UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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| HOULIHAN SMITH & COMPANY, INC., *et al.* | ) | |
| | ) | |
| Plaintiffs | ) | |
| | ) | |
| v. | ) | Case No. 1:10-cv-2412 |
| | ) | |
| JULIA FORTE, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES**

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**CONSTITUTION, STATUTES AND RULES**

Plaintiffs sued Julia Forte, the host of two interactive message boards, after she refused their demand that she remove comments posted by third parties that sullied plaintiffs' reputations. Plaintiffs knew that a federal statute protects such hosts against being sued for comments posted by others. To evade that statute, plaintiffs concocted a theory that, because pages containing comments about Houlihan show up in Google, Forte must have caused that to happen by including both Houlihan's name, and derogatory words about Houlihan, in meta tags and other hidden HTML code of those pages. Those allegations about Forte were false, and there was never any basis for alleging them. In fact, it appears that the allegations were originally drafted to sue an entirely different message board operator, but when that defendant took money to sanitize complaints about Houlihan, Houlihan rewrote the papers to make the allegations against Forte when she was unwilling to be intimidated or paid off.

Supported by the false allegations, Houlihan labeled its claims as "intellectual property claims" invoking both trademark law and the Illinois right of publicity act, and while deliberately denying Forte advance notice, it rushed into state court for an ex parte proceeding to obtain a TRO requiring Forte to take down all comments on her message board about them. Houlihan continued to advocate the claims even after Forte and the Court pointed out their falsity, and even after it hired an expert witness who could not support them. Only once Forte had representation, sought summary judgment dismissing the claims, and served a Rule 11 motion did plaintiffs drop the lawsuit against Forte. But in the meantime, plaintiffs' stubbornness in refusing to drop their claims put Forte to the trouble and expense of seeking dismissal and/or summary judgment.

Houlihan's principals are understandably outraged over being vilified in some postings on Forte's message board. But Forte could not be sued for those postings — the proper way to deal with false posts would have been to proceed against the posters. Bringing Forte into the case to pressure her into removing the posts to avoid the trouble and expense of litigation, by making false allegations and legally unsupportable claims, should not be countenanced. The Court is requested to award attorney fees under two Illinois statutes that authorize awards of attorney fees to the prevailing party, and because Houlihan sued in bad faith.

**FACTS AND PROCEEDINGS TO DATE**

This case arises from web sites operated by Julia Forte with her husband at 800notes.com and whocallsme.com. First Forte Affidavit ¶¶ 2-3, DN 16-2. The web sites are message boards on which the public can discuss marketing phone calls and those who make them. *Id.* ¶¶ 4-10 and attached exhibits. Forte neither authors the message board 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 post comments on the message board about the telephone number from which the call was placed. *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. Hundreds of thousands of different phone numbers are discussed on the two sites. *Id.* ¶ 10. When a viewer posts new content to the web sites, including content about a new phone number not previously discussed there, the sites' software automatically and instantaneously places it on the message board without any human review or intervention. *Id.* ¶ 13.

Houlihan Smith & Co., Inc. and Houlihan Smith Advisors LLC (together, "Houlihan") are an investment banking operation based in Chicago. Since 2007, hundreds of messages have been posted on pages on Forte's sites about Houlihan's main telephone number 312-499-5900. *Id.* ¶ 20; Exhibit B to Complaint. Forte did not know Houlihan was being discussed on her site. *Id.* ¶ 21.

The complaint's vital allegations about Forte appear in paragraphs 31 to 38, which claim 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. The allegations not only are false, *id.* ¶¶ 22-30, but are contradicted by Houlihan's own documents. Indeed, 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 attached such code to her affidavit as well. *Id.* ¶ 23 and Exh. K. This code shows 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 and Exh. J, K.

On March 2, 2010, Houlihan petitioned for discovery in Cook County Circuit Court, alleging that several specified posts had been posted on Forte's web sites by third parties, and asking that Forte be ordered to give information leading to their identification. *Id.* Exh. K. Among the petition's attachments was the downloaded source code from one of Forte's pages. On April 12, 2010, Houlihan's counsel wrote to Forte complaining about her having allowed defamatory postings and demanding their removal; he did not mention any allegedly infringing hidden code on her web site, nor did he request any removal of such code. DN 6-1, Exh. I.

On April 16, Houlihan sued Forte 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, on the theory that use of its name, and its employees' names, to identify the subjects of criticism violates its trademark and the employees' publicity rights. Finally, Houlihan alleged that Forte's own content—meta tags, title tags and other features—violated its trademarks. Complaint ¶¶ 31-38. In support of the requested temporary restraining order

("TRO"), Houlihan acknowledged that Forte would ordinarily be immune but contended that, because its complaint showed that Forte was supplying her own content in the form of hidden code, and because that code violated its trademarks and the right of publicity, Forte was not immune. However, the relief Houlihan requested on an emergency basis had nothing to do with the alleged hidden code; Houlihan asked instead for the removal of **all** statements about itself or any of its staff (whether or not shown to be false or defamatory), an injunction against carrying any statements about Houlihan or its staff (again, whether or not false and whether or not defamatory), and a mandatory injunction compelling Forte to provide identifying information about every anonymous individual who had published the allegedly defamatory statements on Forte's message boards.

Although Houlihan knew how to reach Forte in North Carolina, it did not even email its TRO papers to her until about an hour before the TRO hearing that it had set in Chicago. The Supreme Court of the United States has held that the First Amendment forbids ex parte injunctions against speech without notice, *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), but Houlihan did not call this authority to the attention of the state court judge.

After a TRO was granted without notice, Forte removed to this Court. DN 1. Plaintiffs moved to extend the TRO. DN 9. Forte's opposition included an affidavit describing in detail the falsity of the allegations about the hidden code on her web site, DN 16-2, ¶¶ 22-32, and a brief rebutting the trademark claims based on the use of the Houlihan name. Plaintiffs' reply brief in support of a preliminary injunction repeated the false contentions about the use of Houlihan's trademarks and the derogatory words in the hidden code, without even the slightest acknowledgment that Forte had shown that the allegations were false. DN 19, at 20-21. Plaintiffs also submitted an affidavit from an expert contending that he could not judge the truth of Forte's averments about the hidden code without obtaining unspecified documents.

