**SHEPPARD, MULLIN, RICHTER & HAMPTON LLP**
CHARLES A. LeGRAND, New Jersey Bar No. 049121997
clegrand@sheppardmullin.com
KEVIN E. GOERING, New York Bar No. 1812478
kgoering@sheppardmullin.com
JAMES M. CHADWICK, California Bar No. 157114
jchadwick@sheppardmullin.com
30 Rockefeller Plaza, Suite 2400
New York, NY 10112
Telephone: 212-332-3800
Facsimile: 212-332-3888

Attorneys for Defendant
WIKIMEDIA FOUNDATION, INC.

| | |
|---|---|
| BARBARA BAUER and BARBARA BAUER LITERARY AGENCY, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>JENNA GLATZER, et al.,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: MONMOUTH COUNTY<br>DOCKET NO.: L-1169-07<br><br>CIVIL ACTION<br><br>**REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANT WIKIMEDIA FOUNDATION, INC. TO DISMISS THE COMPLAINT** |

## I. INTRODUCTION.

The Wikimedia Foundation, Inc. ("Wikimedia") provides a website known as Wikipedia, on which users create articles about every conceivable subject. One of those articles was about the plaintiffs, Barbara Bauer and Barbara Bauer Literary Agency, Inc. ("Plaintiffs"). Plaintiffs sued Wikimedia for defamation and interference with prospective economic advantage.

This lawsuit is precisely the kind of claim that Section 230 of the Communications Decency Act (47 U.S.C § 230, hereafter "Section 230") was enacted to prevent. Plaintiffs admit that Section 230 "prohibits the imposition of liability" on a website operator such as Wikimedia for publishing content provided by another. (Brief in Opposition to Motion to Dismiss, hereafter "Opposition," p. 3.)

Plaintiffs attempt to avoid the plain application of Section 230 to their claims against Wikimedia by relying on documents not contained in or referred to by their complaint. (Opposition, pp. 2-3.) Their reliance on the documents they refer to as "evidence" is misplaced. Those documents are both inadmissible and irrelevant. They are inadmissible because they are not authenticated. They are irrelevant because the motion to dismiss must be granted unless the allegations of the complaint itself are sufficient, without reference to Plaintiffs' extrinsic "evidence." The complaint itself fails to state a claim. Moreover, even if Plaintiffs' documents were to be considered, they fail to establish that anyone employed by or working at the direction of Wikimedia created the statements contained in the June 30, 2006, version of the Article upon which Plaintiffs base their claims ("the Article").[1]

In short, Wikimedia is not the author of any statements in the Article. However, even if it were the statements at issue are protected as fair comment and indeed are not actionable statements of fact at all. Indeed, the statements on which Plaintiffs base their claims are not actually contained in the Article. In addition, their own complaint demonstrates that the integrity and viability of their services are a topic of widespread public interest and concern, and Plaintiffs have failed even to allege the knowledge of falsity or reckless disregard of the truth necessary to support their claims.

Plaintiffs have failed to state viable claims against Wikimedia. Their effort to prop up their lawsuit by misrepresenting the meaning of documents not even referred to in their complaint merely serves to underscore that they have no viable claims. Therefore, the claims against Wikimedia should be dismissed.

## II. PLAINTIFFS' CLAIMS ARE BARRED BY THE COMMUNICATIONS DECENCY ACT.

### A. Plaintiffs Cannot Avoid Dismissal by Relying on Inadmissible and Improper Extrinsic Evidence.

In ruling on a motion to dismiss, the court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. *Rieder v. Department of*

---

[1] Plaintiffs concede that the version of the Article that appeared on the Wikipedia website on June 30, 2006, is the one on which their claims are based. (*See* Opposition, pp. 2-3.)

*Transportation*, 535 A.2d 512, 514, 221 N.J. Super. 547, 552, (App. Div. 1987).[2] If the factual allegations are insufficient to support a claim upon which relief can be granted, the court must dismiss the complaint. *Id.* "While the court has the power to enlarge the scope of said motion and treat the same as 'one for summary judgment,' this may be done only if on said motion 'matters outside the pleading are presented.' However, such matters must be presented by depositions, admissions or affidavits. They cannot be raised, without verification, in oral arguments of counsel or in briefs filed with the court." *P.J. Auto Body v. Miller*, 178 A.2d 237, 239, 72 N.J. Super. 207, 211 (App. Div. 1962).

