

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

VO GROUP, LLC

Index No. 8758/11

Plaintiff,

-against-

OPINION CORP. d/b/a PISSEDCONSUMER.COM,
MICHAEL PODOLSKY, ALEX SYROV and
JOHN DOE

Defendants.

-----X

**MEMORANDUM OF LAW OF BEHALF OF
DEFENDANTS OPINION CORP., MICHAEL PODOLSKY
AND ALEX SYROV IN SUPPORT OF MOTION TO DISMISS**

GOETZ FITZPATRICK LLP
Ronald D. Coleman, Esq.
Joel G. MacMull, Esq.
One Penn Plaza
New York, NY 10110
Telephone: (212) 695-8100
Facsimile: (212) 629-4013

*Attorneys for Defendants Opinion Corp.
d/b/a PissedConsumer.com, Michael
Podolsky & Alex Syrov*

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF FACTS | 2 |
| LEGAL ARGUMENT | 4 |
| I. PLAINTIFF'S CAUSES OF ACTION FOR DEFAMATION SHOULD BE DISMISSED | 4 |
| A. Plaintiff's Claims In Its Fifth Cause Of Action Are Barred By § 230 Of The Communications Decency Act | 4 |
| B. Plaintiff's Claims In Its Sixth Cause Of Action Fail To State A Cause Of Action | 6 |
| C. Plaintiff's Claims In Its Seventh Cause Of Action Fail As A Matter Of Law Under And Under § 230 Of The Communications Decency Act | 8 |
| II. PLAINTIFF'S CAUSES OF ACTION FOR CIVIL RICO SHOULD BE DISMISSED | 9 |
| III. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR TRADEMARK INFRINGEMENT | 15 |
| A. Plaintiff Has Failed To Plead Facts That Amount To A Plausible Claim Of A Likelihood Of Confusion | 15 |
| B. Defendants' Use Of VO Group's Alleged Trademarks Is Fair Use | 18 |
| C. The "Initial Interest Confusion" Doctrine Is At Best Inapplicable Here | 20 |
| IV. PLAINTIFF'S CAUSES OF ACTION FOR TORTIOUS INTERFERENCE UNDER STATE LAW SHOULD BE DISMISSED | 26 |
| V. PLAINTIFF CANNOT MEET THE HIGH STANDARDS NECESSARY TO JUSTIFY THE GRANTING OF AN INJUNCTION TO RESTRAIN FREE SPEECH ON DEFENDANTS' WEBSITE | 27 |
| CONCLUSION..... | 29 |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|--|-----------------------|
| Cases | |
| <i>A.B.C. Home Furnishings, Inc. v. Town of E. Hampton</i> , 947 F.Supp. 635 (E.D.N.Y.1996)..... | 28 |
| <i>Andrea Doreen Ltd. v. Bldg. Material Local Union 282</i> , 299 F. Supp. 2d 129 (E.D.N.Y. 2004)..... | 14 |
| <i>Anza v. Ideal Steel Supply Corp.</i> , 547 U.S. 451 (2006)..... | 9 |
| <i>Barrett v. Rosenthal</i> , 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, n. 9 (2006)..... | 4 |
| <i>Bihari v. Gross</i> , 199 F.Supp.2d 309 (S.D.N.Y. 2000)..... | passim |
| <i>Brookfield Communic., Inc. v. West Coast Entmt. Corp.</i> , 174 F.3d 1036 (9th Cir. 1999)..... | 20 |
| <i>Car-Freshner Corp. v. S.C. Johnson & Son, Inc.</i> , 70 F.3d 267 (2d Cir.1995)..... | 19 |
| <i>Children of Bedford, Inc. v. Petromelis</i> , 77 N.Y.2d 713 (1991), <i>rev'd on other grounds</i> , 79 N.Y.2d 972, (1992)..... | 28 |
| <i>Cintas Corp. v. Unite Here</i> , 601 F. Supp. 2d 571 (S.D.N.Y. 2009) <i>aff'd</i> , 355 F. App'x. 508 (2d Cir. 2009)..... | 18, 19, 22 |
| <i>Continental Realty Corp. v. J.C. Penney Co.</i> , 729 F.Supp. 1452 (S.D.N.Y.1990)..... | 11 |
| <i>Deem v. Lockheed Corp.</i> , 1991 WL 196171, at *9 (S.D.N.Y. Sept. 25, 1991)..... | 11 |
| <i>Dillon v. City of New York</i> , 261 A.D.2d 34, 704 N.Y.S.2d 1, 5 (1999)..... | 6, 7 |
| <i>Electronics, Inc. v. McDonald</i> , 362 F.3d 17 (2d Cir.2004)..... | 16 |
| <i>Fare Deals, Ltd. v. World Choice Travel.com, Inc.</i> , 180 F.Supp.2d 678 (D. Md. 2001)..... | 23 |
| <i>Girls Scouts v. Personality Posters Mfg. Co.</i> , 304 F. Supp. 1228 (S.D.N.Y. 1969)..... | 17 |
| <i>Green v. America Online (AOL)</i> , 318 F.3d 465 (3rd Cir.), <i>cert. denied</i> , 540 U.S. 877, 124 S.Ct. 200, 157 L.Ed.2d 140 (2003)..... | 6 |
| <i>Gucci Am., Inc. v. Hall & Assocs.</i> , 135 F.Supp.2d 409, 417 (S.D.N.Y.2001)..... | 4 |
| <i>H.J., Inc. v. Northwestern Bell Tel. Co.</i> , 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)..... | 10, 11 |

| | |
|--|------------|
| <i>Hard Rock Café</i> , 955 F.2d 1143 (7 th Cir. 1992) | 25 |
| <i>Hasbro, Inc. v. Clue Computing</i> , 232 F.3d 1 (1st Cir. 2000)..... | 20 |
| <i>Hearts on Fire Co. v. Blue Nile</i> , 603 F. Supp. 2d 274 (D. Mass. 2009)..... | 21 |
| <i>Hecht v. Commerce Clearing House, Inc.</i> , 897 F.2d 21 (2d Cir.1990) | 9, 10 |
| <i>Howard v. Am. Online Inc.</i> , 208 F.3d 741 (9th Cir. 2000) | 10, 11 |
| <i>Inwood Labs., Inc. v. Ives Labs, Inc.</i> , 456 U.S. 844 (1982)..... | 23, 24, 25 |
| <i>James v. Gannett Co., Inc.</i> , 40 N.Y.2d 415, 353 N.E.2d 834 (1976)..... | 8 |
| <i>KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.</i> , 543 U.S. 111 (2004)..... | 20 |
| <i>Lamparello v. Falwell</i> , 420 F.3d 309 (4th Cir. 2005)..... | 20, 22 |
| <i>Lockheed Martin Corp. v. Network Solutions, Inc.</i> 985 F.Supp.949 (C.D. Cal. 1997) | 11, 24, 25 |
| <i>Malletier v. Dooney & Bourke, Inc.</i> , 340 F. Supp.2d 415 (S.D.N.Y. 2004)..... | 27 |
| <i>Martin Corp. v. Network Solutions, Inc.</i> , 194 F.3d 980 (9th Cir. 1999)..... | 24, 25 |
| <i>Mazurek v. Armstrong</i> , 520 U.S. 968 (1997)..... | 27 |
| <i>Moll v. US Life Title Ins. Co. of New York</i> , 710 F. Supp. 476 (S.D.N.Y. 1989) | 14 |
| <i>Moss v. Morgan Stanley Inc.</i> , 719 F.2d 5 (2d Cir. 1983)..... | 10, 11 |
| <i>Murawski v. Pataki</i> , 514 F. Supp. 2d 577 (S.D.N.Y. 2007) | 5 |
| <i>Near v. Minnesota</i> | 27, 28 |
| <i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976)..... | 28 |
| <i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)..... | 28 |
| <i>Nissan Motor v. Nissan Computer</i> , 378 F.3d 1002 (9th Cir, 2004)..... | 21 |
| <i>Novak v. Overture Services, Inc.</i> , 309 F. Supp. 2d 446 (E.D.N.Y. 2004) | 26 |
| <i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)..... | 27 |
| <i>People v. Wolf</i> , 98 N.Y.2d 105,722 N.E.2d 1124, 1130 (2002) | 13 |
| <i>Perfect 10, Inc. v. Visa Int'l Serv. Assoc.</i> , 494 F.3d 788 (9th Cir.2007)..... | 26 |
| <i>Pier Connection, Inc. v. Lakhani</i> , 907 F. Supp. 72 (S.D.N.Y. 1995) | 11 |