On March 6, 2010, the Court heard plaintiffs' motion for a preliminary injunction. During the hearing, the Court noted that, based on its previous experience doing child pornography prosecutions, it had learned to read HTML code, and that there was nothing in the hidden code containing either Houlihan's name or derogatory words. Tr. 23-27, 94, DN 31. The Court noted that plaintiffs might be able to make a case based on these contentions, but said that the evidence submitted to date did not show it. Tr. 94. At the outset of an afternoon session set for the Court to announce its ruling, counsel made one more effort to support plaintiffs' allegation that Forte had put actionable content in hidden code, Tr. 83-87; but the Court read the code and said that it did not show any placement by Forte. Tr. 92. Plaintiffs subsequently acknowledged that the document submitted to the Court was created by overeager representatives (whom plaintiffs chose not to identify) but does not show any wrongdoing by Forte. Levy Third Affidavit, Exhibit Y, DN 24-4. In fact, the second Forte affidavit, DN 24-3, which went through the process of replicating the creation of plaintiff's exhibit, shows that whoever created this evidence knew that they were trying to fool the finder of fact into believing that Forte was responsible for putting Houlihan's name into the hidden code

After the TRO was denied, Forte's counsel offered to supply documents required by plaintiffs' expert witness to verify (or refute) plaintiffs' allegations about Forte's code. Plaintiffs' counsel never responded to the offer of informal discovery, but also refused to dismiss the complaint. Levy Third Affidavit ¶¶ 3-4 and Exh. X, DN 24-4. Accordingly, Forte had to seek dismissal of the complaint. The Court ordered a response to be filed by July 16, 2010. DN 29. On July 15, Houlihan's counsel indicated that Houlihan was not willing to dismiss its action. Levy Fourth Aff.

¶ 19 (attached). However, no response to the motion was filed by the July 16 deadline. *Id.*

Forte then served a Rule 11 motion on Houlihan's counsel. *Id.* Only then did Houlihan agree to dismiss the action, beating by one week the twenty-one day safe harbor period within which dismissal was permitted without facing the filing of the sanctions motion against counsel. *Id.* ¶ 20; DN 32. Although the dismissal of the action protects Houlihan's counsel against attorney fees under Rule 11, Forte now seeks attorney fees against Houlihan itself.

## I. Houlihan Is Liable for Attorney Fees Because It Pursued Oppressive Litigation Against Forte Under the Right of Publicity Act and Consumer Fraud and Deceptive Business Practices Act and Because It Sued Forte in Bad Faith Because She Refused to Remove Criticisms for Which Plaintiffs Knew She Was Not Personally Liable.

When plaintiffs dismissed Forte with prejudice after their motion for a preliminary injunction was denied, and in response to her motion for summary judgment and threatened Rule 11 motion, Forte became the prevailing party and hence qualified for a possible award of attorney fees. *Mostly Memories v. For Your Ease Only*, 526 F.3d 1093, 1099 (7th Cir. 2008); *Claiborne v. Wisdom*, 414 F.3d 715, 719 (7th Cir. 2005); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-77 (7th Cir. 1987); (dismissal with prejudice); *All Am. Distrib. Co. v. Miller Brewing Co.*, 736 F.2d 530 (9th Cir. 1984) (denial of preliminary injunction). Both the Consumer Fraud and Deceptive Business Practices Act ("ICFDBA"), 815 ILCS 505/10a(c), and the Right of Publicity Act, 765 ILCS 1075/55, provide for awards of attorney fees to the prevailing party. Forte seeks an award of fees under both of those statutes as well as the bad faith exception to the American Rule on attorney fees, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975), whereby fees can be awarded when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. As applied by the Seventh Circuit, these are interrelated bases for awards of attorney fees, and all of them apply in this case.

### A. Standards for Awarding Statutory Attorney Fees Under the Illinois Consumer Fraud and Deceptive Business Practices and Right of Publicity Acts and the Bad Faith Exception to the American Rule.

Although there is no express authority addressing the standards for awards of attorney fees under the Illinois Right of Publicity Act, a trilogy of cases from the Seventh Circuit and the Illinois Supreme Court sets the standards for awards of attorney fees under the Consumer Fraud and Deceptive Business Practices Act: *Door Systems v. Pro-Line Door Systems,* 126 F.3d 1028 (7th Cir. 1997); *Krautsack v. Anderson*, 223 Ill.2d 541, 861 N.E.2d 633 (2006), and *Nightingale Home Healthcare v. Anodyne Therapy*, 626 F.3d 958 (7th Cir. 2010).

In *Door Systems*, the plaintiff had unsuccessfully sued for violations of both the Lanham Act and the ICFDBA, and the Seventh Circuit held that, under both statutes, a successful defendant should be awarded attorney fees if the lawsuit brought was oppressive, "not just as a losing suit but as a suit that had elements of an abuse of process." 128 F.3d at 1031. Fees can be awarded even if the defendant sincerely believes that the action had merit — "a suit can be oppressive because of lack of merit and cost of defending even though the plaintiff honestly though mistakenly believes that he has a good case and is not trying merely to extract a settlement based on the suit's nuisance value." *Id.* at 1032.

In *Krautsack,* the Illinois Supreme Court held that fees should be awarded in favor of a prevailing defendant when the lawsuit has been brought in bad faith, but that "bad faith" under the ICFDBA is not limited to subjective bad faith comparable to the limits of Rule 137 of the Illinois Rules of Civil Procedure. 223 Ill.2d at 560-562. Specifically, the Illinois Supreme Court declined to decide whether the "'oppression' standard adopted by the court of appeals [in *Door Systems*]" should be followed in ICFDBA cases, *id.* at 560, thus leaving *Door Systems* standing as the authoritative decision when cases under the Act are pursued in federal court.

Most recently, in *Nightingale Home Healthcare*, although not addressing the Consumer Fraud and Deceptive Business Practices statute, the Seventh Circuit reconciled its own jurisprudence regarding fees for prevailing defendants under the Lanham Act as well as cases from other circuits, defining the "oppressiveness" that warrants an award of fees. The Court held that fees should be awarded when the plaintiff has engaged in an abuse of process, which includes "the use of the litigation process for an improper purpose." 626 F.3d 958, 963. The Seventh Circuit expressed particular concern about the misuse of the litigation process by a large, profitable business against a smaller, more vulnerable one, abusing trademark claims not to avoid consumer confusion but to drive a newer entrant out of competition with the plaintiff by impairing its competitiveness.

In this regard, the Seventh Circuit drew on cases from other circuits recognizing the need to create incentives for the defense of litigation when the defense advances the public good by preventing the misuse of intellectual property law to suppress speech, when a large company picks on an underfunded opponent in the hope that the mere cost of a self-defense will drive the defendant into submission. *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 526-527 (D.C. Cir. 1985); *Ale House Mgmt. v. Raleigh Ale House*, 205 F.3d 137, 144 (4th Cir. 2000). *See also Woodhaven Homes & Realty v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005) ("[W]ithout the prospect of such an award, [a defendant] might be forced into a nuisance settlement or deterred all together from exercising his rights.") (citation omitted).

