

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT  
DIVISION FIVE

No. A129536

CRAIGSLIST, INC.,  
*Defendant and Petitioner,*

vs.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY  
*Respondent,*

SCOTT P.  
*Plaintiff and Real Party in Interest.*

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**PRELIMINARY OPPOSITION OF REAL PARTY IN INTEREST,  
SCOTT P., TO PETITION FOR WRIT OF MANDATE,  
PROHIBITION OR OTHER APPROPRIATE RELIEF AND  
REQUEST FOR STAY**

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From July 6, 2010, Order Overruling in Part Craigslist, Inc.'s Demurrer  
San Francisco Superior Court, No. CGC-10496687  
The Honorable Peter J. Busch, Department 301  
**Tel Number (415) 551-3719**

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

(Cal. Rules of Court, Rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (CRC, Rule 8.208(d)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (CRC, Rule 8.208(d)(2)):

**Craigslist, Inc.**

Defendant in underlying Superior Court action

**Foster Dairy Farms, Inc.**

Defendant in underlying Superior Court action

**Alberto Carreno**

Defendant in underlying Superior Court action

**Michael O. Simpson**

Defendant in underlying Superior Court action

**Craig Newmark**

Founder and shareholder of Craigslist, Inc.

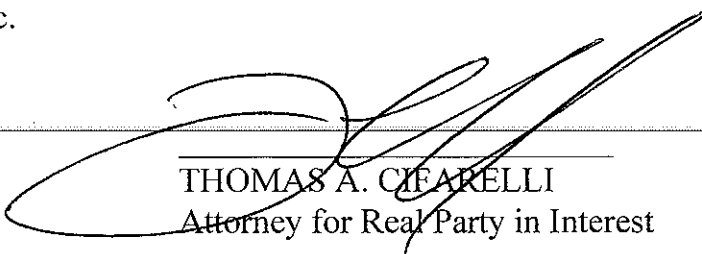
**Jim Buckmaster**

Chief Executive Officer and shareholder of Craigslist, Inc.

**eBay Domestic Holdings, Inc.**

Shareholder of Craigslist, Inc.

DATE: September 8, 2010



THOMAS A. CIFARELLI  
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**PRELIMINARY OPPOSITION OF REAL PARTY IN INTEREST,  
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REQUEST FOR STAY**

**I. INTRODUCTION AND SUMMARY OF OPPOSITION**

This is not a case of Plaintiff SCOTT P. attempting to treat Defendant/Petitioner CRAIGSLIST as the publisher of third party content, namely the harassing and fraudulent CRAIGSLIST posts targeting Plaintiff SCOTT P. Nor is this a case where Plaintiff is seeking an exception to Section 230 of the Communications Decency Act (hereinafter Section 230) in an attempt to hold CRAIGSLIST liable for said internet posts. Rather, SCOTT P.'s allegation in this case is clear and straightforward: CRAIGSLIST made legally enforceable promises to SCOTT P., upon which SCOTT P. reasonably relied, to his detriment. Thus, this case is analogous to *Barnes v. Yahoo!, Inc.* (2009) 570 F.3d 1096 which held that a promisor, regardless of its status as an interactive service provider, is liable for its failure to perform legally enforceable promises because one's duty to perform said promises does not arise from its status as a publisher/speaker. *Id* at p. 1107. Accordingly, pursuant to the holding in *Barnes*, Section 230 does not protect CRAIGSLIST from liability arising out of its breached promises to Plaintiff.

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Now, after having filed an unsuccessful demurrer in this action, CRAIGSLIST once again attempts to escape liability simply by virtue of its

status as an interactive computer service provider, without having made any showing that Plaintiff is treating CRAIGSLIST as the publisher/speaker of Defendant SIMPSON's fraudulent posts. CRAIGSLIST agrees that Section 230(c) protects CRAIGSLIST only if Plaintiff's claims seek to "treat" the Defendant as the "publisher or speaker" of information. *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 330; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 804-805; *The Communications Decency Act of 1996*, 47 U.S.C. 230 (c)(1). As herein argued, Plaintiff's claim for Promissory Estoppel against CRAIGSLIST does not seek to treat CRAIGSLIST as the publisher/speaker of the harassing ads posted by SIMPSON. To the contrary, Plaintiff simply asserts that he has sufficiently pleaded a viable cause of action against CRAIGSLIST for breaching its duties arising out of clear, repeated and enforceable promises. The fact that CRAIGSLIST happened to promise Plaintiff that it would remove and prevent fraudulent internet ads in no way establishes that Plaintiff is treating CRAIGSLIST as the publisher or speaker of the ads posted by Defendant SIMPSON.