| | |
|--|-----------|
| <i>Polaroid Corp. v. Polarad Elec. Corp.</i> , 287 F.2d 492 (2d Cir.1961)..... | 19 |
| <i>Polymer Tech. Corp. v. Mimran</i> , 975 F.2d 58, (2d Cir. 1992) | 23 |
| <i>Reit v. Yelp!, Inc.</i> , 29 Misc. 3d 713 (Sup. Ct, New York Cty. 2010)..... | 5, 6 |
| <i>Rosetta Stone Ltd. v. Google, Inc.</i> , 730 F.Supp.2d 531 (E.D. Va. 2010)..... | 26 |
| <i>Savin Corp. v. The Savin Group</i> , 391 F.3d 439, 462 n. 13 (2d Cir. 2004) | 22 |
| <i>SB Designs v. Reebok Int’l, Ltd.</i> , 338 F.Supp.2d 904 at 913 (N.D. Ill. 2004) | 24, 25 |
| <i>Sedima S.P.R.L. v. Imrex Corp.</i> , 473 U.S. 479 (1985)..... | 10 |
| <i>Shiamili v. Real Estate Group of New York, Inc.</i> , 68 A.D.3d 581, 892 N.Y.S.2d 52 1st Dept., 2009]..... | 5 |
| <i>Sony Computer Entertainment America, Inc. v. GameMasters</i> , 87 F.Supp.2d 976 (N.D. Cal. 1999)..... | 24 |
| <i>Steinway, Inc. v. Ashley</i> , 01 CIV 9703 GEL, 2002 WL 122929 (S.D.N.Y. Jan. 29, 2002) | 23 |
| <i>Stop the Olympic Prison v. United States Olympic Committee</i> , 489 F. Supp. 1112 (S.D.N.Y.1980)..... | 17, 28 |
| <i>Taubman Co. v. Webfeats</i> , 319 F.3d 770 (6th Cir. 2003) | 17 |
| <i>Taylor Bldg. Corp. of Am. v. Benfield</i> , 507 F. Supp. 2d 832 (S.D. Ohio 2007) | 17 |
| <i>Tiffany Inc. v. eBay Inc.</i> , 600 F.3d 93, 104 (2d Cir. 2010) | 25 |
| <i>Town of W. Hartford v. Operation Rescue</i> , 915 F.2d 92 (2d Cir. 1990) | 9, 14, 15 |
| <i>Weiss Assoc., Inc. v. HRL Assoc., Inc.</i> , 902 F.2d 1546 (Fed. Cir. 1990) | 20 |
| <i>Yankee Pub. Inc. v. News America Pub. Inc.</i> , 809 F. Supp. 267 (S.D.N.Y. 1992)..... | 16 |
| <i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir.1997)..... | 4 |

Statutes

| | |
|------------------------------|--------|
| 15 U.S.C. § 1115(b)(4) | 19 |
| 18 U.S.C. § 1961(1)(B)..... | 10 |
| 18 U.S.C. § 1961(5) | 10, 14 |
| 18 U.S.C. § 1962(c) | 10, 14 |

| | |
|---------------------------------|---------|
| 18 U.S.C. § 1962(d) | 10 |
| 47 U.S.C. § 230..... | 1, 4, 8 |
| 47 U.S.C. § 230(c)(1)..... | 4 |
| 47 U.S.C. § 230(e)(3)..... | 4 |
| New York Penal Law §180.05..... | 12, 13 |
| New York Penal Law §180.08..... | 12 |

Rules

| | |
|-----------------------------|---|
| C.P.L.R. § 3211(a)(7) | 1 |
| CPLR § 3016(a) | 7 |

PRELIMINARY STATEMENT

Defendants Opinion Corp., Michael Podolsky and Alex Syrov, by their attorneys, Goetz Fitzpatrick LLP, respectfully submit this memorandum of law in support of the motion for an Order dismissing the complaint pursuant to C.P.L.R. § 3211(a)(7) for the failure to state a cause of action, directing that all the claims alleged in the plaintiff's complaint be dismissed with prejudice and for such other and further relief as the Court may deem proper.

Defendant Opinion Corp. is, as set forth in plaintiff's Verified Amended Complaint, the corporate owner of an Internet website called PissedConsumer.com. That website is an indelicately but accurately named "gripe site" – a consumer forum that permits third parties to log on and post criticism or praise of businesses. Defendants Podolsky and Syrov are two of Opinion Corp.'s principals (collectively, all three defendants are referred to herein as "Opinion Corp.").

Plaintiff VO Group, LLC ("VO Group") describes itself as "nationally known company" providing services to current and prospective timeshare owners. It claims various trademark rights and is suing the defendants for use of the alleged marks, as well as other supposed wrongdoing, on the Pissedconsumer.com website. Ultimately VO Group claims that PissedConsumer.com has defamed it, conspired against it, and competed unfairly with it.

But VO Group and PissedConsumer.com are not in competition. This is a defamation case in which neither defamation nor defamers are named, dressed up as a federal trademark claim in order to avoid the sting of guaranteed dismissal under Section 230 of the Communications Decency Act (47 U.S.C. § 230).

VO Group imagines that it is easier to have this Court silence criticism on PissedConsumer.com than to address its critics on the merits, either on PissedConsumer.com or elsewhere. But its complaint is premised on the negation of fundamental constitutional principles and controlling law regarding prior restraint of free speech, and has nothing at all to do with

consumer confusion, the touchstone of a trademark infringement claim. This attempt to use the Lanham Act, RICO and other torts of competition as a proxy for censorship should be rejected.

STATEMENT OF FACTS

As set forth in the Verified Amended Complaint, VO Group is a New Jersey company that offers various “timeshare consulting services.” (A copy of the Verified Amended Complaint is attached as Exhibit “A” to Affirmation of Joel MacMull, Esq., dated November 16, 2011 (“MacMull Affm.”). Plaintiff claims to have been using the trademark VO GROUP since April of last year (2010) and that it has applied for two trademark registrations. Opinion Corp. runs PissedConsumer.com, a website on which third parties – mainly “pissed consumers” – post comments about various businesses, which is alleged to be operated by defendants Podolsky and Syrov. Among the businesses criticized on PissedConsumer.com is VO Group.

The complaint alleges various “schemes” by which PissedConsumer will supposedly arrange with parties who are the subject of negative reviews to “remove, recategorize, hide and/or filter existing and new complaints published on its website.” (Amended Complaint ¶ 20.) The Amended Complaint admits, however, that “PissedConsumer makes no attempt to discern which complaints are legitimate and which are fake or false.” (Amended Complaint ¶ 23.) The website also accepts advertising through third parties which are topically related to the subject matter of the complaints on a given page of the website. (Amended Complaint ¶¶ 34-35.) VO Group also alleges that the PissedConsumer website utilizes search engine optimization so that Internet users will be drawn to the topic of those web pages, and VO Group claims that these techniques are “deceptive.” (Amended Complaint ¶ 41-48.)