In summary, then, in *Door Systems* the Seventh Circuit equated the standards for fees under both the Lanham Act and the ICFDBA, and established an "oppressiveness" standard for both statutes; then in *Krautsack* the Illinois Supreme Court adopted a modified "bad faith" standard for ICFDBA claims while leaving open the relationship between that rule and the *Door Systens* standard. And in *Nightinggale*, the Seventh Circuit refined the *Door Systems* approach in an effort to reconcile its approach to Lanham Act fees with that of the other circuits. The best reading of this line of cases is that, pending further action from the Illinois Supreme Court, in ICFDBA cases pending within the Seventh Circuit, the *Nightinggale*–refined *Door Systems* rule remains the law of the Circuit.[1]

In any event, the difference may not matter in this case because Forte also seeks fees under the bad faith exception to the American rule, which applies to all of Houlihan's claims, not just the claims under the two Illinois statutes that authorize fee awards for prevailing defendants. In this regard, the requisite "bad faith" is not necessarily a subjective matter, but applies in this case based on an objective assessment of the lack of colorable merits to Houlihan's claims. The Seventh Circuit has repeatedly held that awards of fees for bad faith litigation are appropriate when suit was brought "without at least a colorable basis." *Benner v. Negley*, 725 F.2d 446, 449 (7th Cir. 1984), quoting *Analytica, Inc. v. NPD Research,* 708 F.2d 1263, 1269 (7th Cir. 1983). Bad faith litigation can include "harassment, unnecessary delay, needless increase in the cost of litigation, willful disobedience, and recklessly making a frivolous claim." *Mach v. Will County Sheriff*, 580 F.3d 495, 501 (7th Cir. 2009). As the Seventh Circuit has said,

> If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting

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[1]We have found no cases addressing the standards for attorney fees under the Illinois Right of Publicity Act. However, the right of publicity is a trademark-like protection against the misuse of the commercial value of an individual's name to promote goods and services. Consequently, it makes sense to apply the Seventh Circuit's standards for attorney fees under the Lanham Act to decide whether to award fees when a state right of publicity claim fails.

> recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law. Our court has long treated reckless and intentional conduct as similar.
>
> * * * *
>
> Subjective bad faith or malice is important only when the suit is objectively colorable. A lawyer who pursues a plausible claim because of the costs the suit will impose on the other side, instead of the potential recovery on the claim, is engaged in abuse of process.
>
> *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985).

Indeed, the objective component of the bad faith standard extends to "extremely negligent conduct" as well as reckless and indifferent conduct. *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1185 (7th Cir. 1992); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 2000 WL 283939, at *9, (N.D. Ill. Mar. 14, 2000), *aff'd in part, rev'd in part sub nom. IDS Life Ins. Co. v. Royal Alliance Associates*, 266 F.3d 645 (7th Cir. 2001), quoting *Pacific Dunlop Holdings v. Barosh*, 22 F.3d 113, 119-20 (7th Cir. 1994).

### B. Attorney Fees Should Be Awarded Against Houlihan Under Both the Bad Faith Standard and the Oppressiveness / Abuse of Process Standard.

#### 1. Houlihan Sued Forte in Bad Faith.

In filing suit against Forte as well as against the Doe posters, the complaint repeatedly acknowledged that the derogatory messages about which plaintiffs complain were posted by the John and Jane Doe defendants. Moreover, as Houlihan admitted in its original state court TRO motion papers, as the operator of web sites where third parties may post comments about companies that place marketing telephone calls, Forte is not liable for the content that third parties place on her web site. Under the Telecommunications Act of 1996, 47 U.S.C. § 230(c)(1): "[n]o 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 the Appellate Court of Illinois, *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*, *Inc.,* 129 F.3d 327, 330 (4th Cir. 1997); *see also, e.g.*, *Ben Ezra, Weinstein & Co. v. America Online*, *Inc.,* 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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> *Green v. America Online*, 318 F.3d 465, 471 (3rd Cir. 2003).[2]

**a. Bad Faith Claims About Forte's "Hidden Code."**

Consequently, having conceded the existence of a section 230 defense, Houlihan knew that it could not properly sue Forte unless it could reasonably allege and argue that, on the facts of the case, her section 230 protection was forfeit. Houlihan claimed it could get around section 230 because section 230 immunity applies only to content provided by others but not to content provided by the web host, and Houlihan claimed that Forte was making herself liable by including both Houlihan's trademarked name, and derogatory words about Houlihan, in the HTML code of her web site. Specifically, the complaint and Houlihan's motions for a TRO and preliminary injunction relied on a series of completely false allegations, in some cases alleged on information and belief but

[2]*See also Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008); *Universal Commc'n 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).

sometimes not, that Forte had used sneaky means to bring search engines to her pages about calls from Houlihan's telephone numbers. Paragraphs 32 through 35 alleged that Forte included Houlihan's name and defamatory words in the HTML script on the relevant pages, specifically including the title tag and the description meta tag (*see also* ¶¶ 31 and 37, referring more vaguely to "original content" provided by Forte); paragraph 36 alleged that Forte made "agreements" with search engines to ensure that postings about Houlihan would show up in search results; and paragraph 38 alleged that Forte was responsible for the appearance of words like "scam," "scam artist," "ex-con," and "fraud" in search results pages.

These factual claims were simply invented out of whole cloth — there was no truth to them at all, as the Court ascertained by looking at the HTML code while sitting on the bench during the TRO hearing. First Forte Affidavit, ¶¶ 22-28 and Exhibits K, L, DN 16-2. The code was readily available to plaintiffs; indeed, the source itself was attached to a document attached to Houlihan's petition for pre-litigation discovery. *Id.*, Exhibit L. Neither Houlihan's name nor any defamatory word can be found anywhere in that code. Thus, the only way that Houlihan and its counsel could not have known the falsity of their allegations about the code is if they did not read the documents they filed. The true facts in this regard were just as readily available to Houlihan (and its counsel) before they dragged Forte into court and put her to the expense of defending herself against motions for a TRO and, later, for a preliminary injunction. The suit against Forte was based on bad faith, false factual allegations.

