

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

<p>AMERIGAS PROPANE, L.P.,</p> <p><i>Plaintiff,</i></p> <p>- vs. -</p> <p>OPINION CORP. <i>d/b/a</i> PISSÉDCONSUMER.COM,</p> <p><i>Defendant.</i></p>	<p>CASE ACTION NO. 12 cv 00713 (RB)</p>
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**REPLY BRIEF IN FURTHER SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT  
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF  
CAN BE GRANTED PURSUANT TO FED. R. CIV. P. 12(b)(6)**

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### **PRELIMINARY STATEMENT**

Defendant Opinion Corp. (“defendant” or “Opinion Corp.”) submits this reply memorandum in further support of its motion to dismiss the Complaint of AmeriGas Propane, L.P. (“plaintiff” or “AmeriGas”) for failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff’s opposition memorandum confuses its fatally deficient Complaint with what it asks the Court to infer from its pleadings. As demonstrated below, the leaps AmeriGas asks the Court to make fail to meet the modern day “plausibility” standard to withstand dismissal under Rule 12(b)(6).

AmeriGas’ “creative” legal theories depend on either no legal authority or cases that are readily distinguishable from the claims here. Ultimately, it remains that plaintiff’s claims of infringement are transparent workarounds of Section 230 of the Communications Decency Act (47 U.S.C. § 230) (“Section 230”).

For the reasons set forth in defendant’s initial moving papers, its affirmation in further support<sup>1</sup> and below, defendant’s motion to dismiss should be granted with prejudice.

### **LEGAL ARGUMENT**

AmeriGas has filed a complaint which is legally unsustainable, so it is reduced in its opposition brief to either ignore applicable authority altogether, or to invent specious distinctions

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<sup>1</sup> Opinion Corp.’s initial memorandum cites extensively to the Opinion and Order of Senior United States District Judge I. Leo Glasser in *Ascentive, LLC and Classic Brands, LLC v. Opinion Corp., et al.*, (10 cv 4433- ILG SMG), 2011 WL 6181452 (E.D.N.Y. Dec. 13, 2011) (the “Ascentive Decision”). As noted previously, the Ascentive Decision involves nearly identical claims against the same defendant, which evidently were lifted verbatim by AmeriGas from the *Ascentive* complaint. Despite the procedural distinctions between the motion before this Court and the ones considered by Judge Glasser in *Ascentive*, the legal analysis in the Ascentive Decision should be regarded by this Court as persuasive authority and unusually on-point authority here. For this reason defendant has submitted a copy of the Ascentive Decision for the Court’s convenience as Exhibit A of the Reply Affirmation of Daniel Segal, dated April 27, 2012 (“Segal Reply Affm.”). Ascentive’s complaint from that action, which was the blueprint upon which AmeriGas’ complaint is based, is attached as Exhibit B.

and technicalities to evade the effect of the straightforward legal doctrines that doom the Complaint. The most glaring of the flaws in AmeriGas' position are addressed below.

**I. THE ISSUE OF FAIR USE CAN BE DECIDED ON A MOTION TO DISMISS**

Plaintiff's would-be magic bullet – its assertion that the fair use defense to likelihood of confusion is a question of fact that cannot be decided at the pleading stage – is a dud. (*See* Pl. Mem. at 7-8.) Time and again, federal courts have dismissed meritless cases such as that of AmeriGas at the pleading stage where, as here, the alleged use can be determined from the face of the complaint to be fair use as a matter of law. *See In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460 (9th Cir. 1993) (use of the term VCR-2 “was fair use as a matter of law”); *Architectural Mailboxes, LLC v. Epoch Design, LLC*, No. 10cv974 DMSCAB 2011 WL 1630809, at \*4 (S.D. Cal., Apr. 28, 2011) (courts may resolve the issue of fair use at the pleading stage); *see also Hensley Manufacturing v. ProPride Inc.*, 579 F.3d 603, 612 (6th Cir. 2009) (use of HENSLEY name was “fair as a matter of law”).