VO Group alleges that the following statements were published on PissedConsumer.com:

49. On November 10, 2010, certain false and defamatory statements concerning VO Group (the "Initial Defamatory Statements") were published on the PissedConsumer website. The Initial Defamatory Statements published on the

PissedConsumer website included the following:

NJ VO GROUP IS A SCAM
THE WHOLE VO GROUP ARE PRIOR WYNDHAM
EMPLOYEES... ADAM LACERDA IS A LIAR
ASHLEE LACERDA IS A TRASHY LIAR
VINNY GIORDANO IS A DISGRACE TO MANKIND...
AIMEE DOESN'T KNOW ANY BETTER
BRIAN CORLEY IS A LOSER AND THEY ARE ALL DRUGGED UP
LOSERS. THEY ALL ARE NOT EDUCATED. . . THEY JUST KNOW HOW
TO MAKE YOUR TIMESHARE PROBLEM SEEM FIXABLE.
THEY ARE ALL CON ARTISTS. . . . STEALING YOUR PRIVATE INFO
FROM LEAKS WITHIN THE WYNDHAM CORPERATION. . . THEIR TIME
WILL COME WHEN ALL THAT MONEY THEY ARE MAKING WILL BE
TURNED BACK INTO LAWSUITS . . . MAKES ME EXCITED TO KNOW
ALL OF THESE LOSERS ARE GOING TO FALL RIGHT ON THEIR FACES
AND ALL OF US HERE IN MYRTLE BEACH ARE LAUGHING AND
POINTING AT HOW *** THEY ALL ARE

(Amended Complaint ¶ 49.) The truth of these statements is denied by VO Group, which admits that they were not written by defendants. (Amended Complaint ¶ 53.) VO Group contacted defendants, one of whom, claims, “demanded” payment to remove these statements. (Amended Complaint ¶ 67.) This alleged “demand” was supposedly declined and no money changed hands. (Amended Complaint ¶ 69.) No documentation is offered in support of this claim, but the Amended Complaint claims that other unnamed persons have had the same experience and have called it “extortion.” (Amended Complaint ¶¶ 70-72.)

LEGAL ARGUMENT

I. **PLAINTIFF'S CAUSES OF ACTION FOR DEFAMATION SHOULD BE DISMISSED**

A. **Plaintiff's Claims In Its Fifth Cause Of Action Are Barred By § 230 Of The Communications Decency Act**

Section 230 of the Communications Decency Act (47 U.S.C. § 230, hereinafter “Section 230” of the “CDA”) prohibits the imposition of liability under state law on any user or provider of “interactive computer service” for publishing content provided by another. Section 230 provides, in pertinent part, that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” *id.* § 230(c)(1), and that “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section,” *id.* § 230(e)(3).

It is well established that sites such as PissedConsumer.com fall squarely within the protection of the statute, which applies to all state law claims, however styled, so long as the act complained of is the publication of third party content. *See Gucci Am., Inc. v. Hall & Assocs.*, 135 F.Supp.2d 409, 417 (S.D.N.Y.2001) (citing legislative history of Section 230); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997) (holding that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content are barred” by Section 230); *Barrett v. Rosenthal*, 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, 518 n. 9 (2006) (collecting cases).

This is the case here. Section 230 defines “interactive computer service” 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.” 47 U.S.C. § 230**Error! Bookmark not defined.**(f)(2).

PissedConsumer.com is an “interactive computer service” and qualifies for immunity under Section 230 because, (1) it is an internet search engine within the meaning of the statute that allows members of the public to search its directory of webpages and is therefore an “information service ... that provides or enables computer access by multiple users to a computer server”; and (2) the claims against it assert that it is liable for publishing “content” originated by others. *See e.g., Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007).

The provisions of Section 230 apply in state as well as federal courts, of course. A recent on-point case arising in New York State courts is *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 716-17 (Sup. Ct, New York Cty. 2010). There, the plaintiff Reit, while acknowledging that the defendant Yelp! was an Internet computer service, insisted, as plaintiff suggests here, “that the CDA does not immunize it from defamation here because its removal of posts was not editorial, but business related. Specifically, Reit argued that the selective removal of all of his positive reviews was more than the action of an editor ‘simply selecting material for publication.’ This distinction, Reit argued, makes Yelp! an internet content provider.” *Id.* at 716-17, 907 N.Y.S.2d at 413-14. However, Supreme Court, New York County, disagreed and dismissed the complaint, explaining as follows:

Shiamili [v. Real Estate Group of New York, Inc., 68 A.D.3d 581, 892 N.Y.S.2d 52 1st Dept., 2009] is analogous to the present matter. In *Shiamili*, the plaintiff sued an interactive computer service for defamation based on information published on its website. The complaint alleged that the defendants “choose and administer content” that appears on the website. *Shiamili* argued that the defendants “engaged in a calculated effort to encourage, keep and promote bad' content on the Web site.” The First Department held that this allegation does not raise an inference that defendants were information content providers within the meaning of the CDA because “message board postings do not cease to be data provided by another information content provider merely because the construct and operation of the Web site might have some influence on the content of the postings” (*Id.*, at 583, 892 N.Y.S.2d 52).

Here, Yelp is an interactive computer service. The allegedly defamatory content was supplied by a third party information content provider and consisted of a message board posting. That Yelp allegedly uses “bad” posts in its marketing strategy does not change the nature of the posted data.

Moreover, Yelp's selection of the posts it maintains on Yelp.com can be considered the selection of material for publication, an action “quintessentially related to a publisher's role” (*Green v. America Online (AOL)*, 318 F.3d 465, 471 [3rd Cir.], *cert. denied*, 540 U.S. 877, 124 S.Ct. 200, 157 L.Ed.2d 140 [2003]). Accordingly, Yelp may not be considered an internet content provider, so that Reit's defamation claims are barred by the CDA.

Id. The same analysis, and rule of law, applies here. Congress clearly did not intend to allow Section 230 of the CDA to be circumvented merely by alleging that an Internet service provider such as defendants here have some role in the presentation of the material on their website. Here, too, plaintiff's defamation claim set out in its Fifth Cause of Action, is barred by the CDA.

B. Plaintiff's Claims In Its Sixth Cause Of Action Fail To State A Cause Of Action

Aware of the inescapable bar of Section 230 to their claims against defendants based on the allegedly defamatory statements of third parties, defendants have, in their Sixth Cause of Action, attempted a preposterous expansion of New York defamation law by which the alleged authors of the “defamatory” material are the defendants themselves. Examination of these alleged “false and defamatory” statements, however, can only leave an observer wondering what depths a party will stoop to claim in a lawsuit in an attempt to control what others say about it – no better how benign the actual statement.

“Defamation has long been recognized to arise from “the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.” *Dillon v. City of New York*, 261 A.D.2d 34, 37-38, 704 N.Y.S.2d 1, 5 (1999) (internal quotations and citations omitted). Moreover, as noted in *Dillon*, CPLR §

3016(a) requires that in a defamation action, “the particular words complained of ... be set forth in the complaint.” *Id.* “Thus, in evaluating plaintiff’s claim, only the words alleged in the complaint as constituting the libel may be considered by the Court as the actionable language.” *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 1002, 810 N.Y.S.2d 807, 812 (Sup. Ct. New York Cty. 2005). The question for the Court here then is what possible content in the language quoted below could “expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society”? The allegations in the Amended Complaint are as follows:

82. On or about April 25, 2011 or at some time prior thereto, PissedConsumer created content without VO Group’s authorization or consent (located at <http://vo-group.pissedconsumer.com>) which contained a number of false and defamatory representations concerning VO Group’s business and the services it provides to its customers and published that content on the PissedConsumer website (referred to hereinafter as the “Additional Defamatory Statements”).