Houlihan's bad faith assertion of the claims about Forte's code was not limited to the complaint and TRO motion. Even after Houlihan received proof positive that there were no hidden code and no secret agreements on which it could hang its attempted evasion of section 230, it refused to dismiss its action and continued to advocate its false allegations. Forte's opposition to the motion to extend the TRO included an affidavit that explained how to read HTML code and walked through the HTML code of the web pages in question; she rebutted as well the vague assertions in the complaint that the Google search results reflected any actions by the web operators to promote the ranking of those pages, and that there were any secret agreements with Google or other search engines to make her pages rank higher. *Id.* ¶¶ 22-32. Plaintiffs responded to this affidavit in two ways – their reply brief simply repeated the complaint's allegations about the hidden HTML code (without any citation to evidence), DN 19 at 20-21, while at the same time, they submitted an affidavit from an expert witness who averred that he couldn't tell for sure whether Forte's affidavit on these points was truthful without getting documents from Forte. *Id.*, Exhibit O (after all, the web pages were, by that time, offline, having been removed pursuant to the TRO). Thus, at the same time plaintiffs was seeking a preliminary injunction based on the contention that Forte **was using** secret code that included Houlihan's trademarks, and including derogatory words, their expert said that he did not know what the truth was (because the TRO had forced Forte to remove the documents he needed). The brief also cited anonymous Internet postings about Forte to support a claim that she was responsible for the adverse posts about them; the fact that Houlihan cited such plainly inadmissible matter shows its awareness that it really had no evidence to support its claims against Forte. The reply brief was filed in bad faith.

Desperate to stave off denial of its preliminary injunction motion after the Court told them what was in the code on which they were relying, Hearing Tr. 23-27, Houlihan tried to introduce new evidence at the last minute – code from a page on one of Forte's web sites that appeared, on superficial examination, to include Houlihan's name in the code. But a closer examination showed that the page creating that code had been rather cynically created by a user performing a search that introduced the words in question into the search box; the code then showed the code for the words appearing inside the search. Forte Second Affidavit ¶¶ 4-8, DN 24-3. Houlihan ultimately told the Court that they were not relying on the document. We do not argue that the initial advocacy of a delay to permit examination of the document is an independent example of bad faith, but it is relevant to the issue of bad faith because it shows that someone in Houlihan's camp—its counsel have refused to say who—went out of his or her way to fabricate this evidence to support a failing argument. That person knew exactly what he or she was doing, and Houlihan must bear the legal responsibility for that misconduct, which colors its advocacy of the allegations about Forte's non-immunity under Section 230.

Even plaintiffs' claimed desire for discovery turned out to be a charade. At the hearing, Forte's counsel suggested that, in light of what had eventuated during the hearing, plaintiffs might want to amend their complaint to drop certain allegations (such as about the code). After the hearing, Forte repeatedly offered to supply plaintiffs with the evidence that their expert said he needed to determine the veracity of Forte's averments about paragraphs; but plaintiffs never responded to the offer. Levy Third Affidavit ¶¶ 3-4 and Exh. X and Y, DN 26-5. Nor did they amend the complaint, knowing that defendants were preparing a motion to dismiss and/or for summary judgment. Judging from the submitted time records, it is apparent that once the Court told Houlihan's counsel at the hearing that it had not proved Forte's involvement in placing its name or criticisms either in the meta tags or, indeed in the overt text of the web site, but that the Court recognized that Houlihan could try to prove it in a merits proceeding, Houlihan's counsel stopped working on the case. That is because Houlihan and its counsel **knew** that they could not offer such proof, and hence that they had no chance of securing injunctive or any other relief against Forte's hosting of the criticisms, even if the First Amendment and Illinois or federal law might otherwise have permitted.

But plaintiffs refused to admit that the case was over. Their continued reliance on false allegations about Forte's supposed secret code thus forced Forte to oppose the complaint. Indeed, after refusing to dismiss or amend the complaint, plaintiffs missed the deadline to oppose dismissal and/or summary judgment. Only once Forte served a motion for Rule 11 sanctions, warning that it would be filed after the expiration of the twenty-one day safe harbor period, did Houlihan's counsel secure their client's permission to dismiss the action. Although the dismissal protects Houlihan's counsel from paying a financial price for pursuing the litigation, this sequence confirms the bad faith with which Houlihan pursued the lawsuit, and Forte's counsel should be compensated for having had to seek dismissal.

#### b. Plaintiffs' Bad Faith Assertion of Claims Beyond the Code

Moreover, even if there were the slightest grain of truth to paragraphs 31 and 38 of the complaint, Houlihan's claim that Forte was liable under trademark law based on those paragraphs lacked an colorable basis. There is **no** legal support for the proposition that the operator of a web site violates the trademark laws by using words that truthfully identify the subject matter of pages about the trademark owner, and plaintiffs never purported to cite any authority showing that. There is, to be sure, substantial precedent for the proposition that a **competitor** may not use a trademark on web sites to draw the trademark holder's customers or potential customers to buy competing goods, but every case on the subject holds that web site meta tags and other techniques that identify a web site as being about the trademark holder are consistent with the trademark laws.[3] Indeed, although courts routinely hold that a competitor may not use a domain name in the form www.trademark.com, courts **also** hold that a commentary site **may** even use such a domain name so long as the site itself is clear from the outset about lack of affiliation with the trademark holder.[4] And because the Illinois right of publicity provides trademark-like protection against the exploitation of the commercial value of an individual's name, the same authority forbids application of the right of publicity to prevent web sites from allowing the use of somebody's name to identify the subject of criticism carried on the web site.

Forte cited this authority in opposition to the motion to extend the TRO; Houlihan never responded to that aspect of Forte's argument, yet continued to advocate the allegations in the

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[3] *Gregerson v. Vilana Fin.*, 2006 WL 3227762 (D. Minn., Nov. 7, 2006); *J.K. Harris & Co. v. Kassel*, 253 F. Supp. 2d 1120 (N.D. Cal. 2003); *Bihari v. Gross*, 119 F. Supp.2d 309 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998). *See also 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); *Interactive Prods. Corp. v. a2z Mobile Office Solutions*, 326 F.3d 687, 698 (6th Cir. 2003) (reseller of plaintiff's product could use the trademarked name of that product in the post-domain path for pages on the reseller's web site where the product was offered for sale); *Playboy Enters. v. Welles*, 279 F.3d 796, 803-804 (9th Cir. 2002) (former "playmate of the year" could use the trademarked abbreviation "PMOY" in the meta tags for the web site where she sells her services, and sells access to photographs of herself); *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). Moreover, the contention that including the Houlihan name, or derogatory words, in the keyword meta tags affects search rank is technological nonsense. Keyword meta tags mattered at one time, but as Google itself has noted, it had been many years since they played any role in Google's search ranking algorithm. http://googlewebmastercentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html. Google is, of course, by far the dominant search provider in the United States, and it was Google search results alone that Houlihan invoked as the basis for its suit.

[4] *Utah Lighthouse Ministry v. Foundation for Apologetic Info. & Research*, 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).