**A. Defendant's Use of the Term “AmeriGas” Is Fair**

Nearly a century ago, the Supreme Court explained that the “use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin . . . of the product.” *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 529 (1924). This common law principle was codified in the Lanham Act as the fair use defense, which allows a party to use a word or term “otherwise than as a mark ... [and] fairly and in good faith only to describe the goods or services of such party, or their geographic origin.” 15 U.S.C. § 1115(b)(4). Consistent with *Eli Lilly*, a defendant demonstrating fair use need not negate the likelihood of confusion, because “some possibility of consumer confusion must be compatible with fair use.” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 121 (2004).

As demonstrated below, there is neither a factual nor legal basis to support AmeriGas' claim that defendant's use is anything but permissible as fair use under the facts pled here. The inclusion of nearly 70 pages of exhibits to the Complaint, far from amplifying plaintiff's vague allegations of liability and harm, merely underscores the shotgun-like approach of its pleading.

### 1. AmeriGas' Complaint

The heart of what AmeriGas complains of is that advertisements on Opinion Corp.'s webpage dedicated to third-party complaints about AmeriGas may generate "click thru" advertisements by other sellers of propane gas – none of which is alleged to use the name or mark AMERIGAS or otherwise to present ad copy or graphics that are themselves confusing – yet which, it is alleged, will still "confuse" Internet users. (Compl. ¶¶ 33-35) For all the ballast weighing down the AmeriGas complaint, one thing plaintiff has avoided is a clear demonstration of the manner in which the allegedly confusing advertisements are displayed on defendant's website, and ultimately experienced by the consumer.

As set forth in the Complaint, an Internet user may (though he may not) generate competitors' advertisements by executing certain steps set out in the Complaint, particularly by entering the word "AmeriGas" into an Internet search engine such as Google (Compl. ¶ 38), and subsequently "clicking" on a search result. The Internet user may then be met with this result:

The screenshot shows the AmeriGas website. At the top, there is a navigation bar with links like "Submit Complaint", "Consumer Tips", "Business Solutions", "Hot Topics", "Cobill", "Util Transport Solutions", "Lipofuze Scan", and "Customer Satisfaction Index". Below this is a search bar and a "Home" link. The main content area features a large "AmeriGas" logo and a description of the company. To the right, there is a sidebar with several advertisements. One advertisement, "Need a Propane Dealer?", is circled in red. This ad offers "Get up to 3 quotes from pre-screened propane suppliers - free!" and includes a link to "www.Propane.Pro/Home+Propane". Other ads in the sidebar include "Clears Bad Reviews", "Local Furnace Estimates", "Electricity For Less", and "Recently Discussed".

A consumer who then – given the wealth of options, i.e., hyperlinks on the page – opts to click the above-circled advertisement<sup>2</sup> is subsequently presented with a new web page consisting of this advertisement by an AmeriGas competitor (Compl. ¶ 33):

The screenshot shows the propane.pro website. The header includes the propane.pro logo, VeriSign, and BBB Accredited Business logos. The main content area is titled "Time for a New Propane Company?" and offers competitive quotes from up to three pre-screened propane dealers. The form includes a required field for "Delivery Zip Code\*", a question "What do you use propane for?" with checkboxes for Home Heating/Furnace, Air Conditioner, Hot Water Heater, Appliances, Cooking/Grilling, Fireplace, and Other, and a field for "Who is your current propane supplier?".

**propane.pro** VeriSign BBB ACCREDITED BUSINESS

**How it Works**

- FIND Pre-screened, full-service propane suppliers in your neighborhood.
- GET Up to three competitive quotes on propane or new equipment.
- SAVE As Much as \$300-\$400 on your propane bills this winter.

**What are the Benefits**

- Get up to three competitive quotes for propane or equipment absolutely free.
- Only well-known, established and reputable dealers are permitted to

**Time for a New Propane Company?**  
Get competitive quotes from up to three pre-screened propane dealers in your neighborhood today. You could save \$300-\$400 per year on propane and service.

\* Indicates a required field

Delivery Zip Code\*

What do you use propane for?\*(Please check all that apply)

- Home Heating/Furnace
- Air Conditioner
- Hot Water Heater
- Appliances
- Cooking/Grilling
- Fireplace
- Other

Who is your current propane supplier?

In short, the fruit of this process is an advertisement for a company called “Propane PRO,” an advertisement which could not under any plausible conception be “confusing” with respect to the AMERIGAS trademark. Nor is it plausibly amenable to a claim that consumers will believe that the offerings of this company, a competitor of AmeriGas, could be approved or endorsed by AmeriGas.

