

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

ALVIS COATINGS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:04CV482-K
	)	
ALAN TOWNSEND and LINDA	)	
TOWNSEND,	)	
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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This action is a North Carolina siding company's attempt to suppress constitutionally protected criticism of its business practices on the Internet. The company has inspired widespread consumer dissatisfaction, leading defendants to create a website that criticizes the company and provides a forum for others to speak out as well. Now, the company is attempting to halt that discussion. Plaintiff alleges that the consumers' noncommercial website in Georgia violates the Lanham Act and defames the company. However, the complaint fails for several reasons. First, the Court lacks jurisdiction because the consumers do not have the requisite contacts with North Carolina. Second, the noncommercial website at issue is wholly outside the scope of trademark law, is fully protected by the First Amendment, and presents no likelihood of confusion as a matter of law. Finally, the Communications Decency Act immunizes the website from plaintiff's defamation claims and, even if it did not, plaintiff is a public figure and has failed to plead actual malice. Accordingly, the complaint should be dismissed.

## STATEMENT

### A. Facts.

On September 3, 2003, Alan and Linda Townsend (the "Townsend"), Georgia residents, contracted with Spray On Siding of North Georgia, Inc. ("Spray On Siding") to perform work on their home. Townsend Aff. ¶¶ 2,5. The Townsend have never lived or owned property in North Carolina. They have no employees or offices in North Carolina and have no contacts with North Carolina. *Id.* ¶ 3. They have not even visited North Carolina since long before the events giving rise to this litigation occurred. *Id.*

The Townsends were extremely dissatisfied with the company's work. *Id.* ¶ 5. For nine months, the Townsends tried to work with the Georgia company, and eventually Alvis, the supplier of the products used, to resolve numerous problems. *Id.* However, by late May 2004, the

Townsend became convinced that the companies would never honor their warranties or fix the damage done to the Townsends' home. *Id.* They left the house with serious problems that the Townsends believe will require removing the existing siding, reroofing the house, replacing the entire roof, and replacing the gutter system. *Id.*

The Townsends decided to create a website chronicling their experiences to warn other consumers about Spray On Siding's and Alvis's business practices. *Id.* ¶ 6. They chose domain names for their intended website that accurately portrayed the subject of the site—"www.spraysiding.com" and "www.sprayedonreview.com." Both domain names employ generic industry terms, "spray siding" and "sprayed on," that Alvis has not trademarked. *Id.* ¶¶ 7-8. The latter domain name appends the word "review" to "sprayed on" to signify that the site *reviews* sprayed on products. *Id.* ¶ 6.

Linda Townsend created the website on her own time and pays the expenses of the site from her own pocket. She does all the work connected with the site in Georgia. The code for the site is uploaded from her computer in Georgia to a server in California. *Id.* ¶ 4. California is also the location of the company with which she registered the domain names. *Id.* The site has nothing to do with North Carolina, except for the fact that Alvis is located there.

The website itself, a copy of which is attached to this memorandum, is entitled "Sprayed-On Review - Look Before You Buy!", and is devoted almost exclusively to criticizing Alvis. It provides testimonials from consumers like the Townsends and a forum in which users can discuss their complaints. The site contains a prominent disclosure stating "This site is not affiliated with Alvis, Inc. or Alvis Coatings, Inc. or any of their dealers. The official site for Alvis Spray On Siding is located at [sprayonsiding.com](http://sprayonsiding.com)," and it provides a link to Alvis's official site. *Id.* See also Amended Complaint ¶ 25. Since the filing of this action, the Townsends have added a statement explaining

that Alvis has sued the site's owners. Townsend Aff. ¶ 12. No reasonable person could look at the site and assume that it was created by anyone other than a critic of Alvis.

The site is completely noncommercial. It contains no advertisements or links to any commercial websites, and it does not sell any products or services. Although the site provides a form for viewers to send messages to the Townsends, and although there is a forum on which viewers can post their comments, the site is not commercially interactive in any way. The Townsends gain no financial benefit from it. Townsend Aff. ¶ 11.

On August 16, 2004, Alvis sent the Townsends a letter demanding that they cease and desist from operating the website.

**B. Proceedings to Date.**

Alvis filed this action on September 17, 2004, then amended its complaint on September 27, 2004. On October 19, 2004, defendants moved to dismiss for failure to state a claim and lack of personal jurisdiction, but, with plaintiff's consent, the deadline for the memorandum in support of that motion was postponed until November 9, 2004.

**SUMMARY OF ARGUMENT**

This action should be dismissed, first of all, because there is no basis for suing the Townsends in North Carolina. The Townsends live and work in Georgia and have no property or business in North Carolina. They created their website in Georgia to provide information about a dispute arising out of work done on their Georgia home by a Georgia company that contracts with the plaintiff. Under settled Fourth Circuit law, a suit cannot be filed over alleged wrongdoing on a website unless the website is commercially interactive and provides a way for the defendants to do business in the forum state. The Townsends website is wholly noncommercial, is aimed at a national audience, and is not purposely directed at North Carolinians.

Even if jurisdiction were present, the action should be dismissed because the trademark laws, construed consistently with the First Amendment, permit consumers to create noncommercial websites commenting on companies and to use words accurately to denominate the content of their websites, even if those words are trademarked. Here, the website itself is in the record and can be considered on a motion to dismiss because it is alleged in the complaint. Scrutiny of the site clearly reveals its wholly noncommercial character, shows that the website is about Alvis Spray on Siding, and thus shows that the domain names chosen by the Townsends fairly describe the subject of their website. Numerous recent decisions have rejected trademark attacks on noncommercial websites similar to this one.

Finally, plaintiff has not pleaded a proper claim for defamation. First, plaintiff complains only about the statements of persons other than the Townsends that are posted on their website, and the Communications Decency Act gives the providers of an interactive computer service immunity from suit for content authored by others. Moreover, the allegations in the complaint show that Alvis is a public figure. Yet Alvis fails to plead actual malice as required by the First Amendment, and its allegations affirmatively negate the presence of actual malice.