Complaint based on the alleged secret code, and to argue that those allegations supported Houlihan's trademark claims and, therefore, that Forte's section 230 defense should be rejected. The absence of any legal argument on this point precludes the possibility that Houlihan was trying to extend or modify existing law; rather, it is apparent that Houlihan wanted to invoke a trademark argument without having to justify it. And, by refusing to amend the complaint to drop paragraphs 31 to 38, Houlihan and its counsel needlessly forced Forte to move to dismiss or, in the alternative, for summary judgment. "[Houlihan] continued to advocate a claim that had no legal basis and refused to alter or withdraw it when that deficiency was pointed out to it." *Fabriko Acquisition Corp. v. Prokos*, 536 F.3d 605, 610 (7th Cir. 2008). That conduct was objectively in bad faith.[5]

Still further aspects of plaintiffs' claims were so lacking in a colorable basis as to show their bad faith. Moreover, even if all of the factual allegations had been true, they would not have provided a basis for the injunctive relief that Houlihan sought. First of all, the First Amendment rule against prior restraints would have barred entry of a TRO or a preliminary injunction requiring removal of **anything** from her web site. At best, Houlihan would have been able to get a final judgment, and, indeed, under Illinois law the judgment could only have been for damages and not against repetition of defamatory statements, *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees*, 400 Ill. 38, 51, 79 N.E.2d 46, 53 (1948), not to speak of an

[5]Moreover, even without section 230's protections, Houlihan could not hold Forte liable for defamation, because Houlihan is a public figure, and Houlihan had no evidence that, at the time she allowed the allegedly false statements to be published on her site, she either knew that the statements were false, or allowed the postings with reckless disregard of the probability that they were false, as required by the First Amendment. And, given the single publication rule that is recognized in Illinois, 740 ILCS 165/1, the tort was committed when the anonymous reports were first published on her site. Even if Houlihan's demand letter is considered to give knowledge of anything more than that Houlihan considered some of the statements about it to be false, Forte did not have that knowledge as the time of publication.

injunction against allowing future posting of statements whose defamatory nature had not yet been determined. *Lothschuetz* v. *Carpenter*, 898 F.2d 1200, 1208-1209 (6th Cir. 1990) *See also e360 Insight v. Spamhaus Project*, 500 F.3d 594, 605-606 (7th Cir. 2007) (injunction against statement that is defamatory now cannot stand because the statement might be true in the future). Additionally, the Supreme Court has squarely held that a restraining order can be issued against protected speech only in the most dire circumstances, where there is no possibility of providing advance notice so that the person to to be enjoined has an opportunity to show why the injunction is unjustified. *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968). Yet without the slightest effort to meet the rigorous test for ex parte injunctions (and without citing this controlling authority), Houlihan went to court without advance notice and obtained a prior restraint of sweeping breadth.[6]

In addition, even had Forte exceeded her section 230 immunity by putting trademarked names and derogatory words in the HTML code of her web site, the proper relief would have been **limited** to a remedy for that conduct; section 230 would still protect her liability for information provided by others. *E.g.*, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc). But the complaint, TRO motion, and preliminary injunction motion all sought broad injunctive relief barring Forte from keeping any critical statements from anonymous third parties on her web site, or from allowing future criticism to be posted there. The entire proceeding for a TRO and preliminary injunction was brought in bad faith.

[6] The TRO papers implied that Houlihan had only learned of the basis for its claims a few days before filing, thus supporting a claim for emergency relief. In fact, the essential allegations in ¶¶ 31 to 38 of the complaint were similarly invoked in a previous action for pre-litigation discovery filed six weeks earlier. Moreover Houlihan had known about the criticisms on 800Notes.com and whocallsme.com since June 2008, when Houlihan staff first responded to the criticisms on both message boards. Forte Second Affidavit ¶¶ 2-3, DN 26-4.

#### c. The Apparent Source of Houlihan's False Claims About the Code Also Shows Its Bad Faith.

The discovery provided by the Court's local rules provided Forte with an explanation of how this error was made; these facts are further evidence of plaintiffs' bad faith. The attorney fee records provided by Houlihan's counsel reveal the records were maintained under the file name "XCENTRIC ET AL LITIGATION"*,* and refers in passing to a review of the "XCentric / Houlihan Agreement," and further reveal that Houlihan's counsel spent all of 2.5 hours on the state court complaint for pre-litigation discovery from Forte. Levy Fourth Aff. ¶ 29 and Exh. 12, 14 (attached). The pre-litigation discovery complaint contained the same allegations about HTML code and other ways to boost search engine inclusion that were included in the verified state court complaint against Forte that ultimately formed the basis for the lawsuit against Forte and Houlihan's motions for emergency relief against her. And the time was described, not as **drafting** a complaint, but as "revis[ing]" a complaint. *Id.* ¶ 31 and Exh. 14. Houlihan refused to provide any time records showing the time spent **drafting** the pre-litigation discovery complaint, apparently because, before time was spent on the revisions, the case did not involve Forte.

As the attached Levy affidavit reveals, ¶¶ 29-30, XCentric Ventures is the company name for the operator of Ripoff Reports, a web site that, like Forte's whocallme and 800Notes, hosts comments about companies, many of them critical ones. But unlike Forte, XCentric Ventures does place both derogatory words and trademarked name in the meta tags of web pages containing comments on companies; also unlike Forte, XCentric allows criticized companies to purchase participation in its "Corporate Advocacy Program" a service through which XCentric purports to conduct an investigation of the criticized company and, if the company passes the investigation, Ripoff Report will carry XCentric's certification of the company's "Commitment To 100% Customer Satisfaction." Inspection of the pages on Ripoff Reports reveals that Houlihan is a participant in the Corporate Advocacy Program. *See* Levy Affidavit ¶ 30.

It appears, therefore, that the reason Forte ended up a defendant in this action is that, when Houlihan complained about Ripoff Report's allowing third parties to post criticism on its web site, Ripoff Report was amenable to being paid to have those complaints sanitized, but Forte responded to Houlihan's complaints by refusing to take any action, suggesting instead that Houlihan sue the anonymous posters and obtain a proper subpoena, from a court with appropriate personal jurisdiction. Instead of pursuing these legally supportable actions, Houlihan decided to sue Forte even though it knew that the law proscribed that lawsuit, and it invented false allegations, and indeed manufactured evidence to support those allegations, to obtain a TRO and to seek a preliminary injunction. That conduct reeks of bad faith and warrants an award of attorney fees.