83. For instance, the content created by PissedConsumer stated that VO Group’s services include “resale, financing and debt management associated with v[a]ncational properties.”

84. Such statements are and were simply not true, are false and defamatory concerning VO Group and the nature of its business, and directly contradict various disclaimers and other notices VO Group has published on its website and other locations concerning the scope and nature of the services VO Group provides to its customers.

85. The Additional Defamatory Statements are false and intended solely to attack VO Group’s business and its reputation.

Plaintiff says the set off language quoted is “false,” but it does not say how. Nor does it specify how, as alleged in ¶ 157, these statements, which are the only ones quoted in the Amended Complaint, could “adversely affect [VO Group’s] business and reputation” or “directly injure[] or prejudice[] VO Group’s reputation.” No matter how many times one re-reads these alleged

“Additional Defamatory Statements,” it is, defendants submit, impossible to find language here which could “expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.”

In a defamation case, “The statement complained of will be read against the background of its issuance with respect to the circumstances of its publication. It is the duty of the court, in an action for libel, to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer.” *James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 420, 353 N.E.2d 834, 838 (1976) (internal citations and quotations omitted). If there is something defamatory about being in the business of services including the “resale, financing and debt management associated with vacation properties,” plaintiffs do not say what it is. It is certainly not something, however, that should induce a black mark on plaintiff’s name in the mind of any “right-thinking person.” The Court is not obligated to accept the incredible claim of the Amended Complaint that these words are defamatory when they clearly are not. Plaintiff has simply failed, in the Sixth Cause of Action, even to plead a *prima facie* claim for defamation.

C. Plaintiff’s Claims In Its Seventh Cause Of Action Fail As A Matter Of Law Under And Under § 230 Of The Communications Decency Act

Both of the foregoing arguments apply to the Amended Complaint’s Seventh Cause of Action for trade libel. *See Penn Warranty Corp. v. DiGiovanni, supra*, 10 Misc. 3d 998, 1003, 810 N.Y.S.2d 807, 813-14.

II. PLAINTIFF'S CAUSES OF ACTION FOR CIVIL RICO SHOULD BE DISMISSED

Plaintiff has topped off its elaborate repackaging of its defamation claim with the pièce de résistance of modern junk litigation – multiple claims under civil RICO and claiming “commercial bribery” and “extortion” as the underlying predicate torts. As the Second Circuit taught in *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92, 104 (2d Cir. 1990) (internal quotations and citations omitted):

We have also made clear that we will, of course, enforce the statute as written by Congress. That does not imply, however, any disposition on the part of this court to countenance fanciful invocations of the draconian RICO weapon in civil litigation. Just as we are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and origins may require, so too are we not at liberty to recast the statute to expand its application beyond the limited reach Congress gave it.

Plaintiff tries its hand at just such “ingenious analytical instruments” here to induce a court to censor criticism of it. Not surprisingly, plaintiff fails here, too, to demonstrate a likelihood of success on the merits.

The RICO claims fail on many legal grounds. For one, under RICO there must be some damage to the plaintiff, and that damage must be proximately caused by the alleged racketeering itself. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-58 (2006). As the Supreme Court explained in *Anza*:

The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State). The attenuation between the plaintiff's harms and the claimed RICO violation arises from a different source in this case than in *Holmes*, where the alleged violations were linked to the asserted harms only through the broker-dealers' inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.

Id. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir.1990) (“in order to have standing, a plaintiff must show: (1) a violation of section 1962; (2) injury to business or property;

and (3) causation of the injury by the violation.”); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (injury in the form of lost future business commissions “too speculative to confer standing” under section 1962(c); injury from overt racketeering act lacking under 1962(d)).

As demonstrated above, however, no evidence, or even a coherent theory, of damage is before this Court. The allegations speak of no “direct injuries” other than those arising from a legally privileged activity: the publishing of criticism about plaintiffs on defendants’ website. There is no connection between that notional damage and any alleged “racketeering activity” or “extortion”; the harm alleged, if it can be called that, arises from the postings on PissedConsumer.com – not the supposed offer to delete them for money.

Secondly, the Complaint alleges only lots of “things” in ¶ 117, but ultimately only one supposed predicate act of racketeering: The supposed scheme to “extort” (or “bribe”) VO Group as a condition to removing unflattering comments about its business. But a “violation under section 1962(c) requires proof of: “(1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity.” *Sedima S.P.R.L. v. Imrex Corp.*, 473 U.S. 479, 496 (1985) (footnote omitted).

A pattern is defined as “at least two acts of racketeering activity” within ten years of each other. 18 U.S.C. § 1961(5). Two acts are necessary, but not sufficient, for finding a violation. *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). “[T]he term ‘pattern’ itself requires the showing of a relationship between the predicates and of the threat of continuing activity.” *Id.* at 239, 109 S.Ct. 2893 (internal citation and quotation marks omitted).

Howard v. Am. Online Inc., 208 F.3d 741, 746 (9th Cir. 2000). To show a pattern under RICO, a plaintiff must prove that there are a sufficient number of predicate acts “indictable” as mail or wire fraud. *See* 18 U.S.C. §§ 1961(1)(B), 1962(c). *Id.*; *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). The predicate acts and the threat of continuing activity are linked by a requirement of

proof of “**criminal acts** that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” *Moss*, 719 F.2d at 17 (emphasis added). This complaint fails to do this. Citing miscellaneous lawful activities as a part of a RICO pattern, without proving, much less alleging, that they are indictable, is not sufficient. See *Howard*, 208 F.3d at 748 (online misrepresentations did not qualify as predicate acts). Thus publishing and managing, on an ongoing basis, the website content on PissedConsumer.com or any other acts alleged elsewhere in the Complaint that offend plaintiff, are not indictable and cannot qualify as RICO predicate acts.

Similarly, the allegations of the Complaint fail to establish the “continuity” aspect of a RICO pleading:

Plaintiffs’ claim of open-ended continuity fails because Pier Connection has alleged no facts that would allow the Court to infer that Defendants committed anything other than a single fraudulent scheme. To infer a threat of repeated fraud from a single alleged scheme would in effect render the pattern requirement meaningless.” *Continental Realty Corp. v. J.C. Penney Co.*, 729 F.Supp. 1452, 1455 (S.D.N.Y.1990). In *Continental Realty*, the plaintiff’s allegations with respect to a failed real estate transaction supported an open-ended scheme on their face. However, the court refused to find open-ended continuity. The court noted that “nothing in the Defendants’ actions suggest[ed] ‘a distinct threat of long-term racketeering activity.’ ” *Id.* at 1455, citing *H.J. Inc.*, 492 U.S. at 242, 109 S.Ct. at 2902. As in *Continental Realty*, the plaintiffs in the instant case have “fail[ed] to provide any factual support for [their] contention that [Defendants’] fraudulent activity will continue in the future.” *Continental Realty*, 729 F. Supp. at 1455. See also *Deem v. Lockheed Corp.*, 1991 WL 196171, at *9 (S.D.N.Y. Sept. 25, 1991) (finding no threat of continuity “since there is no indication that defendants committed these same or similar acts before[,] or that they committed them after” completing the scheme against the plaintiffs).

Pier Connection, Inc. v. Lakhani, 907 F. Supp. 72, 77 (S.D.N.Y. 1995). Indeed, the only allegation in the Complaint involves the largely speculative and conclusory claims surrounding an alleged “scheme” that began and ended with Opinion Corp. presenting plaintiff with an offer that the latter elected not to accept. Though alluded to gauzily in the pleadings, no other parties are identified in the Complaint as “victims” of this “scheme.”

