical comments. It offers an arbitration program whereby targets of criticism on Ripoff Report may submit their claims to arbitrators selected by Xcentric if they agree to abide by that arbitrator's determinations about whether specific comments are false; Xcentric also agrees to be bound. http://www.ripoffreport.com/remove-a-report/vip-arbitration-program/ed-magedson-explains-7ad2e.htm. Perhaps Xcentric accepts the judgment of such arbitrators because it is confident in the arbitrators it selects and in the process that it requires those arbitrators to follow, although the fact that Xcentric itself must be paid for the arbitration is troublesome. This procedure is another example of the discretion that section 230 gives ICS operators.[2]

---

[2]Ripoff Report also offers a "Corporate Advocacy Program" through which businesses can pay a tidy sum to be investigated by Xcentric's management. http://www.ripoffreport.com/CorporateAdvocacyProgram/Why-Corporate-Advocacy.aspx. If Xcentric's management determines that the business is committed to rectifying any problems, Xcentric will not remove the critical statements but it will bury the criticism in boilerplate praise. The boilerplate praise is also inserted into the description meta tags for each page about the business so that a Google search will show the praise rather than any criticism about its search results. In addition to a steep upfront charge, the business is required to make periodic payments to keep its status in the program.

There is at least a serious conflict of interest that could lead the judicious observer to be skeptical of claims that Xcentric conducts a dispassionate investigation into those who are paying to be investigated. Several litigants have tried to make the case that Xcentric's Corporate Advocacy Program is itself a ripoff, but their discovery efforts have come to naught. However, so far as Public Citizen is aware, there has never been any neutral audit of the Corporate Advocacy Program to verify Xcentric's characterization of its program. Consumers must take these concerns into consideration in assessing Ripoff Report's bona fides.

On the other hand, the facts of this case provide ample basis for cynicism about the process leading to Judge Adrien's injunctive relief against Xcentric. From the outset of the case, Giordano's litigation efforts, and the trial judge's orders, were addressed more to Xcentric than to Romeo, and were never intended to lead to damages or other relief genuinely directed against Romeo. Romeo consented to the entry of a preliminary injunction requiring her to ask Xcentric to remove her criticism of Giordano and his substance abuse clinic, but in consenting to the injunction she was careful not to admit to any personal liability for the statements in question. September 14, 2010 Tr. at 22. She acknowledged that she had been mistaken in concluding that the John Giordano whose felony conviction she had found online was the same John Giordano who ran the substance abuse clinic where she had been treated, *id.* at 19-20, but she carefully couched that concession in terms that protected her against liability for defamation. *Id.* at 22 (agreement to have injunction entered was "without admissions and without findings"). Judge Adrien also said that, in approving the agreed injunction requiring Romeo to seek removal of the statements, he was not making any findings. *Id.* at 15, 22. Romeo never admitted that she had even been negligent in that error, which would be required to find her liable for defamation of a private figure, *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974); *Hay v. Independent*

Newspapers, 450 So.2d 293, 296 (Fla. App. 2 Dist. 1984), not to speak of conceding that she published the accusation with reckless disregard for probable falsity of the statement, which would be required for liability for defamation of a public figure. *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964). And, indeed, the finding of falsity was not made after a trial on the merits; Giordano submitted an affidavit and testified at a preliminary injunction hearing, September 14 Tr. at 6-8, while Romeo's side of the story was presented by an offer of proof from her lawyer. *Id.* at 17-21. In effect, Romeo went along with the entry of an injunction against herself without conceding actual liability that could be used to impose any other relief against her, such as damages. Thus, the order against Xcentric was not even based on a finding that Romeo herself was liable for defamation, no less a finding that Xcentric had made false statements with the requisite degree of negligence or actual malice. Even apart from the section 230 issue, the absence of findings on these key factual issues poses a serious issue about whether Judge Adrien's order was consistent with the First Amendment.[3]

Even the preliminary injunction against Romeo was never really directed at her. Everybody present at the hearing—the judge, Giordano's lawyer, and Romeo's lawyer—recognized that the injunction against Romeo was going to be

[3]Even a finding that Romeo posted the comments with actual malice would not mean that Xcentric acted with actual malice in allowing the comments to be posted.

ineffective because Romeo herself could not remove her own statements from the Ripoff Report web site, but could only ask Xcentric to do so. June 14 Tr. at 11. The sole purpose of that injunction was to set up a later effort to obtain an injunction against Xcentric, September 14 Tr. at 23, or, in Judge Adrien's words "to jump through the hoops" to set up an injunction against Xcentric. June 24 Tr. at 11. Because there was never a finding of liability, even against the information content provider, or a proper basis for a finding of such liability, there is no good reason why the ICS operator should be subject to an injunction.