## **ARGUMENT**

### **I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PREVENTS THIS COURT FROM EXERCISING PERSONAL JURISDICTION OVER DEFENDANTS.**

For this Court to assert personal jurisdiction without violating the Due Process Clause of the Fourteenth Amendment, the Townsends must have “certain minimum contacts with [North Carolina] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Ellicott Machine Corp. v. John Holland Party*, 995 F.2d 474, 477 (4th Cir. 1993). The minimum contacts

test requires “in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant’s connection with the state must be such that “it should reasonably anticipate being haled into court” in the state in the event of a dispute. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980).

The minimum contacts analysis generally requires an assessment of whether the court is exercising “general” or “specific” jurisdiction. Alvis cannot sustain his burden of proving either general or specific jurisdiction because the only conduct at issue—the Townsends’ creation in Georgia of a website where they and others can express opinions about Alvis—occurred outside North Carolina and entailed no contact by the Townsends with North Carolina. Townsend Aff. ¶ 3.<sup>1</sup>

#### **A. General Jurisdiction Is Lacking.**

The exercise of general jurisdiction requires that a defendant’s contacts with the forum be “continuous and systematic.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Even “continuous activity of some sorts within a state is not enough to support [general jurisdiction].” *Int’l Shoe*, 326 U.S. at 318. “This is a fairly high standard in practice.” *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990); accord *Nichols v. GD Searle Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993). For North Carolina to assert general jurisdiction over non-resident defendants, their contacts with North Carolina must be of such a “continuous and systematic” nature that personal jurisdiction is proper even if the action is unrelated to the defendants’ contacts with the state. *Id.* Where a defendant is not licensed to do business in the forum state, does not maintain offices or employees there, and owns no property in the forum, the

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<sup>1</sup> On a motion to dismiss for lack of personal jurisdiction, the Court is not limited to considering the face of the complaint; defendant’s evidence may also be considered. *Mylan Labs v. Akzo*, 2 F.3d 56, 62 (4th Cir. 1993). Plaintiff has the burden of proof on this motion. *Young v.*

facts do not support general jurisdiction.

Alvis's complaint does not allege any basis for jurisdiction aside from the Townsends' website; therefore, it does not allege any basis for general jurisdiction. Moreover, the record does not support general jurisdiction. The Townsends do not live in North Carolina. Townsend Aff. ¶ 2. They own no property in North Carolina, have no employees or offices in North Carolina, and have no contacts with North Carolina. *Id.* ¶ 2-3. They maintain the website in their spare time and gain no monetary benefit from it. *Id.* ¶¶ 4, 11. The Townsends have not even visited North Carolina since 1995. *Id.* ¶ 3. Put simply, they do not have "systematic and continuous" contacts with North Carolina so as to support the exercise of general jurisdiction.

**B. Specific Jurisdiction Is Lacking.**

Specific jurisdiction is proper when a defendant has sufficient contacts with the forum related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8; *Diamond Healthcare v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000). To maintain specific personal jurisdiction, Alvis must show that: (1) the Townsends have purposely availed themselves of the privilege of conducting business or causing consequences in North Carolina; (2) the cause of action arises from their activities in North Carolina; and (3) their conduct has a substantial enough connection with North Carolina to make the exercise of jurisdiction reasonable. The Townsends' contacts with the North Carolina must have been sufficient to give them fair warning that they would be subject to suit in that state. *Federal Ins. Co. v. Lake Shore*, 886 F.2d 654, 657-58 (4th Cir. 1989).

The only allegations in Alvis's complaint to support personal jurisdiction are boilerplate assertions that the Townsends' website constitutes unfair or deceptive trade practices and unfair

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*FDIC*, 103 F.3d 1180, 1191 (4th Cir. 1997).

competition in North Carolina, Amended Complaint ¶¶ 45, 52, and causes injury in North Carolina. Amended Complaint ¶¶ 49, 55. These allegations do not provide a sufficient basis for asserting personal jurisdiction.

**1. The Townsends' Website Does Not Provide a Basis for Specific Jurisdiction.**

Courts addressing claims of personal jurisdiction based on a website *consistently* rule that personal jurisdiction is lacking where the defendant's sole contact with the forum state is that people in the state can view the defendant's noncommercial website (or even passive commercial website). The Fourth Circuit, like many other courts, has held that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of *commercial* activity that an entity conducts over the Internet." *ALS Scan v. Digital Serv. Consultants*, 293 F.3d 707, 713 (4th Cir. 2002) (emphasis added) (quoting *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). Therefore, the Fourth Circuit has adopted the "sliding scale" standard of assessing contacts pioneered by *Zippo Manufacturing Co.*:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Website which is accessible to users in foreign jurisdictions. A passive Website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Website.

*ALS Scan*, 293 F.3d at 713-14 (quoting *Zippo*, 952 F. Supp. at 1124). The court further elaborated that, under this scale, Internet activity will not give rise to jurisdiction unless it is *directed at a particular state with the manifest intent of conducting business or other activities there*. *ALS Scan*,

293 F.3d at 714 (“[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) *directs electronic activity into the State*, (2) *with the manifested intent of engaging in business or other interactions within the State*, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.”) (emphasis added); *see also id.* at 714 (“[S]pecific jurisdiction in the Internet context may be based only on an out-of-state person’s Internet activity *directed at [the forum state]* and causing injury that gives rise to a potential claim cognizable in [that state].”) (emphasis added).

The Townsends’ website falls at the far end of the no-jurisdiction side of the scale. First, Alvis fails even to allege that the Townsends’ website is directed at North Carolina. The Townsends’ own experiences with Alvis’s products, the centerpiece of the website, occurred in Georgia. Townsend Aff. ¶ 5 & Exhibit A. The two other prominently featured consumer “testimonials” on the site are from families in Illinois. The site plainly does not manifest any intent to engage in business or any other activities in North Carolina. *See* Townsend Aff. Exhibit A. Furthermore, the website is completely noncommercial. It does not advertise or sell any products, nor does it link to any commercial website. Townsend Affidavit ¶ 11. Users may post messages to one another and engage in discussion on the website, but such discussion is not targeted toward North Carolina and never involves advertising or commercial information. *Id.*

This analysis does not change because the object of much of the commentary on the website, Alvis, is a North Carolina corporation. In a recent, instructive case, the Fourth Circuit rejected jurisdiction in the state of Virginia over two Connecticut newspapers that published, on the Internet, allegedly defamatory statements targeting a particular prison warden in Virginia. *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). Both newspapers ran commercially interactive websites that carried advertising and sold advertising. Plaintiff alleged that (1) “the newspapers,

knowing that Young was a Virginia resident, intentionally discussed and defamed him in their articles,” (2) “the newspapers posted the articles on their websites, which were accessible in Virginia,” and (3) “the primary effects of the defamatory statements . . . were felt in Virginia.” *Id.* at 261-62. Despite these allegations, the Fourth Circuit held that jurisdiction would be unconstitutional because the newspapers did not “manifest[] an intent to direct their website content—which included certain articles discussing conditions in a Virginia prison—to a Virginia audience.” *Id.* at 263. It explained:

[T]he fact that the newspapers’ websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to indicate that the newspapers purposefully (albeit electronically) directed their activity in a substantial way to the forum state. The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.