Plaintiff relies on New York Penal Law §§ 180.05 and 180.08 to provide predicate acts for this supposed scheme to threaten plaintiff with free speech. The Amended Complaint, however, fails as a matter of law. Each of these claims, § 180.05, requires an allegation that a “commercial bribe” has been made by an employee “without the consent of his employer . . .” They do indeed allege that “Defendants, their employees, agents, fiduciaries or others acting on their behalf committed acts of commercial bribery when, among other things, an employee, agent or fiduciary of PissedConsumer, without the consent of his employer or principal, solicited Mr. Lacerda for \$5,000” (Amended Complaint ¶ 110). The problem here is that according to ¶ 1 of the Amended Complaint, “Mr. Podolsky and Mr. Syrov are referred to collectively hereinafter, along with PissedConsumer, as ‘Defendants’,” and “PissedConsumer” is defined in that same paragraph as “Opinion Corp. d/b/a PissedConsumer.com.” Thus the allegation is that Opinion Corp., Podolsky and Syrov committed acts of commercial bribery when they “acted without the consent of” . . . Opinion Corp.

Admittedly ¶ 110 of the Complaint is incoherent. Thus it can be expected that plaintiff will respond that it “meant to say” one of the two individual defendants, i.e., Mr. Podolsky or Mr. Syrov, “acted without the consent of” Opinion Corp. But the Amended Complaint also alleges as follows:

5. Upon information and belief, defendant Michael Podolsky is the chief executive officer of PissedConsumer and an individual residing at 130 Combs Avenue, Woodmere, New York 11598. Upon information and belief, Mr. Podolsky controls and operates the PissedConsumer website.

6. Upon information and belief, defendant Alex Syrov is the president of PissedConsumer and an individual residing at 1856 13th St., Apt. 2B, Brooklyn, New York 11229. Upon information and belief, Mr. Syrov controls and operates the PissedConsumer website.

In other words, these two defendants are respectively the CEO and President of defendant Opinion Corp., and each is alleged to “control and operate” the company. Yet each is – or, perhaps, both

are – also accused of acting, in violation of § 180.05, “without the consent” of that company. It hardly needs to be explained, however, that taking the Amended Complaint at its own word, either defendant is authorized to give that consent, either by virtue of his position as CEO or President of the company or the person alleged to “control and operate” it. Indeed, the Amended Complaint’s incoherence on this score is only exacerbated by the fact that it also alleges “Upon information and belief, Defendants knowingly assisted each other in their acts of commercial bribery in conducting the PissedConsumer Enterprise” (Amended Complaint ¶ 112). Thus, the unnamed “rogue CEO” or “rogue President” is alleged to have acted contrary to the corporations interest here with the cooperation of what can only be the only other individual defendant named in the case, leaving the question of who, on behalf of the corporation, could possibly have been left to withhold its consent to the alleged “bribe.”

Even abstracting from this logical conundrum, there is no allegation that this \$5000 payment was to be made to any particular individual, thus constituting a kickback to the particular unnamed “employee, agent or fiduciary” at the corporation’s expense. A conclusory allegation of economic harm to the corporation in question is insufficient. Rather, “The language and legislative history of our felony commercial bribing statute, and the decisional law on kickbacks and employee bribery under the analogous federal mail fraud statute, thus all militate toward requiring more than payment of a kickback to establish the economic harm element of commercial bribing in the first degree.” *People v. Wolf*, 98 N.Y.2d 105, 114, 772 N.E.2d 1124, 1130 (2002) (“The payment of the kickback may show that the payor was willing to take less to consummate the transaction. But it does not provide the necessary proof of actual economic harm-that, absent the corrupt arrangement, the employer of the kickback payee would have paid a lower price or secured better terms”). It is never sufficient to plead that an employee, agent or principal did not

turn over money to the corporate entity. “[T]he statute's economic harm requirement—specifically added by the legislature in 1983—would be rendered superfluous if it were met simply by an agent's failure to turn over a bribe to his principal.” *Moll v. US Life Title Ins. Co. of New York*, 710 F. Supp. 476, 482 (S.D.N.Y. 1989) (dismissing commercial bribery as predicate act under civil RICO).

In fact, here the Amended Complaints does not even claim that a bribe was made and not turned over to PissedConsumer, which would itself be legally insufficient to withstand dismissal. It states only that “Upon information and belief, the acts of the [unspecified] employee, agent or fiduciary of PissedConsumer have caused harm to PissedConsumer in an amount exceeding two hundred and fifty (\$250) dollars.” (Amended Complaint ¶ 111.) This is nothing but a conclusion meant to track the words of the statute. But in substance, plaintiff simply has not stated a claim under New York Penal Law for commercial bribery.

This dead-end in plaintiff’s narrative is not only fatal to its “consent” claim as to commercial bribery, it also deals a fatal blow to its RICO claim, for “to prevail in a RICO action under Section 1962(c), the plaintiff must show that each defendant conducted or participated directly or indirectly in the conduct of a RICO enterprise by committing at least two acts of racketeering in furtherance of the illegal enterprise. 18 U.S.C. § 1961(5).” *Andrea Doreen Ltd. v. Bldg. Material Local Union 282*, 299 F. Supp. 2d 129, 152 (E.D.N.Y. 2004). Plaintiff’s vague allegations as to what act was committed by what defendant does not remotely meet this standard.

Plaintiff also attempts to describe the publication of criticism or even inaccurate information about VO Group as a violation of the Hobbs Act. But as the Second Circuit noted in *Town of W. Hartford, supra*, 915 F.2d at 92, even publication of information such as “assertedly false accusations of police brutality” is not properly described as the “wrongful use of actual or

threatened force, violence or fear” within the meaning of section 1951(b).” *Id.* at 102. The court went on to state, “We also note the first amendment implications of any ruling that, for example, the publication of a paid advertisement alleging police brutality violates a federal statute which defines a felony punishable by twenty years imprisonment and a fine of \$10,000.” (*Id.*; citations omitted.) It is simply not the “wrongful use of actual or threatened force, violence or fear” to “threaten” to do something – maintain a website featuring consumer reviews – that is protected not only by the First Amendment but explicitly by federal legislation, i.e., Section 230 of the CDA.

The narrative in the Amended Complaint does not amount to extortion; it is not RICO; it is not even, as demonstrated above, a decent story. The RICO claim should be dismissed.

III. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR TRADEMARK INFRINGEMENT

A. Plaintiff Has Failed To Plead Facts That Amount To A Plausible Claim Of A Likelihood Of Confusion

1. Defendants’ Use Of The Alleged Trademarks Was Obviously Critical Of VO Group And Is Not Likely To Cause A Mistake As To Origin, Sponsorship Or Affiliation

Even granting, for purposes of meeting the low threshold of pleading a claim, the existence of protectable trademark rights as claimed in the Amended Complaint, plaintiff’s various trademark-based claims cannot succeed on the merits. Even under the facts as pled plaintiff cannot, as a matter of law, show that the defendants’ use of the alleged trademarks in connection with the web pages criticizing the products with which they are associated is likely to cause confusion, mistake, or deception. Additionally, as discussed *infra*, only is such use not infringing, it is expressive activity protected by the First Amendment, and plaintiff’s claim for trademark infringement should be dismissed.

To prevail on a trademark claim based on an unregistered trademark, a plaintiff “must demonstrate that its unregistered ... trade name is distinctive and that numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question.” *Sunward Electronics, Inc. v. McDonald*, 362 F.3d 17, 25 (2d Cir.2004). Because as a matter of law plaintiff cannot establish a likelihood of confusion or any misleading effect on consumers in this action, defendants are entitled to an order dismissing their complaint.