Further, CRAIGSLIST is not entitled to Section 230(c)(2) protection because it did not act voluntarily, nor in good faith. Indeed, CRAIGSLIST never offered to remove and prevent the harassing ads targeting Plaintiff on its own initiative. Plaintiff contacted the website and secured promises from CRAIGSLIST to remove and prevent fraudulent posts identifying Plaintiff,



especially from the email address Sp.....@hotmail.com. As such, despite its best efforts, Petitioner CRAIGSLIST simply cannot stretch the carefully qualified protections afforded by Section 230 to cover Plaintiff's claim of Promissory Estoppel.

Accordingly, CRAIGSLIST is not entitled to protection under Section 230(c), and CRAIGSLIST'S Petition should be denied in its entirety.

## **II. WHY THE PETITION SHOULD BE DENIED**

For a writ of mandate to issue, *Code of Civil Procedure* section 1085 requires a clear and present duty for the performance of "an act which the law specially enjoins," and a clear, present right in the petitioner to performance of that act. *Taylor v. Board of Trustees* (1984) 36 Cal.3d 500, 507; *Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491. Appellate courts rarely grant pretrial writ relief on matters of pleading, unless the matter involves an issue of great public importance. *County of Los Angeles v. Super. Ct.* (1998) 68 Cal.App.4th 1166, 1170.

Contrary to CRAIGSLIST's contention, this case does not present a significant issue of first impression and does not involve an issue of great public importance. CRAIGSLIST cited a string of cases related to Section 230 in an attempt to imply that the *Barnes* decision as well as the trial court's ruling in the instant case somehow contradict and endanger the long standing rule that internet service providers may avoid liability for third party content

only if the plaintiff's claim seeks to treat the defendant as the publisher or speaker of that information. However, both *Barnes* and the trial court's decision are absolutely consistent with the decisions cited by CRAIGSLIST. Neither the trial court's decision nor the *Barnes* decision disputed that Section 230 applies only if Plaintiff's claim treats CRAIGSLIST as the publisher/speaker of the fraudulent posts at issue. Rather, as the trial court found, the *Barnes* decision "clarified" Section 230 in that the act of promising is not synonymous with the performance of the act promised. (Craigslist's Exh. 13 pp. 1165:14-18; 1167:17-21; *Barnes v. Yahoo!, Inc.* (2009) 570 F.3d 1096, 1107). Thus, the case at bar does not present any significant issue of first impression.

Further, CRAIGSLIST cannot demonstrate that it will suffer irreparable harm if its Petition were to be denied. CRAIGSLIST makes a sweeping assumption that the trial court's ruling in the instant case would encourage all online service providers to restrict content and to refuse to help their customers because it would expose online service providers to potential liability for third party content. However, as repeatedly stated herein, Plaintiff's claim does not seek to hold CRAIGSLIST liable for publishing the subject internet posts. Indeed, SCOTT P.'s case involves a very unique set of facts based upon very specific promises made by CRAIGSLIST to Plaintiff SCOTT P. in response to his particular requests that CRAIGSLIST prevent further fraudulent posts

identifying Plaintiff from being posted on its website. CRAIGSLIST cannot demonstrate that there are any, let alone numerous, other cases matching the very specific facts involving promises made by internet service providers to their customers, and reliance thereon. Therefore, CRAIGSLIST cannot make the showing of any irreparable harm that is required for the granting of its Petition. Accordingly, the Court should deny CRAIGSLIST's Petition and allow the case to proceed in the trial court.

### **III. STATEMENT OF RELEVANT FACTS**

#### **A. PROCEDURAL BACKGROUND**

Plaintiff SCOTT P. filed his original complaint on February 5, 2010. (Craigslist's Exh. 1). Thereafter, Plaintiff filed his First Amended Complaint. (Craigslist's Exh. 2). The FAC asserted two causes of action against CRAIGSLIST: Promissory Estoppel and Unfair Competition. (Craigslist's Exh. 2. "FAC"). On May 3, 2010, CRAIGSLIST filed a demurrer to Plaintiff's FAC on grounds that Plaintiff's causes of actions against CRAIGSLIST were barred by Section 230, among others. (Craigslist's Exhs. 3-6). Plaintiff filed an opposition on to the demurrer on May 17, 2010. (Craigslist's Exhs. 7-8). On June 1, 2010, the trial court issued a tentative ruling sustaining the CRAIGSLIST's demurrer as to Plaintiff's Unfair Competition claim, and overruling the demurrer as to Plaintiff's promissory estoppel claim. (Craigslist's Exh. 12). The Court noted that Plaintiff had sufficiently pleaded an agreement

supported by promissory estoppel. *Id.* A hearing on the demurrer was held on June 2, 2010. (Craigslist's Exh. 13). After extensive oral argument, the Court adopted its tentative ruling. *Id.* CRAIGSLIST filed the instant writ of mandate, prohibition and request for stay on August 31, 2010.