*Id.* (citation, brackets, and quotation marks omitted). Thus, even though the newspapers allegedly defamed a Virginia resident, and even though they had reason to believe Virginians would be particularly interested in the statements, the Virginia courts lacked jurisdiction because the papers did not specifically target Virginia readers.

The court in *Falwell v. Cohn*, 2003 WL 751130 (W.D. Va. Mar. 4, 2003), applied the reasoning of *Young* in a case highly analogous to this one. There, Virginia resident Jerry Falwell sued Illinois resident Gary Cohn over a website that used Falwell’s name as its domain name and allegedly defamed Falwell by comparing him to other “false prophets.” The district judge dismissed for lack of personal jurisdiction because the website was not commercially interactive and, although it was directed to a national audience, it was not directed to a Virginia audience in particular. Similarly, here, the Townsends have created a noncommercial website about their own experiences, as well as the experience of homeowners in Illinois, and they have not targeted North Carolina

consumers. As in *Falwell*, this case should be dismissed for lack of personal jurisdiction.

In addition to these defamation cases, courts have repeatedly employed the *Zippo* analysis to reject personal jurisdiction in trademark cases. For example, in *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.2d 25 (2d Cir. 1997), a St. Louis jazz club published a website using its name, the Blue Note, which was the same as the world-famous club in New York City. The New York club sued for trademark violations, but the district court refused to exercise jurisdiction, because, as here, defendant had no presence of any kind in the forum “other than the Website that can be accessed worldwide.” 937 F. Supp. at 301. The court found that to permit jurisdiction in New York would have violated due process because the defendant did not actively seek to encourage residents of the forum to access the site and conducted no business in the forum. As the court stated, “[c]reating a [web] site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.” *Id.* (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1992)). *See also Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002) (finding personal jurisdiction in Michigan based on a website a “close question” and relying instead on other contacts, even where defendant provided passwords to Michigan consumers with which they could download test results they had purchased). The basis for asserting personal jurisdiction over the Townsends is even weaker because—in contrast the Blue Note’s solicitation of business for a jazz club—the Townsends’ site does not solicit or conduct any business whatsoever.

In *Berthold Types Ltd. v. European Mikrograf Co.*, 102 F. Supp. 2d 928 (N.D. Ill. 2000), two companies that market typefaces litigated whether the defendant’s font software violated the plaintiff’s trademarks. The defendant’s website enabled potential and existing customers to interact with the defendant to access information about their commercial relationship with the defendant, and

it even included information on ordering products. *Id.* at 933. However, the court found jurisdiction lacking because the defendant “ma[de] no commercial response to customers’ submissions,” did not conduct sales directly over the Internet, and in no way targeted consumers specifically in the forum state. *Id.* The Townsends’ website is similar in that, despite some interactivity for purely informational purposes, no one on the website responds commercially to submissions, targets North Carolina, or conducts sales through the website. Additionally, the argument for jurisdiction over the Townsends is again weaker because their site contains no commercial content at all.

## **2. No Other Basis for Specific Jurisdiction Exists.**

Under the above cases, the Townsends’ website cannot provide the basis for personal jurisdiction. Alvis therefore must assert North Carolina jurisdiction simply based on the fact that Alvis is a North Carolina corporation with its principal place of business in that state. That argument fails as well.

The Fourth Circuit has rejected the proposition that a defamatory statement made in the defendant’s home state constitutes a tort committed in the plaintiff’s home state, even if the defendant knew that the plaintiff was located there and knew that people in that state would be interested in the defendant’s statement. *Young*, 315 F.3d 256; *see also Nelson v. Bulso*, 149 F.3d 701 (7th Cir. 1998). Similarly, the use of a trademark in a noncommercial Internet site is not enough, by itself, to subject a defendant to personal jurisdiction in the home state of the trademark holder. We have found no case authorizing personal jurisdiction solely on that basis, which would squarely contradict cases such as *Bensusan, Berthold*, and others. *See Mid City Bowling Lanes & Sports Palace v. Ivercrest*, 35 F. Supp. 2d 507, 511-12 (E.D. La. 1999), *aff’d mem.*, 208 F.3d 1006 (5th Cir. 2000) (even in a commercial context, use of a trademark on a passive website is insufficient

to support personal jurisdiction in a foreign state).

If any tort was committed (which defendants deny), it was committed in Georgia, where the website was created, and where the HTML code was loaded onto the server. Townsend Aff. ¶ 4. See *Christian Sci. Bd. v. Robinson*, 259 F.3d 209, 218 & n.11 (4th Cir. 2001) (jurisdiction in North Carolina based on defendant having asked a North Carolina resident to create a website for him); *Compuserve v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (jurisdiction could be exercised in Ohio over a defendant who had loaded his software onto the plaintiff's server in Ohio, but Court pointedly declined to extend its holding to any Internet user who happened to use the software on a computer in a different state).

In sum, North Carolina's interest in protecting Alvis from Georgia residents' exercise of their First Amendment rights is slim and does not trigger personal jurisdiction. Indeed, a finding of jurisdiction here would have chilling implications for citizens' right to speak freely about corporations and public figures with whom they disagree. This case does not concern a manufacturer or entrepreneur who placed a product in the stream of commerce in the hopes of making profits—an expectancy that can be balanced against the danger of being sued in some location where the product came to rest and caused injury. Rather, it concerns people speaking freely on the Internet without any commercial interest. Every person who posts an opinion on the Internet knows that people sitting at computers not just in their own country, but in foreign lands around the globe, may access to their views by simply clicking on a link or finding them through a search engine. If citizens knew that they could be forced to defend themselves against litigation in every forum where their speech may be viewed, they would surely be chilled in the exercise of their First Amendment rights. Moreover, the Fourth Circuit specifically adverted to this danger by adopting the *Zippo* standard in *ALS Scan*. 293 F.3d at 713.