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). Under 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, the use of the alleged trademarks of VO Group on PissedConsumer.com could not plausibly lead even the dimmest Internet user to believe that the commentary on the website – so offensive to plaintiff that it brought this lawsuit – was approved by VO Group. Nor could the offerings of companies supposedly competing with VO Group possibly be construed as being “affiliated, connected, sponsored, associated, or approved” by plaintiff – otherwise they would not be competitors.

As the Southern District noted in *Bihari v. Gross*, 199 F.Supp.2d 309 (S.D.N.Y. 2000), where, as here, it may be inferred that the goal of a “junior user’s” alleged adoption of a trademark is to injure the “senior user,” the likelihood of confusion is **minimal**, because the public is trusted to have common sense. “Because the purpose of the [defendants’] websites is to injure [plaintiff] commercially, no reasonable viewer would believe that the disparaging comments regarding [plaintiff’s] business ethics – comments which appear on the first page of the websites – are

endorsed by [plaintiff].”) *Bihari*, 119 F.Supp.2d at 319. In fact, the courts routinely define “sophistication” in much less “sophisticated” terms than plaintiffs such as VO Group would suggest, for here a simple grasp of the obvious is all that is required to negate any confusion. For example, in *Girls Scouts v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228, 1231 (S.D.N.Y. 1969), the court ruled that “rational analysis” precluded confusion about whether the Girl Scouts were the source of a poster depicting a pregnant girl in the well-known uniform of the Girl Scouts appearing with the caveat “BE PREPARED.” Similarly, in *Stop the Olympic Prison v. United States Olympic Committee*, 489 F. Supp. 1112, 1123 (S.D.N.Y.1980), a poster reading “Stop the Olympic Prison” was held not to infringe the trademark of the United States Olympic Committee.

The court reasoned as follows:

On the basis of its own examination of the poster, the Court finds it extremely unlikely that anyone would presume it to have been produced, sponsored or in any way authorized by the U.S.O.C. While at a fleeting glance, someone might conceivably mistake it for a poster advertising the Olympics, nobody could conceivably retain such a misconception long enough to do any harm: for example, there is no danger that anyone would purchase or display it as such.

Id. Similarly, in *Taylor Bldg. Corp. of Am. v. Benfield*, 507 F. Supp. 2d 832 (S.D. Ohio 2007), the Court rejected a Lanham Act claim arising out of alleged trademark use on a gripe site such as PissedConsumer.com using this language:

Perhaps most significant, the words “Taylor Homes” on Benfield's website are accompanied by the phrase “Badly Fingering Your Dreams” and “Ripoffs,” plainly demonstrating that his is not a website sponsored by Taylor. Simply put, reasonable minds could come to but one conclusion on this issue: that there is no likelihood of confusion between Benfield's use of the word “Taylor” and Taylor's mark.

Id. at 845. As the Sixth Circuit explained in *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003):

[Plaintiff] Taubman concedes that Mishkoff is “free to shout ‘Taubman Sucks!’ from the rooftops....” Brief for Respondent, at 58. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public

expression, no different in scope than a billboard or a pulpit, and Mishkoff has a First Amendment right to express his opinion about Taubman, and as long as his speech is not commercially misleading, the Lanham Act cannot be summoned to prevent it.

Here too no reasonable person could believe that anything about PissedConsumer.com is in any way affiliated with VO Group. In the end, the overall impression given by PissedConsumer.com web page, including its title and the name of the website itself, is so distinct both in style and content that no confusion is plausible. Indeed, the domain name complained of by VO Group itself negates the possibility of likelihood of confusion by virtue of its embedded statement of disapproval (by a “pissed consumer”).

For the foregoing reasons, there exists – as a matter of law – no likelihood of confusion caused by the use of plaintiff’s mark in the instant case, including in the subject domain names, regardless of which of the various legal theories sounding in unfair competition plaintiff relies on.

B. Defendants’ Use Of VO Group’s Alleged Trademarks Is Fair Use

Issues of fair use and a likelihood of confusion analysis are linked inextricably. A recent and factually similar case in this Circuit involving domain names is *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571 (S.D.N.Y. 2009) *aff’d*, 355 F. App’x. 508 (2d Cir. 2009). In *Cintas* a uniform supplier sued a number of labor unions and their employees, bringing claims under RICO, the Lanham Act, and state law. As here, the trademark claimed was used both in the title of the web page and the domain name: Defendants were accused of trademark infringement for their use of plaintiff’s trademark, CINTAS, for a website called “Cintas Exposed” bearing the domain name www.cintasexposed.org. *Id.* at 575. Much as the plaintiff claims here, Cintas claimed that this website “competed unfairly . . . disparaging Cintas and its business practices, products and services, confusing Cintas's customers, diverting customers, sales and profits away from Cintas and portraying Cintas in a bad light to the general consuming public. . . . According to the

Amended Complaint, some of Cintas's customers decline to do any further business with Cintas after viewing the materials on www.cintasexposed.org.” *Id.*

The Southern District dismissed the trademark claim. After setting out the famous “Polaroid factors” used in the Second Circuit since *Polaroid Corp. v. Polarad Elec. Corp.*, 287 F.2d 492, 495 (2d Cir.1961) and finding that at least four of them favored defendants, the court wrote:

Defendants are not using the “CINTAS” mark as a “source identifier”, but rather solely to criticize Cintas's corporate practices. *See United We Stand Am., Inc. v. United We Stand Am. N.Y., Inc.*, 128 F.3d 86, 92-93 (2d Cir. 1997) (noting there is no justification for relief under Section 1114 and 1125(a), when “the defendants ... us[e] plaintiff's mark not in a manner that would create confusion as to the source, but rather as part of a message whose meaning depend[s] on reference to plaintiff's product”). While the materials available on Defendants' websites may disparage Cintas, the likelihood that Cintas's actual or potential customers would be confused about who provides CINTAS goods and services is remote.

Id. at 579.

This analysis is on all fours with the case at bar. Fair use is established where, as here, a trademark is used as “a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party.” 15 U.S.C. § 1115(b)(4). It “permits others to use a protected mark to describe aspects of their own goods.” *Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 270 (2d Cir.1995). Here plaintiff's use of a trademark is, indeed, to use the language of *Bihari*, 119 F. Supp. 2d at 321, “not a bad-faith attempt to trick users into visiting his websites, but rather a means of cataloging those sites,” and hence fair use. Moreover, a finding of fair use raises the bar for a finding of actionable likelihood of confusion. “Since the burden of proving likelihood of confusion rests with the plaintiff, and the fair use defendant has no free-standing need to show confusion unlikely, it follows . . . that some possibility of consumer confusion must be compatible with fair use, and so it is.” *KP Permanent Make-Up, Inc. v. Lasting*

Impression I, Inc., 543 U.S. 111,121-22 (2004). Plaintiff cannot meet that heightened standard under any plausible factual scenario.

C. The “Initial Interest Confusion” Doctrine Is At Best Inapplicable Here

The “initial interest confusion” doctrine is a dubious concept under which the Lanham Act supposedly “forbids a competitor from luring potential customers away from a producer by initially passing off its goods as those of the producer’s, even if confusion as to the source of the goods is dispelled by the time any sales are consummated.” *Lamparello v. Falwell*, 420 F.3d 309, 315-16 (4th Cir. 2005) (internal quotations omitted). It replaces traditional tort concepts of harm, or even likelihood of harm, with a highly subjective, almost *per se* test for use on the Internet. The doctrine was famously rationalized in the Ninth Circuit’s opinion in *Brookfield Communic., Inc. v. West Coast Entmt. Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999) utilizing the analogy of a misleading highway sign that imposes harm by causing consumers to “get off at the wrong exit.” *Id.* But the doctrine of “initial interest” has been the subject of considerable criticism in general. Both the First and Fourth Circuits have expressed considerable skepticism about whether the doctrine of initial interest confusion is valid at all. *See Lamparello*, 420 F.3d at 317; *Hasbro, Inc. v. Clue Computing*, 232 F.3d 1, 2 (1st Cir. 2000). Developed in a traditional sales context, it was meant to be applied only where “a potential purchaser is initially confused [such that] the [senior seller] may be **precluded from further consideration.**” *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546 (Fed. Cir. 1990) (emphasis added). In other words, it only matters once the user is “off the highway.” For this reason, the application of this analogy to the virtual as opposed to a real world was questioned in *Bihari*, where the court wrote:

The harm caused by a misleading billboard on the highway is difficult to correct. In contrast, on the information superhighway, resuming one’s search for the correct website is relatively simple. With one click of the mouse and few seconds delay, a viewer can return to the search engine’s results and resume searching for the original website.