**B. CRAIGSLIST MADE UNAMBIGUOUS PROMISES TO PREVENT FRAUDULENT POSTS IDENTIFYING SCOTT P., AND SCOTT P. RELIED ON CRAIGSLIST'S EXPRESS REPRESENTATIONS**

CRAIGSLIST expressly promised Plaintiff SCOTT P. on three separate occasions that it would: (1) prevent all ads identifying SCOTT P. by name, telephone numbers and home address; and, (2) prevent all posts originating from the email address Sp.....@hotmail.com.

***Promise #1 by CRAIGSLIST:***

On March 16, 2009, Plaintiff's home phone number was listed in an ad entitled "Seeking a hot stud for first timer" under the "men for men" category of the Casual Encounter's section of Craigslist.org. (FAC ¶ 9). This posting originated from the email address Sp.....@hotmail.com, consisting of Plaintiff's first initial and last name. (FAC ¶¶ 39, 57). The email address did not belong to the Plaintiff. (FAC ¶ 62). On March 18, 2009, Plaintiff telephoned the headquarters of Petitioner CRAIGSLIST and informed its representative that someone had posted a fraudulent ad on Craigslist.org, inviting men to call Plaintiff for casual gay sex. (FAC ¶ 56). In fact, numerous men seeking sex did

call the Plaintiff, causing Plaintiff great harm and emotional distress. (FAC ¶¶ 54, 83, 84). During his first conversation with CRAIGSLIST, Plaintiff expressly requested that no further postings identifying him by name, telephone number or address be allowed on Craigslist.org without his verbal consent. (FAC ¶ 56). Petitioner CRAIGSLIST then expressly promised Plaintiff that it would “take care of it.” (FAC ¶ 56).

***Breach of Promise #1 by CRAIGSLIST:***

Later on March 18, 2009, after CRAIGSLIST’s first promise to the Plaintiff, CRAIGSLIST allowed Defendant SIMPSON to post another ad targeting the Plaintiff, this time entitled “a hard man is good to find!” from the same email address Sp.....@hotmail.com. (FAC ¶¶ 59, 62).

***Promise #2 by CRAIGSLIST:***

On March 20, 2009, Plaintiff called CRAIGSLIST again. (FAC ¶¶ 61, 62). Plaintiff informed CRAIGSLIST that the email address Sp.....@hotmail.com did not belong to him, and had obviously been taken out to impersonate Plaintiff on CRAIGSLIST. (FAC ¶ 62). Plaintiff again requested that CRAIGSLIST not allow further ads containing Plaintiff’s name, telephone numbers and home address to be posted on Craigslist.org. (FAC ¶ 62). Again, Petitioner CRAIGSLIST promised Plaintiff that it would “take care of it,” and that it would take steps to stop the false and harassing posts identifying Plaintiff. (FAC ¶¶ 62,

63).

***Promise #3 by Plaintiff***

On March 21, 2009, SCOTT P. telephoned CRAIGSLIST again to confirm that no further posts containing Plaintiff's information, and emanating from the email address Sp.....@hotmail.com would be posted on Craigslist.org. (FAC ¶ 63). CRAIGSLIST once again promised Plaintiff that it would "take care of it," and promised Plaintiff that it had in fact already taken steps to prevent more posts from the same source. (FAC ¶ 63).

***Breach of Promises #1, #2 and #3 by CRAIGSLIST***

However, in breach of all three promises delineated above, CRAIGSLIST allowed seven additional fraudulent and harassing ads containing Plaintiff's phone numbers and/or home address to be posted on its website beginning on or around April 16, 2009 through April 18, 2009, all from the same email address Sp.....@hotmail.com, which had been plainly identified as belonging to Plaintiff's harasser. (FAC ¶¶ 64-66).