For the above reasons, this Court should dismiss for lack of personal jurisdiction.

**II. BECAUSE THE TOWNSENDS' WEBSITE IS NONCOMMERCIAL, ALVIS'S TRADEMARK CLAIMS DO NOT APPLY, AND THE CLAIMS WOULD INFRINGE THE TOWNSENDS' FIRST AMENDMENT RIGHTS IF THEY DID APPLY.**

Analysis of trademark and other commercial claims in cases concerning Internet commentary on a company begins with an inquiry that bears both on First Amendment and trademark law—whether the speech at issue is commercial or noncommercial. Commercial speech is subject to the Lanham Act and is entitled to lesser First Amendment protection (and no protection at all if it violates Lanham Act). In contrast, noncommercial speech is *not* subject to the Lanham Act and receives full First Amendment protection. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 774-75 (6th Cir. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1015-18 (9th Cir. 2004).<sup>2</sup> Because the Townsends' website is noncommercial, Alvis's trademark claims do not apply to it, and the website is entitled to full First Amendment protection.<sup>3</sup>

**A. Noncommercial Speech Is Not Subject to Trademark Law and Is Fully Protected by the First Amendment.**

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<sup>2</sup> Alvis's action to enforce its trademark implicates the First Amendment even though plaintiff is not a government actor. Relief sought by private parties, if granted by a court, is government action, and thus is subject to First Amendment scrutiny. *Shelley v. Kraemer*, 334 U.S. 1, 14-15 (1948); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461 (4th Cir. 2000).

<sup>3</sup> We do not analyze the state-law commercial claims separately for two reasons. First, the First Amendment protects the Townsends' speech from both state law and federal law claims. Second, for purposes of this discussion, the elements of state unfair competition law are substantially similar to the Lanham Act except that the "commerce" requirement in federal law pertains to *interstate* commerce. *See Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148-49 (4th Cir. 1987) (treating federal trademark claims, North Carolina common law unfair competition claims, and North Carolina statutory unfair competition claims as identical for purposes of assessing likelihood of confusion); *id.* at 148 ("The North Carolina common law of unfair competition in the context of trademarks and tradenames is similar to the federal law of trademark infringement. . . . [D]amages are suffered when a rival adopts for his own goods a sign or symbol in an apparent imitation of another's that would likely mislead prospective purchasers and the public as to the identity of the goods."). *See also* N.C. Gen. Stat. § 75-1.1(b) (defining "commerce" for North Carolina unfair competition law as "all business activities").

Trademark law explicitly exempts noncommercial speech such as the Townsends' precisely so that the law will not run afoul of the First Amendment. *Taubman*, 319 F.3d at 774; *Nissan*, 378 F.3d at 1016-17. Numerous cases show that consumer commentary is core speech protected by the First Amendment. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (*New York Times* standard applied in libel action brought by a manufacturer claiming that consumer group had maligned its product). Many other cases similarly treat criticisms of a company's products or business practices as speech protected by the First Amendment, although commercial speech principles apply to criticism by competitors.<sup>4</sup> The Townsends' website chronicles their and other consumers' frustration with Alvis's business practices. Their criticisms would be pointless if they could not identify the company they are criticizing by using its trademarks. The Fourth Circuit explained:

This is an admittedly partisan account and one that vexes [the plaintiff]. Yet just because speech is critical of a corporation and its business practices is not a sufficient reason to enjoin the speech. As the First Circuit stated, if a trademark owner could "enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct."

*CPC Int'l., Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (quoting *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987)).

Congress has therefore limited the application of the Lanham Act to commercial speech. First, § 43(c) expressly excludes noncommercial use of marks from the entire section's reach: "The following shall not be actionable *under this section*: . . . (B) Noncommercial use of the mark." 15 U.S.C. § 1125(c)(4) (emphasis added). Section (c)(4) was added to the Act when it was amended in

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<sup>4</sup> *E.g., Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119-21 (8th Cir. 1999); *Semco v. Amcast*, 52 F.3d 108, 111-14 (6th Cir. 1995); *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 927-39 (3d Cir. 1990); *Mattel v. MCA Records*, 28 F. Supp. 2d 1120,

1989. The House Judiciary Committee made explicit that the purpose was to avoid any impact on noncommercial speech:

[T]he proposed change in Section 43(a) should not be read in any way to limit political speech, *consumer* or editorial *comment*, parodies, satires, or other constitutionally protected material. . . . The section is narrowly drafted to encompass only clearly false and misleading *commercial* speech.

135 Cong. Rec. H1207, H1217 (daily ed., Apr. 13, 1989) (emphasis added). False designation under § 43(a) is part of Lanham Act § 43; therefore, is it covered by the § 43(c) exclusion.

Second, the Lanham Act creates a cause of action for false representation of origin *only* when the defendant “uses [the trademark] in commerce.” 15 U.S.C. § 1125(a)(1). Section 45 of the Lanham Act defines “use in commerce” as meaning “bona fide use of a mark in the ordinary course of trade,” such as placing the mark on goods or services in commerce. 15 U.S.C. § 1127.<sup>5</sup> Without “use in commerce” “in connection with goods and services,” there is no violation of § 43(a). *Int’l Bancorp, LLC v. Societe des Bains de Mer et duInternational Bancorp, LLC*, 329 F.3d 359, 363 (4th Cir. 2003); *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365 (4th Cir. 2001) (hereinafter “*PETA*”); *see also* S. Rep. No. 100-515, at 44 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5607 (“Amendment of the definition of ‘use in commerce’ [in § 45 of the Lanham Act] is one of the most far-reaching changes the legislation contains. . . . The committee intends that the revised definition of ‘use in commerce’ be interpreted to mean *commercial use* which is typical in a particular industry.”) (emphasis added).

Plainly, the Lanham act excludes noncommercial speech, *Taubman*, 319 F.3d at 774-75;

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1144-45 (C.D. Cal. 1998).