Bihari, 199 F.Supp.2d at 320, n. 15. This is consistent with longstanding principles of trademark law. In *Girl Scouts*, for example, the Southern District of New York rejected transient confusion as proof of trademark harm in a social-commentary context:

Even if we hypothesize that some viewers might at first believe that the subject of the poster is actually a pregnant Girl Scout, it is highly doubtful that any such impression would be more than momentary or that any viewer would conclude that the Girl Scouts had printed or distributed the poster.

304 F. Supp. at 1231. As the Southern District recognized in *Girl Scouts*, ephemeral moments of confusion that do not threaten to divert sales are not evidence of actionable harm under the Lanham Act. Real harm must be shown to recover for any tortious conduct, but all the more so when such harm is posited as a basis for overcoming the constitutional protection of free speech:

No evidence is found anywhere in the record before the court that the poster has to date damaged the plaintiff in any way. No facts are presented to show that contributions to the organization have fallen off, that members have resigned, that recruits have failed to join, that sales . . . have decreased, or that voluntary workers have dissociated themselves or declined to support the honorable work of the organization.

Id. at 1235. Similarly, there is no actual allegation of anything happening to VO Group that could be objectively described as harm attributable to these defendants, merely a conclusory claim that plaintiff has been “damaged.”

Whatever force initial interest confusion has is far less where, as here, customers, in this case of apparently sophisticated financial services, are likely to exercise care in making their final purchasing decisions. See *Nissan Motor v. Nissan Computer*, 378 F.3d 1002, 1019 (9th Cir, 2004); see also, *Hearts on Fire Co. v. Blue Nile*, 603 F. Supp. 2d 274, 287 (D. Mass. 2009) (“initial interest confusion can support a claim under the Lanham Act – but only where the plaintiff has plausibly alleged that consumers were confused, and not simply diverted.”). Because, as *Bihari* taught, trademarks embedded in criticism are unlikely to be confused as competitive, there can be

no application of initial interest here and no basis for a finding of likelihood of success on the merits. “Applying the initial interest confusion theory to gripe sites . . . would enable the markholder to insulate himself from criticism—or at least to minimize access to it. We have already condemned such uses of the Lanham Act, stating that a markholder cannot shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct.” *Lamparello, supra*, 420 F.3d at 317-18 (internal quotes and citation omitted.)

Moreover, VO Group’s desire to utilize the Lanham Act, via “initial interest,” as a tool of censorship is incompatible with the First Amendment. As the *Lamparello* court wrote:

Applying the initial interest confusion theory to gripe sites like [defendants’] would enable the markholder to insulate himself from criticism — or at least to minimize access to it. We have already condemned such uses of the Lanham Act, stating that a markholder cannot shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct. Just because speech is critical of a corporation and its business practices is not a sufficient reason to enjoin the speech.

Lamparello, 420 F.3d at 317-18 (internal quotations and cites omitted). Courts in this Circuit have agreed. Thus in *CINTAS*, the Southern District held as follows:

[B]ecause consumers diverted on the Internet can more readily get back on track than those in actual space, thus minimizing the harm to the owner of the searched-for site from consumers becoming trapped in a competing site, Internet initial interest confusion requires a showing of intentional deception. Here, the allegations do not create any plausible inference of intentional deception. First, no consumer looking for a uniform company’s website would mistakenly visit “cintasexposed.org” or any of the affiliated websites. Second, the website, all of its content, and its prominent disclaimer show that the Defendants were transparent in their disdain for Cintas. The likelihood of confusion among consumers visiting their websites is implausible.

Cintas Corp., 601 F. Supp. 2d at 579-80 (internal quotations omitted), quoting *Savin Corp. v. The Savin Group*, 391 F.3d 439, 462 n. 13 (2d Cir. 2004). Because there can be neither “initial interest confusion” nor any subsequent confusion between plaintiff’s alleged marks and

defendants' services which are limited to publishing reviews, plaintiff has failed to state a claim for trademark infringement on this ground as well.

1. Plaintiff Has Failed Adequately To Plead A Claim For Secondary Trademark Liability

Plaintiff basis its claims both on the subdomains utilized by defendants and content, including advertisements and consumer reviews, found on the PissedConsumer.com website in juxtaposition with the alleged trademarks. Thus their trademark claims are based, though without adequate pleading, on the imposition of secondary liability for trademark infringement by third parties not named in this action. VO Group does not, however, suggest (nor is there any basis for doing so) that the consumer reviews on defendants' site or the allegedly competing third-party websites to which consumers are "diverted" are controlled by defendants. As demonstrated below, even assuming that VO Group had a cognizable trademark eligible for protection here, its claim for secondary trademark infringement liability would fail as a matter of law.

Claims for direct and contributory trademark infringement are legally and factual distinct. *See Steinway, Inc. v. Ashley*, 01 CIV 9703 GEL, 2002 WL 122929 (S.D.N.Y. Jan. 29, 2002) *citing Inwood Labs., Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 853-54 (1982); *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 64 (2d Cir. 1992). Contributory trademark infringement requires the satisfaction of separate elements in determining liability, namely, that "a defendant either **intentionally induces** a third party to infringe the plaintiff's mark or supplies a product to a third party with actual or constructive knowledge that the product is being used to infringe that mark." *Id.* (emphasis added). To find contributory infringement on an Internet website, a plaintiff must prove both that the defendant directly controlled and monitored the activities of the infringing website, and that the defendant had actual or constructive knowledge of the infringement. *Fare Deals, Ltd. v. World Choice Travel.com, Inc.*, 180 F.Supp.2d 678 (D. Md. 2001). *See, Coleman,*

Jane, *Secondary Trademark Infringement*, <http://www.secondarytrademarkinfringement.com/?p=91> (last visited October 10, 2011).

In fact, there can be no secondary liability for trademark infringement without at least an allegation of direct trademark infringement by someone. *See Sony Computer Entertainment America, Inc. v. GameMasters*, 87 F.Supp.2d 976, 986 (N.D. Cal. 1999) (motion for a preliminary injunction based on contributory infringement denied where plaintiff brought “scant evidence and allegations” of direct trademark infringement); *Lockheed Martin Corp. v. Network Solutions, Inc.* 985 F.Supp.949, 964-965 (C.D. Cal. 1997) (“Contributory infringement doctrine has always treated uncertainty of infringement as relevant to the question of an alleged contributory infringer’s knowledge[.]”), *aff’d*, 194 F.3d 980 (9th Cir. 1999). Given that VO Group has alleged no set of facts in its complaint sounding in contributory trademark infringement, including any allegation of trademark infringement by the parties posting reviews or operating the third-party websites to which consumers are allegedly “diverted” via the PissedConsumer.com website, this alone merits dismissal of its claims sounding in “diversion” or based on consumer reviews “associated” with the alleged trademarks.