Plaintiff manifestly and uniquely relied on CRAIGSLIST's *repeated, express and unambiguous* promises that it would prevent additional harassing ads identifying Plaintiff from being posted on the website. Indeed, only CRAIGSLIST, as the owner and operator of Craigslist.org, had the power to carry out the promises it made to the Plaintiff. Thus, after repeated promises and

reassurances from CRAIGSLIST, and in reliance thereon, Plaintiff stopped emailing and calling CRAIGSLIST after March 21, 2009 in his attempt to prevent further harassing ads. (FAC Exhibits 8, 15, 23, 24). Plaintiff did not contact CRAIGSLIST again until April 18, 2009: after seven additional ads targeting Plaintiff were posted on Craigslist.org. (FAC Exhibits 8, 15, 23, 24). Plaintiff plainly relied on the multiple and unambiguous promises made by CRAIGSLIST that it would prevent further harassing posts identifying Plaintiff from the email address Sp.....@hotmail.com, all to his detriment. In fact, after its initial promises CRAIGSLIST expressly promised Plaintiff that “*additional* steps have been taken” (emphasis added) to stop the harassing posts, thereby acknowledging its earlier promises to the Plaintiff. (FAC Exhibit 23).

Plaintiff’s subsequent contacts with police and “uncle Troy” do NOT relieve CRAIGSLIST of the obligations flowing from its repeated promises to the Plaintiff, and Plaintiff’s reliance thereon. Plaintiff’s *subsequent* contacts with police and “uncle Troy” were the actions of a responsible person suffering extraordinary attacks over the internet. It would be hard to imagine one in Plaintiff’s position, who had suffered *repeated* offensive and intrusive calls and visits to his home, not contacting the police or confiding in a family member about such disturbing incidents and phone calls. However, Plaintiff’s responsible subsequent contacts to the police and “uncle Troy” cannot relieve CRAIGSLIST

of the obligations flowing from its prior promises to the Plaintiff.

Plaintiff's contacts with uncle Troy, after CRAIGSLIST's promises, had **nothing** to do with stopping the craigslist posts. Instead, by the language of the emails attached to the FAC, they plainly involved only attempts *to identify the callers who were making the harassing phone calls to the Plaintiff in response to the harassing Craigslist ads impersonating the Plaintiff.* (FAC and Ex 11.) Similarly, Plaintiff contacted the police *after* having received, and relied upon, the actionable promises from CRAIGSLIST. Indeed, the police did not arrest Plaintiff's supervisor at work, Defendant SIMPSON, until July 31, 2009, *more than three months after the last of CRAIGSLIST's series of repeated promises to the Plaintiff.* Furthermore, neither the police nor "uncle Troy" had the ability that CRAIGSLIST uniquely possessed to block posts on its website, as CRAIGSLIST had expressly and repeatedly promised Plaintiff it would, and on which Plaintiff justifiably relied.

#### **IV. LEGAL DISCUSSION**

##### **A. THE TRIAL COURT'S ORDER OVERRULING CRAIGSLIST'S DEMURRER AS TO PLAINTIFF'S CAUSE OF ACTION FOR PROMISSORY ESTOPPEL WAS CONSISTENT WITH THE ESTABLISHED LAWS REGARDING SECTION 230.**

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CRAIGSLIST cited a string of cases in an attempt to portray that Court decisions in California and across the country bar all state law claims that treat



online service providers as publisher of third party content. However, this argument made by CRAIGSLIST is entirely irrelevant because Plaintiff (as well as the trial court's ruling and the *Barnes* decision) does not dispute that claims that treat online service providers as publisher/speaker of third party content are preempted by Section 230. Rather, Plaintiff is simply asserting that under the specific facts alleged in his FAC, his promissory estoppel claim does not treat CRAIGSLIST as the publisher of the internet ads posted by Defendant SIMPSON; making Section 230 inapplicable. None of the decisions cited by CRAIGSLIST addressed the issue of promissory estoppel. As such, the decisions cited by CRAIGSLIST are distinguishable from SCOTT P.'s. Moreover said decisions were issued before the *Barnes* ruling which clarified the law regarding Section 230.

*Zeran v. America Online, Inc.* (1997) 129 F.3d 327 is distinguishable. In *Zeran*, an individual posted advertisements on AOL falsely claiming that the plaintiff was selling tasteless and offensive souvenirs regarding the Oklahoma city bombing. *Id.* at p. 329. CRAIGSLIST attempts to analogize Plaintiff SCOTT P.'s case to *Zeran* simply because the AOL representative "assured" the plaintiff that the posting would be removed. However, *Zeran* was a negligence action, not a promissory estoppel case, in which the plaintiff argued that AOL had a duty to remove the defamatory posts, and to notify its subscribers of their falsity. *Id.* at 330. Here, the duty alleged by Plaintiff SCOTT P. is not based on

notice but on clear and enforceable promises made in response to Plaintiff's requests, which were absent in the facts on *Zeran*. Further, the AOL representative's "assurance" was voluntary, not at the request of the plaintiff. On the other hand, CRAIGSLIST's repeated and specific promises to SCOTT P. were made in response to SCOTT P.'s requests regarding the fraudulent posts. As such, *Zeran* is distinguishable.