<sup>5</sup> The Supreme Court has recently noted that statutory terms that include the word “commerce” do not necessarily reach to the full breadth of the commerce power, but must be construed as commanded by each particular statute. *Circuit City Stores v. Adams*, 121 S. Ct. 1302, 1308-10 (2001) (unlike term “involving commerce,” term “engaged in commerce” does not reach to full extent of commerce clause, but covers only transportation workers).

*Nissan*, 378 F.3d at 1016-17; *see also TMI, Inc. v. Maxwell*, 368 F.3d 433, 436-38 (5th Cir. 2004), and even excludes commercial speech that does not use marks “in connection with goods or services.” *PETA*, 263 F.3d 359, 365 (4th Cir. 2001) (hereinafter “*PETA*”). It excludes commercial speech precisely for the purpose of avoiding infringement of First Amendment rights. *Taubman*, 319 F.3d at 774-75; *Nissan*, 378 F.3d at 1016-17. Thus, when an action is brought against a noncommercial use of a trademark for either political or consumer commentary, the courts do not hesitate to afford full the defendant First Amendment protection by holding that trademark law does not apply, that First Amendment principles bar application of the federal statute, or that the state law is unconstitutional. *See CPC Int’l*, 214 F.3d at 461-64; *Nissan*, 378 F.3d at 1017-18; *L.L. Bean*, 811 F.2d at 33.

**B. The Townsends’ Website Is Noncommercial.**

Although Alvis’s complaint alleges that the website is “used in commerce,” Amended Complaint ¶ 39, the Court can consider the website itself under Rule 12(b)(6) without converting the motion into a summary judgment motion because the site is “integral to and explicitly relied on in the complaint.” *Phillips v. LCI Int’l*, 190 F.3d 609, 618 (4th Cir. 1999) (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998)); *Cortec Indus. v. Sum Holding*, 949 F.2d 42, 48 (2d Cir. 1991); *Williamson v. Virginia First Savings Bank*, 26 F. Supp. 2d 798, 800 (E.D. Va. 1998). The Court may also take judicial notice of public records available on the World Wide Web, *Cairns v. Franklin Mint Co.*, 107 F. Supp. 2d 1212, 1216 (C.D. Cal. 2000); *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F. Supp. 2d 1058, 1066 (N.D. Cal. 1999), because such records are admissible as self-authenticating documents. *See also Elliott Assocs. LP v. Banco de la Nacion*, 194 FRD 116, 121 (S.D.N.Y. 2000) (prime rates on Federal Reserve website are self-authenticating and hence admissible); *Sannes v. Jeff Wyler Chevrolet*, 1999 WL 33313134, at \*3 n.3 (S.D. Ohio. March 31,

1999) (FTC press releases on agency website are self-authenticating). The Townsends' website reveals its entirely noncommercial character, and, as the preceding section of this memorandum shows, none of the trademark causes of action alleged in the complaint can be pursued against a purely noncommercial use of a trademark.

The Townsends' website is plainly noncommercial. *See TMI*, 368 F.3d at 437-38 (finding a consumer gripe site very similar to the Townsends' noncommercial); *Taubman*, 319 F.3d at 772, 775-76 (finding noncommercial an informational website that linked to the websites of stores in a particular shopping mall and had previously linked to the site owner's girlfriend's independent business). The Townsends' domain name uses general industry terms, "spray siding" and "sprayed on," rather than marks owned by Alvis. Townsend Aff. ¶ 7-8. The Townsends have never solicited offers to buy their domain names, *id.* ¶ 9, and plaintiff does not allege they have done so. The website does not contain any links to commercial sites. *Id.* ¶ 11. Moreover, the sole purpose of the website is to communicate opinions and information. *See CPC Int'l*, 214 F.3d at 462 ("The website served a primarily informational purpose, not a commercial one."). The site contains no advertisements (which is how many websites produce revenues for their operators), does not propose any commercial transactions, *see id.* ("Speech is commercial in nature if it does no more than propose a commercial transaction.") (quotation marks omitted), and does not sell or promote any goods or services, *see id.* ("[T]he original website did not offer any products for sale or represent that [the defendant] possessed the trademark for use on . . . products."). In addition, as the Townsends' affidavit shows, ¶ 11, they derive no financial benefit from the website, and they have no investments in any of Alvis's competitors.

Alvis will likely argue that the Townsends' website should be considered commercial under the Fourth Circuit's decision in *PETA*, 263 F.3d 359. However, that case is not controlling here, for

several reasons. The defendant in *PETA* registered a domain name, www.peta.org, that consisted exclusively of People for the Ethical Treatment of Animals' precise trademark, "PETA," *id.* at 363, publicly solicited offers from PETA to buy the domain name, *id.* at 363, failed to include a prominent disclosure that the site was unaffiliated with PETA and a link to PETA's official site, *id.*, and provided "links to more than 30 commercial operations offering goods and services." *Id.* at 366. None of those factors is present here. The Townsends' website is wholly distinct from the one at issue in *PETA*.

More importantly, the legal issues in *PETA* are distinct from those here because the defendant in *PETA* conceded that he used *PETA's* mark "in commerce." *Id.* at 365. The court therefore considered only the distinct, subsequent requirement that such commercial use be "in connection with goods and services." *Id.* The court concluded that the website met that standard because it was "likely to prevent or hinder Internet users from accessing plaintiffs' services on plaintiffs' own web site," *id.* at 365, and because it provided "links to more than 30 commercial operations offering goods and services." *Id.* at 366. Again, neither of those factors is present here. The Townsends' domain name uses general industry terms rather than a mark owned by Alvis, and their website prominently disclaims any affiliation to Alvis's and links to Alvis's official site, thereby allaying *PETA's* concern that users might not find their way to the plaintiff's official site. *Id.* at 365. And their site contains no advertising whatsoever. However, this Court should not even reach the "in connection with goods and services" inquiry. Nowhere does *PETA* suggest that trademark law covers a *noncommercial* website that uses marks in connection with goods and services. Such a holding would turn the Fourth Circuit's law on its head and conflict with several other Circuits because, as discussed above, the Fourth Circuit and several others have explicitly held that a website must be commercial *before* trademark law applies to it.