Ignoring these rules, Plaintiffs seek to avoid the dismissal of their claims by relying on extrinsic documents. Plaintiffs admit that "[t]here is no question that Section 230 of the Communications Decency Act . . . prohibits the imposition of liability on any user or provider of an interactive computer service, such as Wikipedia, for publishing content provided by another." (Opposition, p. 3.) The only basis for Plaintiffs' argument that Section 230 does not bar their claims is the incorrect assertion that "the evidence is clear that allegedly defamatory content in the Wikipedia article dated June 30, 2006, was not provided 'by another,' but rather by Wikimedia itself . . . ." (Opposition, p. 3.) That contention is based on the "evidence" of two documents attached to the Opposition. (Opposition, pp. 2-3.)

The documents attached to the Opposition are irrelevant, because Plaintiffs may not rely on extrinsic evidence to expand the allegations on which they base their claims beyond those contained in the Complaint. *See, e.g., Carlini v. Curtiss-Wright Corp.*, 176 A.2d 266, 269-270, 71 N.J.Super 101, 107-109 (1961) (plaintiff may not use extrinsic evidence that goes beyond the allegations of the complaint in order to avoid summary judgment). Therefore, Plaintiffs' documents, and the argument that they putatively support—*i.e.,* that the Article was created by Wikimedia—must be disregarded.

Furthermore, even if they could be considered in a motion to dismiss, the documents are inadmissible. New Jersey Rule of Court 1.6-6 instructs that (emphasis added):

---

[2] In addressing a motion to dismiss, courts may consider documents referred to in the complaint but not attached to the complaint. *New Jersey Citizen Action, Inc. v. County of Bergen*, 919 A.2d 170, 176, 391 N.J. Super. 596, 605 (2007). The Wikipedia article regarding Plaintiffs, upon which their claims are based (the "Article"), is referred to in the complaint. (Complaint, pp. 25, 26.) The documents relied upon by Plaintiffs are not.

> If a motion is based on facts not appearing of record, or not judicially noticeable, the court may hear it ***on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein***. The court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions.

Courts may not rely on documents that are not authenticated by a certification that complies with all requirements of the rule. *See, e.g.*, *P.J. Auto Body v. Miller*, 178 A.2d at 239, 72 N.J. Super. at 211; *Sellers v. Schonfeld*, 637 A.2d 529, 530-531, 270 N.J. Super. 424, 427 (App. Div. 1993); *Celino v. General Accident Ins.*, 512 A.2d 496, 500, 211 N.J. Super. 538, 544 (App. Div. 1986). Consequently, the documents upon which Plaintiffs rely are inadmissible, and cannot provide a basis for denying the motion to dismiss.[3]

### B. Even If It Could Be Considered, the Extrinsic Evidence on which Plaintiffs Rely Does Not Support the Claim that Wikimedia Created the Article.

Plaintiffs' assertion that the Article was "provided . . . by Wikimedia itself" is premised on the assertion that the Article was "created by a Wikimedia administrator known as 'Avraham.'" (Opposition, pp. 2-3.) The documents on which Plaintiffs rely do not support that premise, and even if that premise were true it would not support the conclusion that Wikimedia was "the content provider." (Opposition, p. 3).

Plaintiffs' "Exhibit B" purports to be a be a "Revision history." (Opposition, Ex. B.) Plaintiffs apparently offer this document to show something about the origin of or revisions to the Article. However, Exhibit B itself not only fails to support but actually refutes the assertion that the Article was created by "Avraham." The "Revision history" indicates that the Article existed for some time before it was apparently revised by "Avraham." (Opposition, Ex. B.). It does not demonstrate that "Avraham" was responsible for creating or adding any statement upon which Plaintiffs' claims are based. (Opposition, Ex. B.) Plaintiffs concede this point. (*See* Opposition at p.2, 3 (the statements at issue were first published on Wikipedia in May, 2006,

---

[3] Furthermore, the documents on which Plaintiffs rely constitute hearsay. N.J. Rule of Court 801(c). Plaintiffs identify no applicable exception to the hearsay rule, and there is none. Therefore, the documents are inadmissible for this reason as well. N.J.R.E. 802; *Feldman v. Lederle Laboratories*, 625 A.2d 1066, 1073, 132 N.J. 339, 354 (1993) (all hearsay is inadmissible unless it falls within recognized exception under evidence rules).

before edits allegedly made by "Avraham" on June 30, 2006).) Thus, not only does this document fail to support the claim that "Avraham" created the Article, it actually indicates that he did not.