This clear presentation of the alleged “confusion” AmeriGas asserts this Court cannot find unactionable as a matter of law should itself resolve the question of whether plaintiff has stated a claim with respect to any of its claims sounding in unfair competition. But omitted from AmeriGas’ narrative as well is a critical point, and one discussed at length in defendant’s moving papers: the fact that the links to these advertisements appear on PissedConsumer.com directly alongside trenchant criticisms of AmeriGas – utterly negating any plausible assertion that consumers could mistakenly infer endorsement or affiliation or association with the webpage

<sup>2</sup> While the precise advertising images plaintiff includes as Exhibit 2 to its Complaint cannot be replicated here because of the dynamic nature of the Internet, the basis for plaintiff’s allegations can be. Substantially the same web page as that reproduced above is contained in plaintiff’s Complaint at Exhibit 2. (Dkt. No. 1 at 36.)

by AmeriGas. (Compl. at Exh. 2 (Dkt. No. 1 at 36.)) A portion from a webpage set forth in Exhibit 2 of plaintiff's Complaint appears below:

 Drewg	#291204 <b>Amerigas Dishonest</b> I just contacted their "emergency" line. No help. Several months ago I received a tank Rental bill. I called customer service and was told that if I had the tank filled, the rental... #290759	Jan 23, 2012 Jan 21, 2012	306
 Leelee1	#290634 <b>Amerigas - Customer service??</b> I am a single mom with 3 kids, i ran out of propane and called my company Amerigas in angles camp, cai was told that it would be at least a week before i could get any ... #290634	Jan 20, 2012	294
 Anonymous	#290598 <b>Amerigas Propane</b> I received my propane bill and was floored. I then took it upon myself as a SINGLE person living in a MOBILE HOME to cut expenses and since I was new to the area I thought keeping ... #290598	Jan 20, 2012	322
 Chashing	#290539 <b>Amerigas Poor Business Ethics</b> Buyer Beware. After I signed on with theirAmerigas propane company they increased propane prices 50 cents/gallon higher than any of their competitors. Not only that but they chan... #290539	Jan 20, 2012	313
 Hosstoph...	#290508 <b>Amerigas , 4-6 weeks for a refund...is bullshit!</b> The company wants the money up front to deliver fuel, then when there is a refund due back...so sad too bad ! 4 - 6 wks and there is nothing the consumer can due. THIS IS BULLSHIT ... #290508	Jan 20, 2012	289
	#290508 <b>Amerigas sux!!! I have no hot water or heat because of them!</b> We moved in on December 9th 2011. The people before us had filled the tank to capacity then had it locked off. Now that we've moved in we have to pay for the propane thats in...	Jan 20, 2012	318

“AmeriGas Dishonest” . . . “AmeriGas Poor Business Ethics” . . . “AmeriGas, 4-6 weeks for a refund is bullsh\_t!” . . . “AmeriGas sux!!!” Based on all the foregoing, including the expletive-rich, negative commentary abounding on the webpage, any allegation of confusion is preposterous as a matter of law. A trademark owner's rights are violated only where the unauthorized use “has a substantial capacity to mislead consumers (or other concerned actors in the marketplace) into a confusion as to the entity furnishing the goods or services.” *Yankee Pub. Inc. v. News America Pub. Inc.*, 809 F. Supp. 267, 272-73 (S.D.N.Y. 1992) (citing 15 U.S.C. §§ 1114(1) & 1125(a)) (emphasis added).

Here there is no capacity to mislead consumers at all, even under §43(a) of the Lanham Act which protects against trademark likelihood of confusion not only as to source, but also as to affiliation, connection, sponsorship, association, or approval. Defendant's use of the

AMERIGAS mark is fair as a matter of law, and eligible for dismissal under Fed. R. Civ. P. 12(b)(6), because there is no plausible chance that someone would look at defendant's commentary about AmeriGas – on Opinion Corp.'s website, surrounded by angry, vulgar comments about the company – and think even for a moment that the commentary, or any of the content on that page, originated or is affiliated with or endorsed by the subject of such calumny.