*Schneider v. Amazon Inc.* (2001) 31 P.3d 37 is also distinguishable. In *Schneider*, the plaintiff sued Amazon alleging breach of contract for its failure to remove false postings by a website visitor regarding the plaintiff. *Id.* at p. 38-39.

CRAIGSLIST asserts that *Schneider* is applicable to the instant case simply because it involved a breach of contract cause of action. However, *Schneider* is distinguishable because the plaintiff's allegations therein treated the defendant Amazon as the speaker and publisher of the content posted by the website visitor. Indeed, the *Schneider* plaintiff's complaint stated, "Amazon.com exercises editorial discretion and decision-making authority over the posting of comments at its site." *Id.* at p. 41. Here, Plaintiff SCOTT P.'s allegations of promissory estoppel are completely separate from CRAIGSLIST's editorial functions and discretion; rather they arise from CRAIGSLIST's duty to perform enforceable promises made to Plaintiff, which happened to be the removal and prevention of fraudulent ads targeting Plaintiff. Further, Section 230 analysis requires inquiry

into “whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1102. In other words, the court must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker. *Id.* The *Schneider* Court entirely failed to follow this analysis. Instead, it simply concluded that “Schneider's claim is based entirely on the purported breach-failure to remove the posting - which is an exercise of editorial discretion.” *Schneider v. Amazon Inc.* (2001) 31 P.3d 37, 41-42. In contrast, the *Barnes* Court carefully analyzed the duty inherent to a promissory estoppel cause of action before arriving at the conclusion that the act of promising is not synonymous with the action promised. *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1107. Moreover, *Schneider* was decided in 2001, eight years prior to the *Barnes* decision. Indeed, at that time, the *Schneider* Court noted: “we find no case addressing the application of the statute to interactive web site operators.” *Schneider v. Amazon Inc.* (2001) 31 P.3d 37, 40. Thus, *Barnes* is more persuasive than *Schneider*, and the Court should reject CRAIGSLIST’s argument made in reliance upon *Schneider*.

The Court's analysis in *Doe I v. Oliver*, (2000) 755 A.2d 1000 is even more lacking than that in *Schneider*. Once again, CRAIGSLIST cited *Doe I* simply because the plaintiffs therein alleged a breach of contract cause of action, among

others, against Defendant AOL. However, in *Doe I*, the plaintiffs sued AOL for transmitting an allegedly defamatory email message sent by other individual defendants. *Id.* at p. 1002. Indeed, the decision in *Doe I* did not provide any facts or analysis whatsoever regarding the plaintiffs' breach of contract claim. In fact, the Court in collectively dismissed counts 15 through 21 of the plaintiff's complaint against AOL, after stating that the plaintiffs have not stated claims upon which relief could be granted. *Id.* at p. 1003-1004. Because *Doe I* does not provide any facts or analysis in support of its decision, it cannot be analogized to the case at issue.

Accordingly, the cases relied upon by CRAIGSLIST are distinguishable and the Court should follow *Barnes's* approach in analyzing Plaintiff SCOTT P.'s promissory estoppel claim.

**B. SECTION 230(c)(1) IS INAPPLICABLE AND DOES NOT BAR PLAINTIFF'S PROMISSORY ESTOPPEL CLAIM BECAUSE PLAINTIFF'S ALLEGATIONS DO NOT TREAT CRAIGSLIST AS THE "PUBLISHER OR SPEAKER" OF THE HARASSING POSTS**

Petitioner CRAIGSLIST is not entitled to immunity simply because it is a web-site operator. Section 230(c) is not a declaration of general immunity for web-site operators from civil liability deriving from third party content. *Chi. Lawyers' Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.* (2008) 519 F.3d 666, 669. In fact, Section 230(c)(1) does not even mention the word

“immunity” or any synonym thereof. *Id.* Further, the decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* rested not on broad statements of immunity, but rather on a careful exegesis of the statutory language, noting that “to provide immunity every time a website uses data initially obtained from third parties would eviscerate [the statute].” *Barnes v. Yahoo!, Inc.* (2009) 570 F.3d 1096, 1100.

CRAIGSLIST may avoid liability under Section 230(c)(2) only if *all* of the following requirements are met:

- (1) Defendant is a “provider...of an interactive computer service
- (2) The allegedly unlawful content was “provided by another information content provider”; and,
- (3) Plaintiff’s claim seeks to “treat” Defendant as the “publisher or speaker” of that information.** (Emphasis added).

*Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 330; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 804-805; 47 U.S.C. 230(c)(1).