Plaintiffs also point to "Avraham's" appearance on a "partial list of Wikimedia administrators" (*see* Exhibit A to the Opposition) to support their contention that Wikimedia itself created the statements in question. (Opposition, p. 2.) However, Plaintiffs offer no evidence whatsoever that "administrators" such as those listed in Exhibit A are employees or agents of the Wikimedia Foundation, as opposed—for example—to simply a class of users of the Wikipedia website. Nor does Exhibit A show that "Avraham" was an "administrator" at the time the statements were made or when the Article was edited.

Finally, the Article itself refutes the claim that the allegedly defamatory statements upon which Plaintiffs' claims are based originated with Wikimedia. Plaintiffs concede that the version of the Article that appeared on the Wikipedia website in June, 2006 is the one on which their claims are based. (Opposition, pp. 2-3.) However, as discussed in greater detail below, the Article does not contain the allegedly actionable statements on which Plaintiffs' complaint is based. Moreover, the statements that were contained in the Article were expressly quoted from and attributed to Writer Beware. Indeed, Plaintiff's Complaint expressly asserts that these statements were made on the Writer Beware website by Defendants Crispin, Strauss, and Science Fiction Writers of America (referred to as SWFA). (Complaint, pp. 11, 13, 14-15.) In short, the Article and the Complaint, read together, establish that any statements in the Article upon which Plaintiffs' claims might be based originated with another content provider.

The statements upon which Plaintiffs' claims are based simply did not originate with Wikimedia, and there is no valid allegation or evidence that they did. Rather, they originated with another content provider. Therefore, Section 230 prohibits the imposition of liability on Wikimedia for those statements.

### C. Plaintiffs Claims Are Based on Statements that Did Not Originate with Wikimedia, so Their Claims Are Barred by Section 230.

Plaintiffs do not dispute—and in fact expressly concede—that Section 230 prohibits the imposition of liability under state law on any user or provider of an "interactive computer service" for publishing content provided by another, and that Wikimedia falls squarely within the protection of this statute. (Opposition, p. 3.) Because, as explained above, there is no basis for

Plaintiffs' contention that the statements on which their claims are based originated with Wikimedia, Plaintiffs' complaint fails to state any cause of action against Wikimedia and should be dismissed. *See, e.g., Donato v. Moldow*, 865 A.2d 711, 374 N.J. Super. 475 (2005) (dismissing complaint where claims were barred by Section 230).

The documents relied upon by Plaintiffs for the assertion that Wikimedia was responsible for the statements alleged in their Complaint are irrelevant and inadmissible. Even if they could be considered as somehow expanding the allegations of the Complaint, however, they would—at most—merely indicate that someone involved in some unspecified manner in 'administering' the Wikipedia website revised or edited the Article. Even if this were true, it would not vitiate the immunity provided by Section 230. "The exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message." *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). *See also Zeran v. America Online*, 129 F.3d 327, 330-31 (4th Cir. 1997) ("[L]awsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.").

Plaintiffs' claims against Wikimedia are barred by Section 230. Even if the inadmissible documents and unsupported inferences upon which Plaintiffs now rely could be considered, they would not alter that conclusion. Therefore, the claims against Wikimedia should be dismissed.

## III. PLAINTIFFS' CLAIMS ARE BARRED BECAUSE THEY FAIL TO ASSERT THAT ACTIONABLE STATEMENTS WERE MADE BY WIKIMEDIA WITH THE KNOWLEDGE THAT THEY WERE FALSE.

### A. The Statements that Wikimedia Allegedly Posted on Its Website Are Not Actionable Because They Did Not Appear in the Article Upon Which Plaintiffs' Claims Are Based.

Plaintiffs argue that the statements posted on Wikimedia's website are capable of defamatory meaning. In order to state a cause of action for defamation, the plaintiff must identify the actual defamatory words upon which its claims are based. *Zoneraich v. Overlook Hosp.*, 514 A.2d 53, 62-63, 212 N.J. Super. 83, 101 (App. Div. 1986); *Darakjian v. Hanna*, 840 A.2d 959, 966, 366 N.J. Super. 238, 249 (App. Div. 2004). Plaintiffs premise their claims against Wikimedia exclusively on two alleged statements: first, that Plaintiff "has no

documented sales at all," and, second that Plaintiff is "the Dumbest of the Twenty Worst literary agents." (Complaint, p. 25; Opposition, p. 5). However, neither of these statements appear in the June 30, 2006, Article upon which Plaintiffs base their claims. (Godwin Decl., Ex. 1.) For this reason, Plaintiffs' claims should be dismissed.