As in *Dual-Deck*, where “No possibility existed that a person would buy the plainly labeled JVC receiver thinking that it was made by Go-Video, because a set of jacks on the back was labeled ‘VCR 2,’” 11 F.3d at 1467, the context of the use of the trademark negates, as a matter of law, any plausible factual scenario that could amount to actionable confusion. *See also Architectural Mailboxes*, 2011 WL 1630809, at \*4 (S.D. Cal. Apr. 28, 2011) (granting motion to dismiss trademark infringement claims based on a finding that the defendant's use was fair as a matter of law).

The cases cited by AmeriGas evade this analysis because their facts are plainly inapposite to those here or because they are based on outdated precedent. Plaintiff relies, for example, on *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F. 3d 1020 (9th Cir. 2004), a case utilizing an obsolete test for fair use in the Ninth Circuit which was modified after the Supreme Court's ruling in *KP Permanent Make-Up*. (*Compare* Pl. Mem. at 7 with Def. Mem. at 9.) Likewise, none of the other cases cited by plaintiff involve factual allegations such as those here which plainly fail to state a claim for a likelihood of confusion either on its own terms or when juxtaposed with the law of nominative fair use. *See id.*

Nor does the Complaint contain plausible, specific factual allegations to support an inference that defendant has acted in bad faith, a factor which, if present, would militate against a fair use finding. Bad faith does not, of course, mean unpleasing to the plaintiff. All that is alleged here is the descriptive use of the AMERIGAS mark by plaintiff on its own website and for

purposes of accurately describing empirical information about the company contained in the brief company profile and directing readers to commentary by third parties. As in *Dual-Deck*, defendant's use of the trademark AMERIGAS is fair use as a matter of law. See *Hensley Manufacturing*, 579 F.3d at 612 (absent allegations of facts from which any inference of bad faith can be drawn, "the fair use defense applies in this case as a matter of law."). Because plaintiff cannot ultimately succeed on the merits of its claim, its complaint should be dismissed with prejudice.

## **II. PLAINTIFF HAS FAILED TO ALLEGE A PLAUSIBLE CLAIM FOR LIKELIHOOD OF CONFUSION**

As addressed to some extent above, plaintiff's first cause of action, trademark infringement under the Lanham Act, 15 U.S.C. § 1114, and 15 U.S.C. § 1125(a) is unsupportable because defendant's use of the AMERIGAS mark is not only not infringing, it is expressive activity and a *bona fide* nominative or descriptive use of these marks protected by the First Amendment. To avoid this clear bar, plaintiff argues that it has alleged that defendant has made commercial use of the 'AMERIGAS' trademark by selling advertising linked to that trademark" and that "by selling to AmeriGas' competitors advertising linked to the 'AMERIGAS' trademark, Defendant has injected itself into the marketplace and become a conduit to steer potential customers away from AmeriGas to its competitors." (Pl. Mem. at 6-7) (citations omitted.)

But this too is inadequate. Leaving aside for the moment the fact that the Complaint specifies no factual basis for its conclusion that **defendant** is the party selling the advertising it found on the PissedConsumer.com website – addressed in the following section on secondary trademark liability – plaintiff's opposition relies on the suspect theory of initial interest confusion, and even then asks the Court to completely suspend disbelief with respect to consumer sophistication. The rule of law urged by AmeriGas, and which this Court should reject

as have all other contemporary decisions, is that use of a trademark without authorization, for any purpose, is *per se* trademark infringement – if it is done on the Internet. This is not, and cannot be, the law.

**A. The Doctrine Of Initial Interest Confusion Does Not Apply**

Plaintiff puts much stock in its initial interest confusion (“IIC”) argument, which it must do in the absence of any plausible likelihood of confusion claim, much less enunciation of harm, as traditionally analyzed in trademark law. But even given the amorphous and generous standards for IIC found in older cases, AmeriGas makes no attempt to distinguish, or even address, the cases cited in defendants’ moving brief that demonstrate (at length) that AmeriGas’ Complaint does not even meet the standards for IIC that have been applied in this Circuit. (*See* Def. Mem. at 13-15.) Indeed, even plaintiff’s assertion that the doctrine has been expressly approved by the Third Circuit (Pl. Mem. at 8-9) elides the fact that *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 357 (3d Cir. 2007) was limited to trade dress issues involving look-alike private branded products, or that in *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 292 (3d Cir. 2001) the existence of any initial interest confusion was upheld on appeal to be *de minimis*. Plaintiff cites no case in which the Third Circuit has actually employed IIC to determine the outcome of a case, much less made a sweeping endorsement of the doctrine which, as set out in defendant’s moving papers, is viewed with increasing skepticism in the courts.