Here, CRAIGSLIST cannot establish the third requirement under Subsection 230(c)(1) that Plaintiff’s promissory estoppel claim treats CRAIGSLIST as the publisher or speaker of the fraudulent postings. In determining whether a plaintiff’s claim treats the Defendant as the publisher or speaker, “what matters is whether the cause of action inherently requires the court to treat the Defendant as the ‘publisher or speaker’ of content provided by

another.” *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1102. In other words, the court must ask whether the duty that the plaintiff alleges the Defendant violated derives from the Defendant’s status or conduct as a publisher or speaker. *Id.*

As herein argued, CRAIGSLIST’s duty to perform legally enforced promises does not inherently derive from CRAIGSLIST’s status as a publisher or speaker.

1. Subsection 230(c)(1) Does Not Preclude Plaintiff’s Promissory Estoppel Claim Because the Duty to Perform Legally Enforceable Promises Is Not Inherent to a Publisher/Speaker.

A promisor, regardless of its status as an interactive service provider, is liable for its failure to perform legally enforceable promises. *See Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1107. In *Barnes*, the Court made it clear that Yahoo!, an interactive computer service provider, could be held liable under the theory of Promissory Estoppel because in a Promissory Estoppel claim, the “duty Petitioner allegedly violated springs from a contract - an enforceable promise - not from any non-contractual conduct or capacity of the Petitioner.” *Id.* 1107. (Emphasis added).

In *Barnes*, the plaintiff’s ex-boyfriend created fraudulent profiles of the plaintiff, Ms. Barnes, on Yahoo!, which included nude photographs, the plaintiff’s contact information and open invitations to engage in sexual conduct. *Id.* 1098. Initially, the plaintiff had no direct communication from Yahoo!

Instead, in accordance with Yahoo!'s policy, Ms. Barnes emailed Yahoo! a copy of her photo ID along with a signed statement denying her involvement with the profiles and requesting their removal. *Id.* After receiving no word or action from Yahoo!, Ms. Barnes made another request a month later and two more the following month. *Id.* Yahoo! ignored the plaintiff's requests until a local news program was preparing to air a report on the incident. At that point Ms. Barnes received her one and only contact from Yahoo!: a call from Yahoo!'s Director of Communications. The Director assured Ms. Barnes that she would handle the situation personally, a promise that Ms. Barnes allegedly relied upon. *Id.* 1099. However, the profiles were not removed, and Ms. Barnes filed a complaint alleging, among others, facts amounting to a claim for promissory estoppel. *Id.* The Court allowed Ms. Barnes to proceed with her claim for promissory estoppel holding that "promising is not synonymous with the performance of the action promised," and reasoned that if in fact there was an enforceable promise made by Yahoo!,

***"contract liability would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the conduct at hand, be it the conduct of a publisher, of a doctor..."***

*Id.* (Emphasis added).

*Barnes* is entirely applicable in this case. As in *Barnes*, Plaintiff SCOTT P. was the victim of fraudulent and harassing internet posts; and similar to *Barnes*, the website operator, CRAIGSLIST, promised to remove and prevent posts targeting Plaintiff. The only distinguishable fact, which strengthens SCOTT P.'s claim, is that the several and repeated promises in the instant case are undeniably enforceable; CRAIGSLIST's promises were express, repeated and unambiguous. In *Barnes*, there was only one "promise" made by Yahoo! Here, there were at least three unambiguous promises by CRAIGSLIST that it would remove and prevent the fraudulent posts. In fact, after CRAIGSLIST's first promises to the Plaintiff to stop the harassing posts, CRAIGSLIST expressly promised the Plaintiff that "**additional** steps have been taken" (emphasis added) to stop the harassing posts, thereby acknowledging that it had made earlier promises to the Plaintiff. ( FAC Exhibit 23). Moreover, in *Barnes*, the one "promise" at issue was initiated by Yahoo!'s Director of Communications, who called the plaintiff months after her earlier requests went ignored. Here, the promises by CRAIGSLIST were made in immediate response to each of Plaintiff's specific requests. As such, there was clearly "a meeting of the minds" to constitute enforceable promises between CRAIGSLIST and Plaintiff SCOTT P. *See Id.* 1108.