Contrary to Plaintiffs' arguments in the Opposition, the Article contained no derogatory statements about Plaintiff Barbara Bauer's intelligence. In fact, the Article did not contain any evaluative statements about Plaintiff's intelligence at all. (Godwin Decl., Ex. 1). To the contrary, the Article documented Plaintiff's educational background, stating that she has both a masters and doctorate degree from St. John's University. (Godwin Decl., Ex. 1). Thus, Plaintiffs' claim that the Article somehow implies that she lacks intelligence, and is therefore capable of defamatory meaning, is completely unavailing.

Similarly, Plaintiffs' argument that their claims are supported by the statement that Plaintiff "had no documented sales at all" fails because this statement does not appear anywhere within the Article. Instead, the Article actually contains the following statement: "[n]one of these agencies has a significant track record of sales to commercial (advance-paying) publishers, and most have virtually no documented and verified sales at all (book placements claimed by some of these agencies turn out to be 'sales' to vanity publishers)." (Godwin Decl., Ex. 1.) The Article continues, "there is some evidence (mostly self-reported) that [Plaintiff] made a few legitimate book sales for her clients early in her career." (Godwin Decl., Ex. 1.)

Thus, the statement that actually appeared in the Article did not include the unqualified assertion of an absence of any sales that is the basis for Plaintiffs' claims. In any case, it does not refer directly to Plaintiffs: "*most* have virtually no documented and verified sales at all" (emphasis added). Even if it did, however, Plaintiffs' Complaint does not allege the falsity of the statement actually made in the Article. Therefore, the statement is not actionable. *See, e.g., Fainsbert v. Cuthbert*, 2006 WL 2096057, at p. * 7 (D. N.J. 2006).

In sum, Plaintiffs admit that the June 30, 2006 version of the Article is in fact the publication from which their claims arise, but the statements that Plaintiffs specifically pled as the basis for their claims did not actually appear in the Article. For this reason alone, Plaintiffs' claims must be dismissed.

### B. The Alleged Statements Contained in the Article Constitute Protected Opinion.

Even assuming that the statements that Plaintiffs allege appeared on Wikimedia's website were in fact made, Plaintiffs fail to show that these statements are not protected opinion.

It is the province of the Court to determine whether an allegedly defamatory statement is one of fact or opinion. *See, e.g, Sokolay v. Edlin,* 65 N.J.Super. 112, 122, 167 A.2d 211, 216 (App. Div. 1961). Opinion statements are generally not actionable because they reflect the speaker's state of mind and are not capable of proof of truth of falsity. *Ward v. Zelikovsky*, 643 A.2d 972, 979, 136 N.J. 516, 531 (1994). Plaintiffs assert that the statement that Plaintiff, "is the Dumbest of the Worst" implies underlying objective facts that are false—namely that Plaintiff is less intelligent than other literary agents. (Opposition, p. 6) However, contrary to Plaintiffs' conclusory assertion, the statement regarding Plaintiffs' skill and intelligence cannot reasonably be interpreted as anything other than the speaker's opinion regarding the Plaintiff's competency. The words "dumbest" and "worst" present no verifiable and objective measure of truth, and Plaintiffs provide no explanation of how they could. Rather, these words reflect the speaker's state of mind and subjective assessment of Plaintiffs. Statements such as these, asserting the inadequacy of person's competency, are not verifiable. For this reason, courts have recognized that such statements are not actionable. *Zheng v. Quest Diagnostics, Inc.*, No. 03-3093, 2006 WL 1933423, at *3 (D.N.J. 2006). Accordingly, these statements of opinion cannot serve as a basis for Plaintiffs' claims.