AmeriGas demonstrates the extent of its desperate legal straits by ignoring the cases and arguments in plaintiff’s moving brief and by relying on the widely-criticized decision in *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006), whose holding and rationale have been roundly rejected by numerous courts and commentators. (*See* Pl. Mem. at 9.) *See S&L Vitamins, Inc. v. Australian Gold, Inc.*, 521 F. Supp. 2d 188, 201 (E.D.N.Y. 2007) (rejecting plaintiff’s theory of initial interest confusion absent plaintiff establishing “use” in the trademark

sense); *Site Pro-I, Inc. v. Better Metal, LLC*, 506 F. Supp. 2d 123, 127 (E.D.N.Y. 2007) (“I find unavailing SitePro 1’s ‘initial source confusion’ argument, as well as its attempts to distinguish the case law from this Circuit.”); E. Goldman, “10th Circuit Recognizes Initial Interest Confusion Doctrine – *Australian Gold v. Hatfield*,” *Technology and Marketing Law Blog*, February 13, 2006 (found at [http://blog.ericgoldman.org/archives/2006/02/10th\\_circuit\\_re.htm](http://blog.ericgoldman.org/archives/2006/02/10th_circuit_re.htm)) (“[T]he 10th Circuit will need to revisit its holding in future cases to clean up its doctrinal errors—much [as] other circuits that lazily adopted the initial interest confusion doctrine to resolve the dispute at hand (the 9th and 7th circuits come most immediately to mind) have had multiple opportunities to revisit/reconsider their errors”).

Indeed, contrary to plaintiff’s insistence, the trend in more recent cases is toward elimination of a *per se* rule of infringement on the Internet – which initial interest essentially embodies – in favor of evaluation of the complete consumer experience which credits Internet users with basic intelligence, and rejects the concept that “diversion” by virtue of one click of a mouse is a cognizable trademark injury. See *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571, 580 (S.D.N.Y. 2009) *aff’d*, 355 F. App’x. 508 (2d Cir. 2009). Perhaps the harshest criticism of *Hatfield* has come from a neighboring District Court. In *Designer Skin, LLC v. S & L Vitamins, Inc.*, 560 F. Supp. 2d 811 (D. Ariz. 2008), the District of Arizona, in expressly rejecting *Hatfield*, wrote:

The Court recognizes that this holding is at odds with the Tenth Circuit’s decision in *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006). There, under facts virtually identical to those in this case, the Tenth Circuit held that the defendant’s use of the trademarks caused initial interest confusion because it “used the goodwill associated with Plaintiffs’ trademarks in such a way that consumers might be lured to the lotions from Plaintiffs’ competitors.” *Id.* at 1239. With all due respect to the Tenth Circuit, this Court does not find *Hatfield* persuasive. In this Court’s view, there is a meaningful distinction between (1) using a mark to attract potential customers to a website that only offers products of the mark holder’s competitors and (2) using a mark to attract potential customers to a website that offers the mark holder’s genuine products as well as

the products of competitors. As discussed above, in the latter situation no “bait and switch” occurs.

*Id.* at 820. (emphasis added.) The facts here are even more favorable to defendant than they were in *Designer Skin*. PissedConsumer.com does not offer products or services that compete with AmeriGas or, as in *Designer Skin*, with “authorized” sellers of Designer Skin products. This defendant merely provides a forum for others to discuss AmeriGas. For this reason alone, AmeriGas’ repeated reliance on the ICC doctrine for its purported likelihood of confusion and resulting irreparable harm is without merit and should be dismissed.

### **III. PLAINTIFF HAS FAILED TO ADEQUATELY PLEAD A CLAIM FOR SECONDARY TRADEMARK LIABILITY**

AmeriGas’ “connect the dots” approach to trademark law continues in its argument that the Complaint’s reference to subdomains and advertisements which “allow[] PissedConsumer to profit from this display of third-party advertisements on its website” and “are displayed in a cluttered fashion and used in connection with AmeriGas’ trademark [such that the resultant effect is consumer confusion]” suffice to state a cognizable claim for secondary trademark liability. (*See* Pl. Mem. at 12-14; Compl. ¶ 29-31, 33-35.) As defendant’s moving brief demonstrates, claims for direct and contributory trademark infringement are legally and factually distinct. (*See* Def. Mem. at 15-16.) The Complaint falls far short of the pleading standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and its progeny.