Moreover, this Court should not read *PETA* backward to imply that a website is rendered commercial merely because it uses a mark “in connection with goods and services” or adversely impacts a plaintiff’s commercial activities. A few cases concerning the “use in commerce” requirement have suggested that may be the case. *E.g.*, *Trade Media Holdings v. Huang & Assocs.*, 123 F. Supp. 2d 233, 242 (D.N.J. 2000); *Christian Science*, 123 F. Supp. 2d at 971 (citing several cases), *aff’d*, 259 F.3d 209 (4th Cir. 2001); *Bihari v. Gross*, 119 F. Supp. 2d 309, 317 (S.D.N.Y. 2000). However, each of these cases goes on either to uphold the defendant’s use of the mark or to find that the defendant was using the mark to raise money or sell its own goods or services or the goods of some other person. For example, in *Christian Science*, the plaintiff and defendants disputed which of them was the “true” Christian Science church, and defendants were using their website to sell tapes, publications, books and educational programs, as well as to solicit donations. 123 F. Supp. 2d at 974, 975. Therefore, the suggestion that a website can become commercial simply by adversely impacting commercial activities is plainly dicta. And it is unpersuasive. None of the cases explains how its dicta is consistent with the statutory definition of “use in commerce” and Congress’s clear intent to confine the meaning of that phrase. And none addresses the serious First Amendment problems—as identified by several courts of appeals—that such a broad definition of “use in commerce” would create.

Consumer criticism routinely affects business activities. That is its purpose—to persuade other consumers to think twice about using a company’s goods or services. Barring the use of marks in such commentary would render it wholly ineffective, in direct conflict with the Lanham Act and the First Amendment. The Fourth Circuit makes clear that commentary on corporations, *and particularly commentary that uses those companies’ marks*, is protected speech. *See CPC Int’l*, 242 F.3d at 462 (“Much useful social and commercial discourse would be all but impossible if speakers

were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.”). This is why Congress modified the Lanham Act to ensure that it does not stymie consumer commentary in violation of the First Amendment.

For these reasons, the only court of appeals to consider the dicta has rejected it. *See Taubman*, 319 F.3d at 777-78 (“[A]lthough economic damage might be an intended effect of [defendant’s] expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business.”); *see also Bosley Med. Inst., Inc. v. Kremer*, 2004 WL 964163, at \*8 (S.D. Cal. 2004) (“[Defendant’s] desire to undermine [plaintiff’s] business, and his use of [plaintiff’s] marks to further that agenda, do not constitute a commercial use of the marks.”). This Court should reject it as well. It should dismiss the trademark claims because the Townsends’ website is not commercial.

### **III. THE TOWNSENDS’ USE OF ALVIS’S MARKS IS NOT LIKELY TO CAUSE CONFUSION OR MISTAKE AND CONSTITUTES FAIR USE, AS A MATTER OF LAW.**

Alvis alleges the Townsends have violated its trademarks by selecting a domain name that resembles Alvis’s registered mark, ALVIS SPRAY ON SIDING, its purported common-law mark, SPRAY ON SIDING, and its domain name, [www.sprayonsiding.com](http://www.sprayonsiding.com), Amended Complaint ¶¶ 22-23, and through using Alvis marks in the content of their website. Amended Complaint ¶¶ 24-27. However, even if trademark law applied to the Townsends’ website and the First Amendment did not protect their speech, Alvis’s trademark claims would fail as a matter of law because the website does not create any actionable likelihood of confusion as to the source of goods or services. Rather, the Townsends make fair use of Alvis’s trademarks to identify the target of their criticism.

Alvis’s claims fail first because the Townsends’ domain name uses a general industry term rather than any of Alvis’s marks. “Spray siding” is a generic name for a paint-like coating that

functions similarly to siding. Alvis has no right to prevent other persons from using that term truthfully to describe their own products or to describe a website that reviews such products. It is noteworthy that the only trademark Alvis has been able to register is “*Alvis* Spray on Siding.” The company does not even have a registered mark in “spray on siding,” much less the precise words in the Townsends’ domain names, “spray siding” or “sprayed on review.” (Patent and Trademark Office records available online show that an individual named James B. Kelly, in Texas, filed to register “spray siding” on July 6, 2004. *See* Townsend Aff. ¶ 8.) Indeed, Alvis only claims common-law trademark rights in “spray on siding,” Amended Complaint ¶ 13, and that mark is similar to the Townsends’ domain names only to the extent that the domain names use words that generally describe a product—siding that may be applied as a spray instead of coming in solid form and being attached with adhesive to the side of a house. In fact, at least two companies in addition to Alvis use domain names that incorporate the terms “spray siding” or “spray on siding.” Townsend Aff. ¶ 7. There is no possibility that Internet users will believe the Townsends’ website is affiliated with Alvis merely because its domain name employs a general industry term.

Moreover, several courts have found an absence of confusion even where domain names use trademarks to denote the contents of the websites, so long as the websites do not create confusion regarding whether they are sponsored by the trademark holders. Even if the Townsends’ domain name used Alvis’s marks, which it does not, the cases law shows that the website’s prominent disclaimers, prominent link to Alvis’s site, and critical commentary eliminate any possibility of confusion as a matter of law. In *Taubman*, for example, the Sixth Circuit upheld the use of a domain name, “shopsatwillowbend.com,” which was nearly identical to the name of a shopping mall and the mark, “The Shops at Willow Bend.” 319 F.3d at 772, 775-77. Even though the domain name consisted of the shopping mall’s name and mark, and even though the site simply provided

information about the mall rather than reviews or commentary that would signal an unaffiliated speaker, the court found no likelihood of confusion because the site contained a conspicuous disclaimer that the site was not the mall's official site, and it linked to the official site. *Id.* at 776-77. Several other courts have reached the same conclusion. *See Ficker v. Tuohy*, 305 F. Supp. 2d 569, 571 (D. Md. 2004) (same); *Bosley*, 2004 WL 964163, at \*10 (same); *Crown Pontiac, Inc. v. Ballock*, 287 F. Supp. 2d 1256, 1258 (N.D. Ala. 2003) (same). The *Taubman* court even found that the disclaimer and link *facilitated* traffic to the mall's official website by sending users who accidentally typed the wrong address to the correct page, instead of their simply receiving a blank page. 319 F.3d at 777.