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CRAIGSLIST's promises to Plaintiff that it would prevent fraudulent ads



identifying Plaintiff were legally enforceable. As such, Petitioner's liability arises not from its publishing conduct or capacity as the operator of Craigslist.org, but from its manifest intention to perform an act, which in this case happened to be the prevention of fraudulent posts targeting SCOTT P. Such manifest intention, according to *Barnes*, imposes a legal duty on the part of CRAIGSLIST, distinct from the conduct of removal and prevention of internet content. Thus, Plaintiff is not seeking to hold CRAIGSLIST liable merely because it published the fraudulent and harassing ads by SIMPSON. Rather, Plaintiff is seeking to hold CRAIGSLIST liable because it expressly promised Plaintiff that it would prevent such postings, yet failed to do so, ultimately to Plaintiff's detriment.

2. The Trial Court Correctly Interpreted and Correctly Applied *Barnes* In Overruling Craigslist's Demurrer as to Plaintiff's Claim of Promissory Estoppel

CRAIGSLIST disingenuously argued that the trial court's ruling "elevated labels and conclusions over the nature and substance of Plaintiff's claims." (Craigslist's Petition at pp. 1 and 24). However, the transcript of proceedings clearly demonstrates otherwise; the trial court did not overrule CRAIGSLIST's demurrer merely because Plaintiff labeled his cause of action "promissory estoppel." Indeed, in response to CRAIGSLIST counsel's argument that "simply saying 'promissory estoppel' is not enough," the trial court stated, "it's not the label; it is the conduct that is pleaded that counts."

(Craigslis't's Exh.13 pp. 1168:26-1169:6). The trial court also noted that the nature of Plaintiff SCOTT P.'s case was "relatively indistinguishable from *Barnes*; while it was "completely different" from *Zeran*. (Craigslis't's Exh. 13 pp. 1168:15-1169:6). Thus, after extensive oral argument, and having considered the cases cited by both parties, the trial court overruled Defendant CRAIGSLIST's demurrer as to Plaintiff's cause of action for promissory estoppel on grounds that Plaintiff had sufficiently alleged facts constituting said cause of action. Accordingly, the trial court's decision does not affect or challenge the long standing rules regarding Section 230 established by the Courts of this country; thus, CRAIGSLIST's claim that it is entitled to the writ of mandate/prohibition because Plaintiff's case changes the landscape of Section 230 is without merit.

**C. CRAIGSLIST IS NOT ENTITLED TO SECTION 230(c)(2) PROTECTION BECAUSE IT DID NOT ACT VOLUNTARILY IN GOOD FAITH**

CRAIGSLIST never volunteered to remove and prevent the fraudulent ads identifying SCOTT P. from its website. In order to be offered protection under Section 230(c)(2), Defendant must prove all of the following: (1) Defendant is a provider or user of an interactive computer service; (2) Defendant acted voluntarily and in good faith; (3) Defendant acted to restrict access to or availability of material that the provider or user considers to be

obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable. *The Communications Decency Act of 1996*, 47 U.S.C. 230 (c)(2). After all, Section 230(c) is captioned “Protection for Good Samaritan Blocking and Screening of Offensive Material.”

Here, CRAIGSLIST is not a “good Samaritan” who acted “voluntarily in good faith” to remove and prevent harassing postings regarding SCOTT P. Indeed, CRAIGSLIST never removed and prevented offensive postings targeting SCOTT P. on its own initiative. In fact, initially CRAIGSLIST entirely ignored the harassing posts targeting Plaintiff SCOTT P. Subsequently, after Plaintiff contacted CRAIGSLIST, it made three express promises to prevent future harassing posts; those promises were specifically and only made in response to Plaintiff’s requests. Since its promises were legally enforceable, CRAIGSLIST had an affirmative duty to remove and prevent fraudulent postings. Accordingly, CRAIGSLIST’s statement that it was acting voluntarily and in good faith is baseless, and CRAIGSLIST is not protected by Section 230(c)(2).

Further, CRAIGSLIST argument that Plaintiff acknowledged that CRAIGSLIST had no duty to respond to Plaintiff’s complaints about the harassing posts does not mean that CRAIGSLIST acted voluntarily. Indeed, Plaintiff acknowledged that CRAIGSLIST had no duty initially to promise to

aid Plaintiff in response to his complaints regarding the internet posts. Further, CRAIGSLIST had no duty to make any promises regarding the fraudulent posts. However, once CRAIGSLIST made the unambiguous and enforceable promises to Plaintiff to prevent all further harassing posts identifying Plaintiff, CRAIGSLIST was obligated to perform said promises. Thus, the actions taken by CRAIGSLIST's, after having made the promises to the Plaintiff, were not voluntary. Accordingly, CRAIGSLIST cannot avail itself to the protection offered under Section 230 (c)(2).