#### **A. Plaintiff Has Not Stated A Claim For Secondary Liability Based On Purported Other, Unidentified Confusion**

“A claim has facial plausibility when the plaintiff pleads **factual content** that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (emphasis added). Conversely, a claim does **not** have facial plausibility when it pleads facts “merely consistent with” a defendant’s liability. *Id.*

Accordingly, a plaintiff must provide “more than labels and conclusions[;] a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

AmeriGas has failed to do so with respect to its claims regarding the advertising on the defendant’s website, which amount to secondary liability claims but fail to allege the required facts to make out sustainable causes of action. Specifically, and as discussed at length in defendant’s moving brief, AmeriGas has failed to allege plausibly that Opinion Corp. exercised direct control and monitoring of the purportedly infringing activity to state a claim for contributory trademark infringement under *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982).

First, as defendant’s moving brief observed, because plaintiff does not allege that defendant intentionally induced third-party advertisers to infringe AmeriGas’ trademark – the first prong of the *Inwood Labs* standard – plaintiff’s contributory infringement claims can only arise under the second prong of *Inwood Labs*, imposing liability on a defendant that “continues to supply” its product to the primary infringer knowing or having reason to know of the infringement. *See Inwood Labs*, 456 U.S. at 854. Opinion Corp. does not supply “products” within the meaning of *Inwood Labs*, but instead supplies “an ancillary service or benefit”; thus plaintiff must allege facts from which one could conclude that defendant engaged in “[d]irect control and monitoring of the [advertisements] used by third-party [advertisers] to infringe the plaintiff’s mark.” *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999).

In other words, the question here is whether Opinion Corp. monitored and controlled the development and distribution of the third-party advertisements appearing on its website, which themselves must be sufficiently alleged to be infringing. Where, as here, the underlying direct infringement claim is tenuous (as demonstrated above), any contributory liability claim can be no

better. *See Sony Computer Entertainment America, Inc. v. GameMasters*, 87 F. Supp. 2d 976, 986 (N.D. Cal. 1999) (preliminary injunction denied where plaintiff brought “scant evidence and allegations” of underlying trademark infringement).

Additionally, nothing in the Complaint remotely alleges facts sufficient to make out a claim of the requisite monitoring and control needed for contributory infringement. At most, the Complaint addresses the display of advertisements on PissedConsumer.com, *i.e.*, “displayed in a cluttered fashion ...” (Compl. ¶ 35), but it says nothing about how defendant may be involved in how those ads get to say what they say – *i.e.*, the monitoring or control of those advertisements. (Compl. ¶¶ 33-35.) An allegation that defendant profits from these advertisements (Compl. ¶¶ 34, 36) – especially, as here, where any profit would be indirect – does not amount to “monitoring or control” under *Inwood Labs. See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F. 3d 93 (2d Cir. N.Y. 2010).

Finally, and relatedly, Counts II and III – plaintiff’s claims for trademark dilution under federal and state law – should be dismissed for at least three reasons: (1) this Circuit has not recognized expansion of trademark dilution to include contributory dilution; (2) plaintiff’s claim that its mark is “famous” for purposes of the federal dilution statute is implausible on its face; and (3) defendants’ nominative fair use defense applies to AmeriGas’ dilution claims as well under 15 U.S.C. § 1125(c)(3)(A).

#### **IV. PLAINTIFF’S STATE LAW CLAIMS, COUNTS IV, V AND VI ARE BARRED BY SECTION 230 OF THE CDA**

Having no rebuttal to the legal arguments and authority set forth in defendant’s initial memorandum of law concerning the application of Section 230, plaintiff relies on bald and conclusory allegations concerning Opinion Corp’s alleged “content creation” to strip away the protections afforded PissedConsumer.com under the CDA. But the Complaint does not remotely approach alleging sufficient plausible facts to meet the high burden required to bypass

Congress's intent that websites such as PissedConsumer.com not be hauled into court to answer for the comments of others.