Furthermore, as recognized by the Supreme Court of New Jersey, "[i]f a statement could be construed as either fact or opinion, a defendant should not be held liable." *Lynch v. New Jersey Educ. Assoc.*, 735 A.2d 1129, 1137, 161 N.J. 152, 168 (1999). "An interpretation favoring a finding of 'fact' would tend to 'impose a chilling effect on speech.'" *Id.* (citing *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 232, 104 N.J. 125, 148 (1986)). Thus, Plaintiffs arguments that this statement should be interpreted as fact or as implying objective facts must fail. Plaintiffs admit that the statement that Plaintiff is "the Dumbest of the Twenty Worst Literary Agents" can be interpreted as a pure opinion. Plaintiffs assert that the statement is capable of "two possible interpretations . . .[t]he first . . . is that it [is] mere rhetorical hyperbole." (Opposition, p. 6.) Therefore, according to Plaintiffs' own argument, the statement must be interpreted as a statement of protected opinion.

Similarly, Plaintiffs have failed to demonstrate that the statement regarding documented sales is actionable. As Plaintiffs correctly concede, context can affect the meaning of a statement. (Opposition, p. 6.) Indeed, context may demonstrate that statements or words that are verifiable and capable of defamatory meaning are not reasonably susceptible to a defamatory meaning. *Wilson v. Grant*, 687 A.2d 1009, 1013, 297 N.J. Super. 128, 136-137 (App. Div. 1996) (finding a statement, although potentially verifiable, was not subject to defamatory meaning when measured in the context of the statements it was grouped); *Cipriani Builders, Inc. v. Madden*, 912 A.2d 152, 166-167, 389 N.J. Super. 154, 178-79 (App. Div. 2006) (isolated phrases potentially capable of verification were not defamatory when read in context). Despite this authority, Plaintiffs ask the Court view the statement at issue here in isolation. However, Plaintiffs provide no legitimate argument for doing so, nor does any such argument exist. The law prohibits a court from automatically deciding whether a statement is defamatory solely by reference to the literal words of the challenged statement. *Ward*, 136 N.J. at 532.

Here, the context in which the statements at issue were published shows that they are not reasonably susceptible to a defamatory meaning, and, even assuming they could be read as being defamatory, Plaintiffs have not alleged or argued that they are false. First, the statements at issue appear in the context of Writer Beware's subjective opinion about the Plaintiffs' professional skills and competency. The statements are expressly identified as part of a "controversy," and they are not endorsed by the Article. (Godwin Decl., Ex. 1.) Furthermore, the statement pertaining to the lack of "documented and verified sales" is not even directly linked to Plaintiffs, but instead is a general characterization of "most" of the literary agencies on the list. The Article goes on to expressly state that "there is some evidence (mostly self-reported) that [Plaintiff] made a few legitimate book sales for her clients early in her career." (Godwin Decl., Ex. 1.) Plaintiffs do not dispute these statements anywhere in their Opposition, nor do they assert that these statements are false. When considered in context, the statement regarding Plaintiffs' sales is not actionable, and Plaintiffs fail to show that it is. Therefore, the Court should dismiss the claims against Wikimedia.

### C. The Actual Malice Standard Applies Because Plaintiffs' Business Practices Constitute a Legitimate Matter of Public Concern.

Plaintiffs' equally cursory argument that the actual malice standard does not apply to this case is also unavailing. In support of their argument, Plaintiffs assert only that the services

provided by their literary agency do not involve a matter of public interest such as the safety of drinking water. (Opposition, p. 4.) Plaintiffs provide no authority, and in fact no argument, to support their contention that the actual services provided by Plaintiffs in this case do not constitute a matter of public concern. Contrary to Plaintiffs' bare assertions, discussions regarding the deceptive services provided by their literary agency do present a legitimate matter of public concern.

The very authority upon which Plaintiffs rely holds that the public has legitimate interest in any business involved in potentially fraudulent business practices. *Turf Lawnmower Repair v. Bergen Record Corp.*, 655 A.2d 417, 428, 139 N.J. 392, 413 (1995).[4] "When the media addresses those issues of legitimate and compelling public concern, the actual-malice standard of proof will apply, regardless of the type of business involved." *Id.* No hard and fast rules exist to determine whether alleged consumer fraud raises a matter of pubic concern sufficient to trigger the actual-malice standard. *Id.* at 416. However, this determination is informed by New Jersey's Consumer Fraud Act which prohibits unconscionable, deceptive, and fraudulent business practices. *Id.* at 414. Whether or not a practice is an unconscionable commercial practice is measured by a standard of good faith, honesty in fact, and observances of fair dealing. *Id.*