*Goddard v. Google, Inc.*, (2008) WL 5245490 is entirely distinguishable and inapplicable. The plaintiff in *Goddard* sued Google for breach of contract alleging that Google failed to enforce its policies with respect to excluding fraudulent advertisements. *Id* 1. According to *Goddard*, the intent of Section 230(c)(2) was to “encourage internet service providers to eliminate violent and harassing materials...and to allow interactive service providers to establish standards of decency without risking liability.” *Id* 6. Here, there is no such “standards of decency” established by CRAIGSLIST at issue. SCOTT P.’s claim is not based on CRAIGSLIST’s good faith failure to enforce its own policy, but on CRAIGSLIST’s failure to perform its legal obligations to prevent fraudulent ads pursuant to its promises made to Plaintiff. Further, shielding CRAIGSLIST from breach of promises based on 230(c)(2) will not only

contravene the Section's very policy to encourage elimination of violent and harassing material, but it will also encourage internet service providers to breach promises and contracts without any fear of legal consequence. As such, the decision in *Goddard* is inapplicable.

Accordingly, CRAIGSLIST's petition should be denied.

**V. CONCLUSION**

For the foregoing reasons, Real Party in Interest and Plaintiff SCOTT P. requests that the Court deny CRAIGSLIST's Petition in its entirety and allow the case to proceed on its merits.

DATED: September 8, 2010

Respectfully Submitted,

THE CIFARELLI LAW FIRM  
THOMAS A. CIFARELLI  
DAWN M. SMITH  
GRACE H. CHANG

BY: 

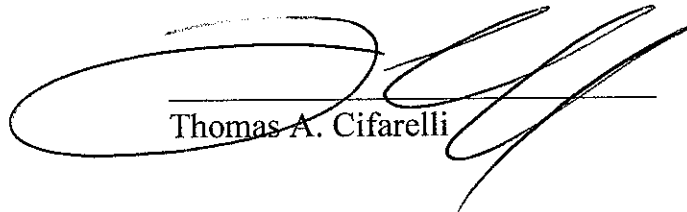
THOMAS A. CIFARELLI  
*Attorneys for Real Party  
In Interest, SCOTT P.*

**VERIFICATION**

I, Thomas A. Cifarelli, declare as follows:

I am an attorney at law duly licensed to practice before all courts within the State of California and I am a partner with THE CIFARELLI LAW FIRM, counsel of record for Plaintiff and Real Party in Interest, Scott P. I make this verification as counsel for Real Party in interest Scott P., because I am familiar with the facts relevant to this Opposition. I have read the foregoing Preliminary Opposition to the Petition for Writ of Mandate, Prohibition and other Appropriate Relief and Request for Stay and know the contents herein. I have read the Petitioner's Appendix, including all exhibits therein. The facts alleged herein are true to my knowledge or are based upon the Petitioners' Appendix cited in this Opposition.

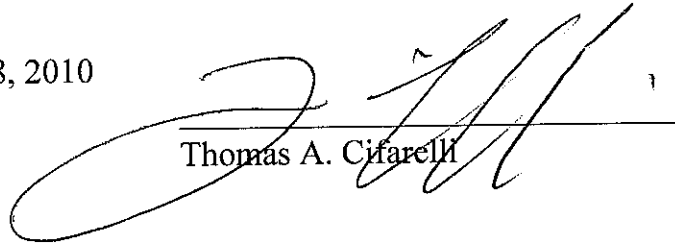
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, on this 8<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
Thomas A. Cifarelli

**CERTIFICATE OF WORD COUNT**  
(Cal. Rules of Court, rules 8.204, 8.490)

The text of this opposition consists of 5923 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: September 8, 2010

  
Thomas A. Cifarelli

**DECLARATION OF SERVICE**

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States, employed in the city of Santa Ana, California, over the age of 18 years, and not a party to or interested in the within action, and that declarant's business address is 200 West Santa Ana Boulevard, Suite 300, Santa Ana, Ca 92701.

2. That on September 8, 2010, declarant served the forgoing documents by Federal Express as noted on the attached service list by placing a true copy thereof in a sealed federal express envelope addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of September, 2010 at Santa Ana, California.

  
Marilyn Vigil



CRAIGSLIST, INC.  
*Defendant and Petitioner,*

vs.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,  
*Respondent,*

SCOTT P.  
*Plaintiff and Real Party in Interest.*

(From the Superior Court of San Francisco County,  
No. CGC-10-496687, Judge Peter J. Busch)

**SERVICE LIST**  
September 8, 2010

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**(Original Preliminary Opposition to  
Petition + 4 copies of Preliminary  
Opposition to Petition)**

*Via Federal Express Overnight*

**Superior Court**

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**(Preliminary Opposition to Petition)**

*Via Federal Express Overnight*