Plaintiff relies on *800-JR Cigar* in this regard, but as explained in *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 633 (E.D. Va. 2010) *aff'd sub nom. Rosetta Stone Ltd. v. Google, Inc.*, 10-2007, 2012 WL 1155143 (4th Cir. Apr. 9, 2012), that decision does not apply to situations such as this one:

In *800-JR Cigar, Inc. v. GoTo.com, Inc.*, a case relied on by Rosetta Stone, the court denied immunity to a pay-for-priority Internet search engine who, like Google, sells to advertisers the right to use keywords as search terms. 437 F.Supp.2d 273, 295 (D.N.J.2006). However, *800-JR Cigar* is distinguishable from the instant case for at least two reasons. First, the court denied CDA immunity because the defendant, unlike Google, did not qualify as an interactive computer service provider. *See id.* Second, the court did not deal with a situation, like here, where third party advertisers are responsible for selecting the keyword triggers. *Id.* at 295. Because the purpose of the CDA is to shield interactive computer providers from the fraudulent and abusive conduct of third parties, *id.*, it is applicable to the instant case, warrants granting immunity to Google, and bars Rosetta Stone from any recovery under a claim for unjust enrichment.

Here too, it is beyond question that, unlike in *800-JR Cigar*, defendant is in fact an interactive computer service provider – indeed, the Ascentive Decision made just such a finding regarding the website. (*See* Def. Mem. at 21-22.) Moreover, the advertising on defendant's website is, as in *Rosetta Stone*, not controlled by Opinion Corp. *800-JR Cigar* is simply not applicable here.

Plaintiff's assertion that certain "creative activity" **may be** attributable to defendant and not third parties does nothing to overcome the more detailed pleading requirements required to sustain plaintiff's state-based causes of action. (*Compare* Def. Mem. at 21-23 citing *Ascentive*, 2011 WL 6181452 at \*19 *with* Pl. Mem. at 16-17.) Thus, plaintiff's allegation that "AmeriGas cannot determine whether the actual consumers of the products are posing the complaints, **whether PissedConsumer itself is posting them**, or whether AmeriGas' competitors are doing so in an attempt to harm AmeriGas' reputation to increase the competitors sales" is meaningless and does not amount to an actionable claim. (Compl. ¶ 26) (emphasis added.)

Likewise, AmeriGas' argument that because its state law-based claims are mentioned in the same breath as its other intellectual property claims, such that in doing so defendant is precluded from applying Section 230 to dispose of inapplicable state-based claims, has no legal basis. (*See* Pl. Mem. at 17-18.) Adopting such a rule of law would be to completely eviscerate Section 230, and flies in the face of every decision that has dismissed state law claims under Section 230 where those causes of actions have federal-law cognates.

Accordingly, because plaintiff's state-based claims are simply not cognizable as a matter of law, Counts IV, V and VI should be dismissed with prejudice.

**V. ANY RESULTING AMENDMENT OF PLAINTIFF'S COMPLAINT WOULD BE FUTILE**

A court may deny leave to amend a complaint when amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting that a court may deny leave when faced with "futility of amendment"). An amendment would be futile when "the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re NAHC, Inc. Securities Litig.*, 306 F.3d 1314, 1332 (3d Cir.2002) (quoting *In re Burlington Coat Factory Securities Litig.*, 114 F.3d 1410, 1427 (3d Cir.1997)).

Here, AmeriGas has not sought leave to amend its fatally defective Complaint. In any event, any proposed amended complaint would fail to state a claim upon which relief could be granted for the reasons set forth above. Any resulting amendment is futile because either one of the two following scenarios would apply: (1) any re-crafted state-based claims, however re-worded or re-pleaded would fall to Section 230; or (2) defendant's use of plaintiff's trademark would be "fair" or otherwise permissible as a matter of law.

**CONCLUSION**

For the foregoing reasons, and those set forth in defendant's initial memorandum, defendant respectfully requests that this Court dismiss the Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

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Dated: April 27, 2012

**CERTIFICATE OF SERVICE**

I, Daniel Segal, hereby certify that a true and correct copy of the foregoing Reply Brief in Further Support of Defendant's Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief can be Granted Pursuant to Fed. R. Civ. P. 12(b)(6) in the above matter were served on the following:

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