Moreover, just as Florida law provides that "equity will not enjoin a libel," *supra* at 5, there is reason to question whether the marketplace of ideas is best served by an injunction requiring removal of Romeo's accusation. Perhaps it would be better for the historical record to reflect that Donna Romeo advanced a number of accusations against John Giordano, some of which were later determined to have been false. Publication of those facts could help the public assess the credibility of the other things that Romeo said about Giordano, and indeed they could stand as a permanent record about Romeo's credibility generally. Such a result might well not be what Romeo herself would prefer, but it might be useful as a form of public education. Xcentric created this sort of record after Judge Adrien issued his injunction—it took down the original report but

replaced it with a lengthy account of the litigation, including a description of the accusations over which suit had been filed.

Indeed, it is unrealistic for a plaintiff like Giordano to expect that his libel suit will eliminate any public record of Romeo's accusations. Libel litigation is not conducted under seal, and indeed the public right of access to judicial records would bar such sealing. *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978); *Barron v. Florida Freedom Newspapers*, 531 So.2d 113, 116 (Fla. 1988). Consequently, it is open to question whether any useful purpose would be served by an injunction requiring Xcentric to tailor its original web page about Giordano and G&G by simply excising either the specific accusation that Judge Adrien treated as being defamatory or, in the alternative, removing the entire post that contains that accusation.

In the alternative, it might be more accurate for the public record to contain both Romeo's original accusations, in the form originally made, along with a partial retraction from Romeo, and a reply from Giordano. This is the sort of historical record favored by those states that encourage retractions to limit punitive damages, as well as by Florida's own "right of reply" statute. Although a requirement of allowing a reply was struck down as unconstitutional in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), Ripoff Report's approach,

which many consumer complaint web sites follow, represents voluntary compliance with the policy choice on which the statute was based. Any member of the public is free to comment on the original criticism. The comment feature allows the original critic to publish a retraction and it also allows the target of the criticism to rebut the criticism or explain the circumstances that led to the dispute.

Still another option open to web hosts—the option that Judge Adrien expressly forbade—is to redact a partially false statement to eliminate that part that is certainly false while leaving the rest of the consumer report intact. In that regard, it is not clear exactly what words ought to be removed from Romeo's statement. Although both sides now agree that plaintiff Giordano is not the individual whose conviction and prison sentence Romeo located online, in light of Romeo's offer of proof, it is not clear that Giordano never engaged in criminal activity.[4] For the host, this leaves questions about how Romeo's statement should properly be edited, if the post should be edited at all.

Section 230 properly gives site operators the discretion to choose among these various approaches to whether, and how, to leave false and defamatory

[4]Romeo's offer of proof alluded to Giordano having told patients about his troubled past, September 14 Tr. at 22, and a video clip on Giordano's YouTube channel, which he uses to promote his business, provides more detail about that past. Giordano says that he did collection work for drug dealers and sold cocaine, making $15,000 to $20,000 per week "cash in your pocket." *John Giordano on Big Idea with Donny Deutsch*, http://www.youtube.com/watch?v=ond7ueD9AZc (minutes 5 to 7).

statements online even after the target of the defamation prevails in litigation against the source of the defamation.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

Paul Alan Levy
(pro hac vice motion filed)

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

Lyrissa C. Barnett Lidsky
Florida Bar No. 0022373
University of Florida Fredric G. Levin College of Law
Box 117625
Gainesville, Florida 32611
(352) 273-0941
lidsky@law.ufl.edu

June 17, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing brief and motion for leave to file have been mailed first class, postage prepaid, this 17th day of June, 2011, to:

Joshua M. Entin
Mendy Halberstam
Rosen Switkes & Entin, P.L.,
407 Lincoln Road, Penthouse Southeast
Miami Beach, Florida, 33139

Sammy Epelbaum
Stack Fernandez Anderson & Harris, P.A.,
Suite 950
1200 Brickell Avenue
Miami, Florida 33131

Maria Crimi Speth
Jaburg & Wilk, P.C.,
Suite 2000
3200 North Central Avenue
Phoenix, Arizona 85012

Paul Alan Levy

Public Citizen Litigation Group
1600 - 20th Street NW
Washington, DC 20009
(202) 588-1000
plevy@citizen.org

Attorney for Amici Curiae