### 2. Houlihan's Suit Against Forte Was an Oppressive Abuse of Process That was Designed to Suppress Lawful Criticisms.

In addition to having been brought in bad faith, Houlihan's suit against Forte was an abuse of process — it was intended to attain an objective that could not be obtained directly through a court order, using the threat of costly litigation to punish Forte for her refusal to adopt a policy of forbidding any criticism of Houlihan, and to force her to adopt such a policy to avoid the expense of litigation. This scenario is precisely the sort described by the Seventh Circuit in *Door Systems* and *Nightinggale*, albeit there it was in the commercial competition context, where a wealthy company brings suit to impose costs that might drive a competitor out of business, thus justifying an award of attorney fees for oppressive litigation.

The evident purpose of this action was to impel Forte to remove all criticism of Houlihan from her message boards, to identify the anonymous posters, and to block any future criticism from being posted. That was the relief that Houlihan demanded in its prelitigation correspondence, DN 6-1, Exh. I, and it is the relief that was sought in the complaint. DN 6. Yet, for the various reasons explained in the foregoing section of the brief, the law clearly placed injunctive relief, and particularly a preliminary injunction, off-limits to Houlihan. Seeking to evade these legal limitations, Houlihan sued Forte based on the false claim that she had placed its name and derogatory words in her HTML code, but Houlihan's demand letter did not ask Forte to remove the code, because removal of information from her HTML code was not what Houlihan wanted – it was the removal of the criticisms. And yet even if Forte had been guilty of manipulating the HTML code, and even if the inclusion of that information in the code violated Houlihan's rights, the remedy for that violation would have been to fix the code, not to take down criticisms or reveal identifying information about the posters. This is a classic case of a lawsuit being brought for an ulterior purpose not properly attainable through litigation.

Moreover, the litigation was conducted in an abusive and oppressive manner. Houlihan's counsel had been aware since at least February 2010 that Forte's sites were hosting harsh criticisms of Houlihan — including most of the derogatory statements identified in the complaint — and had been claiming since the March 2010 petition for discovery that Forte deliberaterly placing Houlihan's name and derogatory words about it in the HTML code for its site. Houlihan itself had been aware of the criticisms since 2008, when its personnel first started posting defenses of Houlihan on the message boards. But without revealing this early knowledge, Houlihan rushed into court seeking an ex parte TRO based on the claim that it had only learned about **one** of the critical statements, an accusation of criminality, against Houlihan's owner, a few days previously. And in addition to lying about the HTML code, Houlihan's TRO papers deliberately withheld reference to the extensive caselaw that barred its efforts to circumvent section 230 to get a TRO against Forte, not to speak of the clear Illinois law that equity will not enjoin a libel.

Courts have relied on miscitation or disregard of governing law as one factor that renders litigation oppressive. *Ale House Mgmt. v. Raleigh Ale House*, 205 F.3d 137, 144 (4th Cir. 2000). Moreover, when, as here, a party seeks ex parte relief, it has an especial obligation to bring potentially adverse facts and authority to the Court's attention. *Maine Audubon Soc. v. Purslow*, 907 F.2d 265, 268-269 (1st Cir. 1990); *Jorgenson v. County of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988); *Cedar Crest Health Ctr. v. Bowen*, 129 F.R.D. 519, 525 (S.D. Ind. 1989). *See also Career Agents Network v. Careeragentsnetwork.biz*, 722 F.Supp.2d 814, 822-823 (E.D. Mich. 2010) (failure to cite controlling law in ex parte TRO motion is ground for awarding attorney fees). Houlihan began this case in complete disregard of this ethical requirement.

Houlihan evidently schemed to obtain a TRO through these dishonest litigation techniques in the hope of obtaining prompt removal of all criticisms, as well as creating an appearance that could lead an informed lay person to believe that the issues had already been decided against her. This is yet another element of the oppressive litigation tactics that merit an award of attorney fees.

Indeed, once the request for immediate injunctive relief was denied, Houlihan apparently lost all interest in the case. The time records produced pursuant to Local Rule 54 reveal that Houlihan's counsel did not spend even one tenth of an hour on this case after the TRO was denied; yet Houlilhan forced Forte's counsel to continue to work on the case. For example, Houlihan had suggested that it needed discovery to determine whether there was personal jurisdiction in Illinois, and whether it could find a basis for supporting its claims about the HTML code; Forte's counsel repeatedly offered to cooperate by providing voluntary discovery despite the fact that the Rule 26(f) conference had not yet been held. Forte's counsel also warned Houlihan's counsel that he was going to have to spend more effort preparing dispositive motion papers. Despite the fact that Houlihan had apparently communicated to its counsel that no further time should be spent on the case, Houlihan forced the Forte defendants to spend more time on the defense of the case, while at the same time refusing to respond to calls and emails inquiring about Houlihan's intentions. This exasperating pattern of conduct continued even after Forte moved to dismiss — Houlihan missed the deadline for responding, but also refused to say whether it would drop the case voluntarily. Only once Forte's counsel had devoted yet more time to the case by drafting and serving a motion for Rule 11 sanctions did Houlihan agree to drop the case. Houlihan's abusive litigation tactics, designed to impose costs on Forte while avoiding further costs to itself, merit an award of attorney fees.

#### 3. Houlihan's Bad Faith Litigation Tactics Continued into the Attorney Fee Phase of the Case.

Not content with litigating the merits of this case in bad faith, Houlihan's abusive tactics continued into the attorney fees phase of the litigation. First, Local Rule 54.3 provides an orderly way for the parties to save themselves, and the Court, time on needless litigation over the amount of fees, by requiring an exchange of information bearing on the amount of fees that ought to be awarded. The party seeking fees first provides evidence on which she will rely to support her claimed hours spent and hourly rates, then the party against which fees are sought must supply its own billing records so that, in case there is a disagreement about the amount to be awarded, the Court can use the amounts paid by the target of the fee application as a benchmark to judge the proper cost of the litigation.

Forte's counsel provided Houlihan with evidence in support of their hourly rates, but Houlihan's counsel refused to provide their own billing records, and would not even return telephone calls asking about when the information would be supplied. Levy Fourth Aff. ¶ 21. Forte was forced to file a motion for instructions under Local Rule 54.3(g). DN 35. The Court ordered Houlihan to comply with the local rules no later than October 19. DN 37. But the information provided in that date was complete; after discussions between counsel, more complete information was provided on November 8. Levy Fourth Aff. ¶ 21. Houlihan also refused to cooperate in the drafting of the Joint Statement required by Local Rule 54.3(e), and refused to specify either the hourly rates that it agrees are reasonable, or the specific hours spent, or even the total number of hours spent by Mess'rs Levy and Platt, that it agrees were reasonable. *Id.*.