The Townsends' website is similar to the site in *Taubman* because it contains a conspicuous disclaimer and a link to Alvis's official site. But the case against the Townsends' website is actually weaker than the case against the website in *Taubman*. The Townsends' site uses general industry terminology in its domain name rather than Alvis's mark. And rather than providing general information about Alvis that might be duplicative of Alvis's own site, the Townsends' site provides consumer commentary and critical reviews of Alvis's products. There is simply no reason to suspect that consumers would think Alvis set up a website to criticize its own business practices. *See, e.g., Bosley*, 2004 WL 964163, at \*10 (“[T]he pejorative content at [defendant’s] sites would also immediately alert a visitor to the sites that he had not accessed [plaintiff’s] official site.”).

In another instructive case, the Seventh Circuit upheld the use of “bargainbeanies.com” by a reseller of Beanie Babies who did not own the Beanie Babies mark. *Ty Inc. v. Perryman*, 306 F.3d 509 (7th Cir. 2002). The Court noted that it was necessary to use the Beanie Babies mark to identify the content of the website because “[y]ou can’t sell a branded product without using its brand name, that is, its trademark.” *Id.* at 512. It elaborated:

[W]e would find it impossible to understand how [defendant] could be thought to be blurring, tarnishing, or otherwise free riding to any significant extent on Ty's investment in its mark. To say she was would amount to saying that if a used car dealer truthfully advertised that it sold Toyotas, or if a muffler manufacturer truthfully advertised that it specialized in making mufflers for installation in Toyotas, Toyota would have a claim of trademark infringement.

*Id.* Likewise, the Townsends may use terms in their domain name that identify the website's subject matter. This echoes the Fourth Circuit's holding in *CPC International* that consumers must be able to use trademarks to identify the object of their commentary. 214 F.3d at 462 (“[I]f a trademark owner could enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct.”) (quotation marks omitted).

Finally, this Court should bear in mind that the Lanham Act's confusion requirement relates only to confusion as to the source of *goods and services*. See *Taubman*, 319 F.3d at 776 (“[T]he only important question is whether there is a likelihood of confusion *between the parties' goods or services*. Under Lanham Act jurisprudence, it is irrelevant whether customers would be confused as to the origin of the websites, unless there is confusion as to the origin of the respective products.”). The Townsends' website cannot create any such confusion because it does not offer any goods or services.

Alvis will again likely rely on *PETA*. But the facts of *PETA* are distinct in several important respects. First, the defendant in *PETA* used the precise name of the plaintiff organization. 263 F.3d 362-63. He therefore conceded that the site's domain name was likely to cause confusion and argued only that its content would subsequently alleviate the confusion. *Id.* at 366. The defendant also did not claim that his website was about PETA. To the contrary, to register the domain name, he claimed that he had established a competing organization named People Eating Tasty Animals. Then, when challenged, he both tried to sell the domain names back to PETA and claimed that he

was operating a “parody” site. He also failed to include a prominent disclosure that his site was not affiliated with PETA or to include a prominent link to PETA’s official website, *id.* at 363, and he failed even to identify that he was attempting to parody PETA. *Id.* at 366. He attempted to intercept PETA’s web traffic and use the website to discuss an entirely fictional organization. The court therefore found that the domain name communicated the message that the site was affiliated with PETA, and that the message that the website was *not* affiliated with PETA was only conveyed when the user read enough of the website to realize it was a parody. *Id.* at 366-67.

In contrast, the Townsends’ domain name does not use an Alvis mark. Rather, it uses the general industry term, “spray siding.” Therefore, it does not create even the initial likelihood of confusion that existed in *PETA*. Furthermore, even if it did create such confusion, the site’s content immediately conveys that it is unaffiliated with Alvis. The website’s title—“Sprayed-On Review - Look Before You Buy!,” Townsend Aff. ¶ 12—makes clear that, rather than selling anything, the website *reviews* a product and warns against buying it. The website also prominently states, at the top of its front page, “This site is not affiliated with Alvis, Inc. or Alvis Coatings, Inc. or any of their dealers. The official site for Alvis Spray On Siding is located at [sprayonsiding.com](http://sprayonsiding.com).” *Id.* These statements clearly and immediately demonstrate to users that the website does not belong to Alvis and is not affiliated with Alvis. *See Taubman*, 319 F.3d at 776-77. Rather than impeding the flow of traffic to Alvis’s site, the Townsends’ inclusion of a link actually *facilitates* users’ finding it. *See id.* at 777 (“[Defendant’s] website and its disclaimer actually serve to re-direct lost customers to Taubman’s site that might otherwise be lost.”).<sup>6</sup> The website also prominently notes that Alvis has

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<sup>6</sup> Similarly, this Court should reject Alvis’s objection to the Townsends’ advertising their website merely because it “at least sometimes appears more prominently than Alvis’s” when a user types Alvis’s marks into the Google search engine. *Id.* ¶ 22. If a user seeking Alvis’s website types Alvis’s marks into a search engine, and the engine returns Alvis’s website, the user will make his or her way to that website even if other sites appear above it.

sued the site's owners, highlights "Alvis Spray On Siding disaster[s]," and states, "Exercise your First Amendment Rights to voice your opinions about Alvis Spray On Siding!" Townsend Aff. Exhibit A. Each of these features demonstrates that the website is critical of, and antagonistic to, Alvis. Alvis's assertion that consumers will think the website is operated by Alvis, or that the Townsends are attempting to sell something by misappropriating Alvis's marks, is nothing short of ludicrous.

#### **IV. THE COMMUNICATIONS DECENCY ACT IMMUNIZES THE TOWNSENDS AGAINST ALVIS'S DEFAMATION AND TORTIOUS INTERFERENCE CLAIMS, AND THE CLAIMS ARE BARRED BY THE FIRST AMENDMENT.**

##### **A. The Communications Decency Act Immunizes the Townsends Against Defamation Liability for Information Posted by Others.**

Section 230 of the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230, immunizes the Townsends against Alvis's defamation claim.<sup>7</sup> The relevant portion of the statute states: "No provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This provision was intended to abrogate common-law defamation liability for people who provide forums for speech on the Internet. *See Zeran v. America Online*, 129 F.3d 327, 330-31 (4th Cir. 1997), *cert denied*, 524 U.S. 937 (1998). In barring providers and users of interactive computer services from being treated as "publishers" (a term of art in common law defamation claims, *id.* at 331-32), the CDA immunizes them from defamation liability for comments provided by others.<sup>8</sup> *Id.* at 330 ("By

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<sup>7</sup> We treat Alvis's defamation and tortious interference claims together because they duplicate one another. *See Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 109-10 (3d Cir. 1988).