Moreover, the law is that website owners are not liable for merely providing a platform for alleged trademark infringements arising from links to third-party websites. Rather, in a claim for contributory negligence, the focus is always on whether the defendant has direct control and monitoring of the instrumentality used by the third party that is allegedly infringing the plaintiff’s mark:

[M]ere association with an allegedly infringing website, without more, has been found to be insufficient to impose contributory liability on a non-infringing third party. There must be evidence that the [defendant] controlled and monitored the contents of the website to justify an extension of the contributory liability doctrine beyond the manufacturer-distributor context set forth in *Inwood*. *See SB Designs v. Reebok Int’l., Ltd.*, 338 F.Supp.2d 904 at 913 (N.D. Ill. 2004), *citing Lockheed*

Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999), for the suggestion that contributory liability theory could be applied to the Internet if there were evidence of monitoring and control. . . .

[In *Reebok*] . . . at issue was whether the court should extend the *Inwood Laboratories* standard beyond the manufacturer-distributor context as the Seventh Circuit had done in *Hard Rock Café*, 955 F.2d 1143 (7th Cir. 1992).

The court refused to do so, noting that the Seventh Circuit’s expansion of the “product” requirement for contributory infringement was much more limited than the plaintiffs would have it. Specifically, the court rejected the plaintiff’s argument that “a non-infringing supplier is contributorily liable if the product it supplies is associated in some way with an infringing product that the supplier did not supply.” *Id.* It also rejected their assertion that “the sponsors of an event who supply products for the event, without more, are contributorily liable for infringement committed by the event’s promoters or organizers.” *Id.*

Furthermore, the court noted that the Seventh Circuit’s expansion of contributory liability “was premised on a defendant’s direct control and monitoring of the instrumentality used by a third party to infringe the plaintiff’s mark.” *Id.*, citing *Hard Rock Café*, 955 F.2d at 1149 and *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999). Reebok, however, maintained that it exercised no control over Crossover Promotions’ conduct or materials, which the plaintiffs could not disprove. The court therefore granted summary judgment. *SB Designs, supra* at 913.

Coleman, Jane, *supra*; see, *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93, 104 (2d Cir. 2010). Here plaintiff has not alleged that the content of the ads or reviews on the Pissed Consumer website are controlled or even materially affected by any action by defendants. It only suggests, by inference, that some reviews which perhaps do not appear may have been affected by them. (Amended Complaint ¶¶ 34-37.) Even if they had, this would not amount to trademark infringement in connection with the reviews that do use the mark. The law still does not impose contributory liability on a defendant for actions by third parties even when a defendant has had some effect on the process that results in infringement, including merely publishing them – notwithstanding plaintiff’s ponderous allegations regarding “improper” and “black hat” (but not unlawful) techniques for search engine optimization. (Amended Complaint ¶¶ 45-47.) “[T]he mere

existence of a tool that assists advertisers in optimizing their advertisements does not, in itself, indicate intent to induce infringement.” *Rosetta Stone Ltd. v. Google, Inc.*, 730 F.Supp.2d 531, 547-48 (E.D. Va. 2010).

Plaintiff here does not, nor could it, claim trademark infringement by the third party authors of critical reviews, nor by the third-party websites to which consumers are allegedly “diverted” by the advertisements on the PissedConsumer.com website. Absent even a *prima facie* trademark infringement claim against such third parties, no claim for contributory liability against defendants can lie here. Neither can VO Group proceed on a theory of vicarious infringement absent allegations of an agency relationship or a similar level of control by defendants. “Absent an agency relationship, vicarious liability can only be imposed if the defendant and infringer ‘exercise joint ownership or control over the infringing product.’” *Id.* at 549 (E.D. Va. 2010), citing *Perfect 10, Inc. v. Visa Int’l Serv. Assoc.*, 494 F.3d 788, 807 (9th Cir.2007). No such claim is found in the complaint, and for this reason, too, the complaint fails as a matter of law to state a claim for which relief can be granted.

IV. PLAINTIFF’S CAUSES OF ACTION FOR TORTIOUS INTERFERENCE UNDER STATE LAW SHOULD BE DISMISSED

Plaintiff has taken the “kitchen sink” approach to its pleading, evidently hoping that what it lacks in merit it can “make up in volume.” Thus, it has “thrown in” a claim for tortious interference with economic advantage along with its other causes of action, despite the clear prohibition of such claims by Section 230. They are in fact barred as a statutory matter and must be dismissed. *See Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 453 (E.D.N.Y. 2004)

V. **PLAINTIFF CANNOT MEET THE HIGH STANDARDS NECESSARY TO JUSTIFY THE GRANTING OF AN INJUNCTION TO RESTRAIN FREE SPEECH ON DEFENDANTS' WEBSITE**

Plaintiff seeks permanent injunctive relief under the Lanham Act and under state law enjoining defendants from essentially doing anything on the PissedConsumer.com website that VO Group finds objectionable: to restrain the rights of third parties who post their complaints about VO Group on PissedConsumer.com based on specious trademark, tort and “RICO conspiracy” theories. The law is clear that no such relief should issue from this or any Court that answers to the United States Constitution or the Constitution of the State of New York.

It is well established that “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion,” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), and that a preliminary injunction “is one of the most drastic tools in the arsenal of judicial remedies and should not be routinely granted.” *Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp.2d 415, 428 (S.D.N.Y. 2004) (internal quotes omitted). Though it is demanded in the complaint, no application for a preliminary injunction is pending. Yet **all** injunctions implicating protected speech, such as the requested order muting criticisms of VO Group’s services on PissedConsumer.com by “merely” forbidding defendants from using the alleged marks, are frowned upon by the law. Nearly forty years ago, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Supreme Court struck down as unconstitutional a state court’s order enjoining the distribution of leaflets critical of respondent’s business practices. The Court emphasized:

It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. . . . No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.

Id. at 418-19 (internal citations omitted). It may at this point be described as an ironclad federal constitutional law principle that prior restraints on speech are presumptively invalid, even when the potential harm at issue was much greater than the sort of vague injury to reputation suggested here. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (rejecting prior restraint issued to ensure protection of criminal defendants' Sixth Amendment right to a fair trial); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (even during wartime, newspapers not enjoined from publishing papers that government feared could threaten national security); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1124-25 (S.D.N.Y.1980) ("A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech. To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, and to historic principles of equity"). As to the New York State Constitution, the New York Court of Appeals has stated that the state constitution's free speech clause "contains language that is more expansive than its Federal counterpart and we have at times interpreted it in a manner that is more protective of free expression than the First Amendment to the Federal Constitution." *Children of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713 (1991), *rev'd on other grounds*, 79 N.Y.2d 972, (1992); see also *A.B.C. Home Furnishings, Inc. v. Town of E. Hampton*, 947 F.Supp. 635, 643 (E.D.N.Y.1996) ("New York courts have noted that the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.")

Ultimately, notwithstanding plaintiff's elaborate pleading, it is essentially seeking the same kind of prior restraint refused by courts in the foregoing cases, and too many others like them to count. There is at least one big difference, however. While the restraint sought by the government, for example, in the Pentagon Papers case required the Court to weigh life-and-death

national security claims against free speech concerns, here plaintiff is asking the Court to get one website to stop publishing complaints concerning a financial services company. This is a consideration that dwarfs those that were found insufficient, though weighty, in the earlier cases. This Court could end its inquiry on that basis alone and dismiss the entire complaint – which is nothing but a request for judicial censorship dressed up in nine different ways – on constitutional grounds alone.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court dismiss plaintiff's complaint in the entirety and with prejudice.

Dated: New York, New York
November 17, 2011

GOETZ FITZPATRICK LLP

By: 
Ronald D. Coleman

Joel G. MacMull
One Penn Plaza—Suite 4401
New York, NY 10119
(212) 695-8100

*Attorneys for Defendants
Opinion Corp., Michael Podolsky & Alex Syrov*