Finally, Houlihan tried to avoid the filing of any fee application by pretending to agree to a settlement of the fee application, but then refusing to sign an agreement. Levy Affidavit ¶¶ 22-24. Thus, when Forte's fee application was nearly complete, Mr. Levy tried to meet and confer about the inclusion of information from the fee records produced in discovery in the fee application. Rather than responding to this request directly, Mr. Darke offered a settlement of the fee application, stating that he was "authorized" to offer a specified amount. Defendants accepted the offer. Mr. Darke promised that he would draft an agreement for mutual signature after returning from a visit to his family in Michigan over the holidays. However, repeating the phenomenon of procrastinating and refusing to respond to calls that characterized the litigation on the merits, Mr. Darke never sent a draft agreement, despite promising repeatedly that a draft was forthcoming. Mr. Levy then sent Mr. Darke a draft that reflected counsel's oral agreement. However, after another two-week delay, Mr. Darke indicated that Houlihan was not going to pay any attorney fees.

Mr. Darke claimed that the "limited information" he had available (which Mr. Darke did not specify) showed that his client was no longer a functioning company. *Id.* ¶ 24. However, despite this contention, Mr. Darke seems to persist in defending his allegedly nonfunctioning client against Forte's fee application. Moreover, several web sites strongly suggest that this latest excuse for not executing the parties' oral agreement is fraudulent. Houlihan Smith & Co. has shut down its main web site, www.houlihansmith.com, but still operates a web site at http://www.hedgefundvaluation .com/ that advertises the services of its New York office, directed by Karl D'Cunha. Stiles Second Affidavit ¶ 2 and Exh. 15. D'Cunha also appears to be a director of "Madison Street Capital," as does Charles Botchway, one of the principals of Houlihan whose right of publicity claim was assigned to Houlihan so that it could prosecute the case in its own name instead of his own. *Id.* Exhibit 20. Moreover, Madison's web site lists as its own accomplishments a variety of financial transactions that were announced by Houlihan Smith's own press releases as having been accomplished by Houlihan Smith. Stiles Affidavit ¶ 6 and Exh. 20. And Andrew Smith, another of the principals of Houlihan whose right of publicity claim was assigned to Houlihan, has a LinkedIn profile that asserts that he has been at a company called "Houlihan Capital" since 1996. Stiles Affidavit, Exh. 19. In the affidavit that he filed in support of the motion for a TRO, Smith averred that he founded Houlihan Smith and that it has been in operation since 1996. So, at best, Houlihan Smith is simply trying to avoid this fee application by changing its name and pretending to have gone out of business. This is a further example of the bad faith that pervaded the bringing and pursuit of this case.

## II. The Court Should Award $137,632.34 in Attorney Fees and Expenses.

"[T]he most useful starting point for court determination of the amount of a reasonable fee payable by the loser is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010); *Anderson v. AB Painting & Sandblasting*, 578 F.3d 542, 544 (7th Cir. 2009).

A reasonable hourly rate is calculated according to prevailing market rates for the services rendered. *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996). "In calculating the market rate, the burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community. . . . Once an attorney comes forward with such evidence, the burden shifts to the defendant to present evidence establishing a good reason why a lower rate is essential." *Connolly v. Nat'l Sch. Bus Serv.*, 177 F.3d 593, 596 (7th Cir. 1999) (internal quotation marks omitted).

Ordinarily, a lawyer's regular billing rate will be presumed to be the market rate for his services. However, the regular billing rate cannot be used when the attorney does not have any regular billing rate (such as when the lawyer works on salary for a municipality or a non-profit group), *People Who Care*, 90 F.3d at 1310, quoting *Blum v. Stenson*, 465 U.S. 886, 892, 895 n.11 (1984), or when the lawyer "sacrifices income to assist a favored group of clients." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1149 (7th Cir. 1993). These circumstances apply to all four lawyers whose services are the basis for the attorney fees sought in this case. Forte's local counsel, Steven Platt, is a union-side labor lawyer who bills an artificially low hourly rate to his union clients in light of their limited ability to pay. And Forte's lead counsel, Paul Alan Levy, and his colleagues Michael

Kirkpatrick and Greg Beck, work in Washington, DC for a public interest law firm, Public Citizen Litigation Group, and by law cannot charge their clients a market rate for their services. Rather, their firm looks to donations from the public (or from foundations) and attorney fee awards as their main source of income.

Forte seeks to have her counsel awarded fees at the following hourly rates:

| **Attorney Name** | **Hourly Rate** | **Year of Graduation** |
|---|---|---|
| Levy | $605 | 1976 |
| Kirkpatrick | $500 | 1991 |
| Platt | $500 | 1978 |
| Beck | $350 | 2004 |

As reflected by their respective affidavits, Mr. Levy has been at Public Citizen for more thirty-three years, where he came after clerking on the United States Court of Appeals for the Sixth Circuit and working for the Solicitor General (who had formerly been on the Sixth Circuit), and is a cyberlaw specialist who frequently lectures at conferences and law schools on subjects related to the issues in this case. He is one of the leading section 230 experts in the country. Levy Fourth Aff. ¶¶ 2-8. Kirkpatrick is an experienced trial lawyer who spent twelve years working for Texas Rural Legal Aid and the United States Department of Justice before coming to Public Citizen seven years ago. Kirkpatrick Aff. Beck is a former computer programmer who came to Public Citizen six years ago after clerking for the United States Court of Appeals for the Tenth Circuit. Beck Aff. Platt has been practicing employment law and union-side labor law since 1978. Platt Aff. Their credentials and experience are set forth in detail in their affidavits.

The affidavits and their exhibits set forth a wealth of evidence about the applicable market rates, including fee affidavits, decisions about various Chicago lawyers, Chicago rates as published in national surveys, but this memorandum identifies three main forms of evidence supporting the hourly rates set forth above. First is the *Laffey* matrix, **the** standard basis for awards of attorney fees in federal cases litigated in Washington DC; in fact, the federal court in DC has encouraged the maintenance and use of this matrix because it discourages needless litigation over hourly rates, Levy Affidavit ¶¶ 9-11; *Smith v. District of Columbia*, 466 F. Supp.2d 151, 156 (D.D.C. 2006); *Brown v. Pro Football*, 846 F. Supp. 108, 120 (D.D.C. 1994). The *Laffey* matrix is also used in the Northern District of Illinois: "numerous judges in this district have considered the *Laffey* Matrix as at least one factor in determining the reasonableness of hourly rates sought [that is] 'satisfactory evidence' of the prevailing rate, so that the burden shifts to opposing counsel to show why a 'lower rate is essential.' *Hadnott v. City of Chicago*, 2010 WL 1499473 (N.D. Ill. 2010), at *7, quoting *Connolly v. Nat'l Sch. Bus Serv*., 177 F.3d 593, 596 (7th Cir. 1999) and many cases from this Court.