Here, the statements that appeared on Wikimedia clearly relate to a previously existing and growing public concern over Plaintiffs' business practices. The Article expressly states that all of the statements about Plaintiffs previously appeared on "Writer Beware (part of the Science Fiction and Fantasy Writers of America writers' organization."). (Godwin Decl., Ex. 1.) The Article notes that Writer Beware posted these statements regarding Plaintiffs due to the large amount of consumer complaints it received about Plaintiffs' services. (Godwin Decl., Ex. 1.) The statements within the Article thus reflect the controversy regarding Plaintiffs' good faith, honesty, and fair dealing in providing services to the national literary community. Accordingly,

---

[4] Courts have consistently recognized that improper business practices are a matter of public concern. *Bihari v. Gross*, 119 F. Supp. 2d 309, 325 (S.D.N.Y. 2000) (speech regarding the alleged fraudulent business practices of an interior decorator can constitute a matter of legitimate public concern); *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 46 (2d Cir. 1983) (complaint of fraudulent and corrupt practices at a hospital constitutes speech on matter of public concern).

the statements at issue here appear as a part of a consumer warning regarding Plaintiffs' business services. As such, the statements constitute legitimate matters of public concern.

Furthermore, Plaintiffs' Complaint and Opposition themselves provide proof of the widespread public concern regarding Plaintiffs' deceptive services. Plaintiffs' Complaint alleges that over 21 persons and entities posted warnings regarding Plaintiffs' professional service and qualifications. (Complaint, pp. 1-35.) Plaintiffs allege, for example, that statements were made indicating that Plaintiff, "engages in dirty business practices," "is a scammer;" further, she "will lie to you," and "vacuum out your savings account." (Complaint, pp. 1-2, 13.) The evidence that Plaintiffs furnish with their Opposition also demonstrates that discussions regarding Plaintiffs' practices appeared on the websites of at least three other defendants in this case. (Opposition, Exs. C-E.) These allegations, by which Plaintiffs are bound, demonstrate that Plaintiffs' fraudulent business practices were the subject of prevalent public discussion and concern.

The public has a vital interest in being aware of the pervasive consumer warnings that exist regarding Plaintiffs' services. *See Dairy Stores*, 104 N.J. at 151. The statements at issue here undeniably form a consumer warning regarding Plaintiffs' business practices. As such, these statements constitute a legitimate matter of public concern. The fair comment privilege protects such statements, thus Plaintiffs must plead and prove actual malice in order to succeed on their claims. *Id.* The allegations contained within the Complaint are insufficient as a matter of law to establish actual malice, and Plaintiffs do not contest this in their Opposition. The Court, therefore, should dismiss the Complaint.

## IV. PLAINTIFFS SHOULD NOT BE ALLOWED TO AMEND THEIR COMPLAINT.

Generally, a court will not grant leave to amend a complaint to permit a futile claim or where a motion to dismiss would have to be granted. *See, e.g., Interchange State Bank v. Rinaldi,* 696 A.2d 744, 752, 303 N.J. Super. 239, 256-257 (1997) (denial appropriate when motion to dismiss would have to be granted as to proposed amendment); *Miltz v. Borroughs-Shelving*, 497 A.2d 516, 524-525, 203 N.J. Super. 451, 466-69 (1985) (judicial discretion allows for the denial of a motion to amend in the interest of justice). Thus, "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law." *Mustilli v. Mustilli*, 671 A.2d 650, 651, 287 N.J. Super. 605, 607 (1995).

Plaintiffs have not requested leave to amend, and have not suggested any manner in which their Complaint could be amended to state a legitimate claim against Wikimedia. Indeed, the additional, extrinsic "evidence" upon which Plaintiffs rely in an attempt to bolster their claims actually demonstrates that their claims are baseless and should be dismissed. Therefore, the claims against Wikimedia should be dismissed without leave to amend.

## V. CONCLUSION.

Plaintiffs have not and cannot overcome the immunity from state law claims such as theirs that is conferred on Wikimedia by Section 230. Furthermore, they do not and cannot assert actionable statements upon which any such claims might be based. Therefore, Wikimedia respectfully requests that Plaintiffs' claims against it be dismissed without leave to amend.

Dated: May 19, 2008

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By: 
CHARLES A. LeGRAND

Attorneys for Defendant
WIKIMEDIA FOUNDATION