<sup>8</sup> Alvis does not allege that any of the Townsends' own postings were defamatory. Both federal and North Carolina law require that allegedly defamatory words be set forth in the complaint. *See Andrews v. Elliot*, 426 S.E.2d 430, 432 (N.C. App. 1993) (defamatory statements must be set out "substantially *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory"); *Bobal v. RPI*, 916 F.2d 759, 763 (2d Cir. 1990); *Asay v.*

its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>9</sup> As *Zeran* explained, Congress was concerned with the chilling effect of the possibility of tort liability because interactive computer service providers cannot possibly screen every message for every potential problem they may present. *Id.* at 331.

The Townsends’ website is an “interactive computer service” under the CDA. The CDA defines that term as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” *Id.* § 230(e)(2). The Townsends’ website falls under the definition’s plain language because it is an “information service . . . that provides . . . computer access by multiple users to a computer server.” Numerous cases have applied the law to immunize providers of online discussion forums such as the Townsends’ website. *See, e.g., Batzel*, 333 F.3d at 1021-22 (website postings and email listserv); *Green*, 318 F.3d at 469 (messages in a chat room); *Zeran*, 129 F.3d at 329 (postings on an interactive bulletin board). Even if the Townsends’ website itself were

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*Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). Only by such pleading does the plaintiff give the defendant a fair opportunity to file a proper answer to the complaint, or to discern whether the complaint should be dismissed because the alleged defamation is constitutionally protected opinion. *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 707 (N.D. Ill. 1990) (plaintiffs alleging defamation must recite the precise language alleged to be defamatory). Alvis alleges that the Townsends posted “numerous false, misleading and disparaging statements,” Complaint ¶ 27, but *fails to cite a single allegedly defamatory statement by the Townsends*. Its allegation against the Townsends is baseless and should be dismissed.

<sup>9</sup> Every other federal court to consider the CDA agrees with the Fourth Circuit’s interpretation. *See Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1026-35 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980 (10th Cir. 2000); *Lockheed Martin Corp. v. NSI*, 985 F. Supp. 949, 962 n.7 (C.D. Cal. 1997), *aff’d*, 194 F.3d 980 (9th Cir. 1999); *Doe v. Franco Publ’ns*, No. 99 C 7885, 2000 WL 816779 \*4-5 (N.D. Ill. June 22, 2000); *Marczeski v. Law*, 122 F. Supp. 2d 315, 327 (D. Conn. 2000); *Blumenthal v. Drudge*, 982 F. Supp. 44, 49-53 (D.D.C. 1998).

not an “interactive computer service,” the Townsends indisputably use such services in posting and maintaining their website, and the CDA immunizes *users* of interactive computer services in addition to providers. *See Batzel*, 333 F.3d at 1030-31. Under the plain terms of the CDA, the Townsends are not liable for comments by other Internet users posted on their website.

**B. Alvis’s Defamation and Tortious Interference Claims Are Barred by the First Amendment.**

Even if the CDA did not immunize the Townsends, Alvis’s defamation and tortious interference claims would be barred by the First Amendment.<sup>10</sup> Because Alvis is a public figure and its business practices are matters of public concern, the First Amendment requires Alvis to prove actual malice to prevail in a defamation action. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Carr v. Forbes, Inc.*, 259 F.3d 273, 278 (4th Cir. 2001). Alvis declares that it and its authorized distributors “extensively have advertised and promoted ALVIS Products under the ALVIS Marks throughout the United States and through various media,” Amended Complaint ¶ 18, and “the products offered by Alvis and its distributors . . . have met with widespread public approval and have established demand and goodwill among consumers throughout the United States[.]” *Id.* By its own terms, then, Alvis is a public figure, and its practices are a matter of widespread public interest. *See Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir.) (organization that “thrust[s] itself into the public eye” through “massive solicitation efforts” is a public figure), *cert. denied*, 464 U.S. 830 (1983). Moreover, the public undoubtedly has a strong interest in the business practices of a national company.

Because Alvis is a public figure, it must allege, and then prove by clear and convincing

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<sup>10</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (First Amendment principles apply equally to other torts aside from defamation that rely on alleged falsity of statements); *Amway Corp. v. Procter & Gamble Co.*, 346 F.3d 180, 185 n.7 (6th Cir. 2003) (“First Amendment protections apply in a tortious interference action when the action complained of was defamatory speech.”).

evidence, that the Townsends acted with “actual malice” in order to prevail on its defamation claim.

*Carr*, 259 F.3d at 282. This is a very stringent standard:

Proof of falsity is not enough; [the plaintiff] must also demonstrate that [the defendant] made the false statement with knowledge that it was false or with reckless disregard of whether it was false or not. Reckless disregard means publishing with a high degree of awareness of . . . probable falsity. Establishing actual malice is no easy task, because the defamation plaintiff bears the burden of proof by clear and convincing evidence.

*Id.* (citations, quotation marks, and original brackets omitted). Here, Alvis fails even to *allege* actual malice. In fact, its allegations are inconsistent with a finding of actual malice. It alleges, for example, that the Townsends posted comments “without performing even a perfunctory investigation.” Amended Complaint ¶ 30. Even assuming the truth of these allegations, as we must for Rule 12(b)(6) purposes, publication without investigation does not constitute actual malice. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968); *see also Gertz v. Welch*, 418 U.S. 323, 332 (1974) (“[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a high degree of awareness of . . . probable falsity.”) (quotation marks omitted). Posting comments without investigating their truth is a far cry from posting them with actual knowledge of their falsehood or with a high degree of awareness of probable falsity. Therefore, Alvis’s defamation claim and tortious interference claims are barred by the First Amendment and should be dismissed.

## CONCLUSION

The complaint should be dismissed.

Respectfully submitted,

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