There are actually two versions of the *Laffey* matrix: the original, whose annual changes in market rates since *Laffey* was decided in the 1980's is determined by applying the Consumer Price Index for All Urban Consumers (CPI-U), and the Updated Laffey Matrix, which updates market rates by applying the inflation rate for legal services. Levy Affidavit ¶¶ 9-11. Under these matrices, the proper hourly rates for Mess'rs Levy, Kirkpatrick and Beck are as follows:

| **Lawyer** | **Updated Laffey** | **Original Laffey** |
|---|---|---|
| Levy | 709 | 475 |
| Kirkpatrick | 589 | 420 |
| Beck | 361 | 275 |

Second, the fees paid by Houlihan Smith to the lawyers who represented it unsuccessfully may well be the best evidence of the proper market rates for handling this case because they are the only lawyers in the case whose rates were set by the market. In this case, the following rates were paid by lawyers with years of experience comparable to counsel for Forte:

| **Attorney Name** | **Hourly Rate** | **Year of Graduation** |
|---|---|---|
| Michael Reiter | $615 | 1967 |
| Roseanne Ciambrone | $590 | 1988 |
| Richard Darke | $465 | 1998 |
| Robert Palumbos | $350 | 2005 |
| David Curcovic | $395 | 2001 |
| Elese Hanson | $335 | 2008 |

Mr. Levy's and Mr. Platt's legal experience is roughly half-way between Mr. Reiter and Ms. Ciambrone; Mr. Kirkpatrick has been practicing a few years longer than Mr. Darke but not so long as Ms. Ciambrone; and Mr. Beck's time as a lawyer is greater than Mr. Palumbos but not so long as Mr. Curcovic. Thus, the requested rates are entirely reasonable.

Third, this was a case that required immediate and very intense attention to oppose the preliminary injunction. Only a small number of practitioners could have taken this case and defended it effectively against one of the nation's largest law firms, with more than 600 lawyers on staff. Mr. Levy's knowledge and experience litigating and writing both about section 230 and about the use of trademarks in domain names and meta tags for web sites that discuss the trademark holder made him uniquely suited to handle the defense of the case, and enabled him to work much more quickly and efficiently than other lawyers of comparable experience could have done. In fact, Houlihan's letter objecting to Forte's Rule 54.3 production indicated that, in opposing the fee request, plaintiffs intend to rely on Mr. Levy's work in two other cases raising related issues, *Career*

*Agents Network v. Careeragentsnetwork.biz*, 722 F.Supp.2d 814, 822-823 (E.D. Mich. 2010), and *Vision Media v. Forte* 724 F.Supp.2d 1260 (S.D. Fla. 2010); Levy Fourth Aff. Exhibit 11; but the very fact of Mr. Levy's involvement in those cases enabled him to spend less time preparing briefs in this case, because he did not have to start either his research or his writing from scratch. This makes his requested hourly rate especially reasonable.[7]

The hourly rate of each attorney is multiplied by the number of hours reasonably spent on the case. Here, the time spent by counsel, and the total amount sought for that work, is as follows:

| **Case Phase** | **Levy** | **Kirkpatrick** | **Beck** | **Platt** | **Total** |
|---|---|---|---|---|---|
| Thru PI | 99.1 hrs | 1.85 hrs | 5.5 | 14.8 hrs | |
| | $ 59955.50 | $ 925 | $1925 | $7400 | $ 70205.50 |
| Post-PI | 37.1 hrs | 2.9 hrs | 2 | 1.9 hrs | |
| | $ 22445.50 | 1450 | 700 | $950 | 25545.50 |
| Fee Stage | 65 hrs | .75 hrs | | 1 hr | |
| | $ 39325 | 375 | | $500 | 40200 |
| **TOTALS** | 198.9 | 5.5 | 7.5 | 17.7 | |
| | $121726 | $2750 | $2625 | $8850 | $135951 |

[7]Houlihan apparently intends to argue that, because Mr. Levy sought to be awarded attorney fees at the hourly rate of $465 in the *Career Agents Network* case, he should be estopped from seeking an award at a higher rate here. But the circumstances in *Career Agents Network* were very different. In that case, Mr. Levy entered the case only at the attorney fee stage, and in a depressed market where his client's original counsel, whose office was in the suburbs of Detroit, had billed for the litigation at $200 per hour; the rates of plaintiff's counsel were unknown but their office was in a small city in Michigan. Mr. Levy sought the rate that was applicable under the original *Laffey* matrix for the period of time when he handled that case, and concluded that seeking fees based on the updated *Laffey* matrix was more than that Court was likely to be willing to accept. In fact, the Court ultimately awarded fees for Mr. Levy's work at hourly rate of $200, which was held to be the local rate as shown by the amount billed to his client 722 F Supp.2d 814, 825 (E.D. Mich. 2010). Here, the market rate in the local legal market, and the much more difficult task that confronted him in opposing emergency relief, justifies a significantly higher hour rate for Mr. Levy.

Houlihan has indicated that it is going to contend that the time spent by Forte's counsel on this case is unreasonable, but a comparison with the time spent and fees billed by Houlihan's own counsel shows that Forte's counsel were far more efficient than Houlihan's counsel. Though the end of the preliminary injunction hearing alone, Houlihan was billed $121,442 by the lawyers who brought this case on its behalf and lost. Levy Fourth Aff. ¶ 28 and Exh.12. For their work on the same phase of the case, Forte's counsel seek to be awarded barely half as much in the way of fees, or $68.280.50. Houlihan's lawyers stopped working on the case after that, but because Forte's lawyers had to keep working to get the case dismissed, the fees they seek for the time they spent on the next phase of the case are another $24,845.50; the total fees sought for time spent on the merits of the case, $95,751, is **still** significantly less than what Houlihan paid its own lawyers to bring a losing case (roughly three-quarters of Houlihan's bill). Only the fee phase of the case brings the total to $135,951, which is more than what Houlihan was billed on the merits (and we do not know how much Houlihan will have spent on the fee stage). The fees sought in this case are eminently reasonable, and the Court should award them.

In addition, as shown by Exhibit 9 to the Levy Affidavit, Forte's counsel had $1681.34 in out-of-pocket expenses in this case, which should be added to their award of attorney fees.

## CONCLUSION

Forte should be awarded $137,632.34 in attorney fees and expenses.

Respectfully submitted,

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February 4, 2011

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2011, I have filed the Motion and Memorandum using the Court's ECF filing system, which will cause it to be served on counsel for plaintiffs. I am emailing the document to defendant Jamon Silva at email@jamon.name, per his preference to receive service by email only.

/s/ Paul Alan Levy

February 7, 2011