No. 15-1009

IN THE
United States Court of Appeals for the Second Circuit

Federal Trade Commission, State of Connecticut,

Plaintiffs–Appellees,

vs.

LeadClick Media, LLC (successor to LeadClick Media, Inc.),

Defendant–Appellant,

On appeal from the March 5, 2015, order granting summary judgment and the March 6, 2015, final judgment of the United States District Court for the District of Connecticut at No. 3:11cv1715(JCH)

FINAL FORM OPENING BRIEF OF APPELLANT LEADCLICK MEDIA, LLC (SUCCESSOR TO LEADCLICK MEDIA, INC.)

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CORPORATE DISCLOSURE

LeadClick Media, LLC, is the successor entity to LeadClick Media, Inc. LeadClick Media, LLC, officially ceased its operations on September 29, 2011.

LeadClick Media, LLC, is a wholly owned subsidiary of CoreLogic, Inc. CoreLogic, Inc., is a publicly held corporation; no publicly held corporation owns 10 per cent or more of the stock of CoreLogic, Inc.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this matter as it raised a federal question under the Federal Trade Commission Act (the "FTC Act"). *See* 15 U.S.C. § 45(a)(1); 28 U.S.C. § 1331. This Court has appellate jurisdiction as the appeal arises from a final judgment of the district court dated March 6, 2015.[1] *See* 28 U.S.C. § 1291. Appellants timely filed their notice of appeal on April 2, 2015. *See* LeadClick Notice of Appeal, ECF No. 342. (R. at 98a)

[1] The district court's docket includes a March 16, 2015, entry that reads as follows: "Docket Entry Correction re 340 Judgment, modified to add corrected pdf. (Lewis, D) (Entered: 03/16/2015)." It appears that the district court replaced the PDF file of the judgment entered on March 6, 2015, with a differently formatted PDF, but that the judgment was not substantively changed.

PRELIMINARY STATEMENT

Internet commerce takes many forms. One prominent one is the affiliate-marketing network. An affiliate-marketing network provides the technical architecture between a company that wants to sell a product (known as a "merchant") and one or more persons or businesses (known as "publishers") that work to attract consumers to the merchant's site for a fee.[2] If a consumer viewing a publisher's site wants to visit the merchant's site, he clicks on a link and the affiliate-marketing network acts as the technical conduit between the publisher's site and the merchant's site. The affiliate-marketing network typically makes no representations of its own to the consumer and, indeed, it acts in the background such that the network is invisible to the consumer.

So it was with Leadclick Media, Inc., a company no longer in operation.[3] LeadClick operated an affiliate-marketing network that provided software and a computer server that allowed consumers to be connected from a publisher's web page to a merchant's web page. If a consumer entered into a transaction with a merchant, the merchant

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[2] Publishers are also known as "affiliates" or "affiliate marketers," the terms the district judge used to describe the publishers in this case.

[3] The complaint refers to LeadClick Media, Inc., and LeadClick Media, LLC. LeadClick Media, LLC, was the successor to LeadClick Media, Inc., and LeadClick Media, LLC, is no longer in operation. For ease of reference, the appellant will be referred to in this brief as "LeadClick."

was to pay LeadClick a fee, 85 to 90 per cent of which LeadClick would have already advanced to the publisher before receiving payment from the merchant. Importantly, LeadClick was a corporation separate from the publishers and the merchants. LeadClick's role was to provide a technical connection between those publishers and merchants, and that role was contract based.

This case deals with a specific merchant called LeanSpa, LLC ("LeanSpa"), and certain publishers who sought to earn fees by encouraging consumers to click on links that would deliver those consumers to LeanSpa's website. LeanSpa marketed weight-loss products, and it was not related to LeadClick.

On November 7, 2011, the FTC and the State of Connecticut filed this action against LeanSpa and certain of its principals.[4] Relying on Section 5 of the FTC Act and the parallel Connecticut statute, the FTC alleged the following: that the LeanSpa merchant web pages included false representations to the effect that consumers could try LeanSpa's products without risk when, in fact, consumers' credit cards were overcharged; LeanSpa's claims about its products were unsubstantiated; and some of the publishers persuaded consumers to

[4] Because their positions are the same, the FTC and the State of Connecticut are referred to in this brief collectively as "the FTC."

visit the LeanSpa merchant pages by using "fake" news sites that included materially deceptive representations.[5]

In 2011, the FTC also separately sued at least one of the publishers alleged to have created and used the fake news sites used to persuade consumers to visit the LeanSpa marketing page and purchase the company's products.[6]

Having brought claims against the merchant that purportedly made false marketing claims and the publishers that created and used the fake news sites, the FTC then overreached and sought to expand the zone of liability under the FTC Act further than the statute allows or any court had, at that point, authorized. Eight months after filing suit against LeanSpa, the FTC amended its complaint to join LeadClick on a theory that LeadClick was somehow liable for the publishers' fake news sites notwithstanding the undisputed facts that LeadClick itself made no deceptive statements, LeadClick was unaffiliated with LeanSpa or the publishers, and LeadClick's relationship with LeanSpa and the publishers was principally to provide the technical conduit between them for which it was to receive a modest fee.[7]

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5 Section 5 of the FTC Act is codified at 15 U.S.C. § 45.

6 *See FTC v. Circa Direct,* No. 11-2172 (D.N.J. April 16, 2011). Notably, in the *Circa Direct* complaint, the FTC alleged that the defendant publisher made the representations in its fake news site—the very news site at issue in this case.

7 A year later, the FTC amended its complaint yet again to join CoreLogic, Inc. ("CoreLogic"), LeadClick's parent corporation, as a "relief defendant." Third Amended Complaint, ECF No. 246, Case No.

Throughout the pleading and discovery phases of the case, the FTC seemed to be pursuing an aiding and abetting theory against LeadClick. The FTC's approach changed, however, as the parties briefed cross-motions for summary judgment.

In seeking summary judgment in its favor, LeadClick made two principal arguments.

First, LeadClick argued that it was an interactive computer service provider as that term is used in Section 230 of the Communications Decency Act (the "CDA").[8] That provision provides full and broad immunity for "interactive computer service providers" such as LeadClick when they are accused of wrongdoing for unlawful content created by third parties.

Second, LeadClick argued that it could not be liable in the first instance because independent third parties created the offending content, and the FTC Act does not recognize aiding and abetting liability.

3:11cv1715(JCH). (R. at 110a) CoreLogic has taken its own appeal from the district judge's final judgment. *See* CoreLogic Notice of Appeal, ECF No. 343, Case No. 3:11cv1715(JCH) (R. at 104a) The State of Connecticut did not join the FTC in asserting a claim against CoreLogic.

[8] 47 U.S.C. § 230. Because CDA immunity protects a party from even participating in the lawsuit, LeadClick first raised it by means of a motion to dismiss. The district judge denied the motion and held that the issue should await discovery. LeadClick then renewed the issue in its motion for summary judgment.

At that point, the FTC disclaimed reliance on an aiding and abetting theory and, for the first time, asserted in its reply in support of its own motion for summary judgment that LeadClick was liable for the conduct of the publishers who created the fake news sites through an agency theory by which LeadClick was the principal and the publishers were its agents.

Although the FTC had never pleaded an agency theory and did not seek leave to amend its complaint to do so, the district court accepted the FTC's invitation to consider the agency theory. In doing so, the district court applied the incorrect legal standard the FTC had proffered. Had the district court employed the correct standard, it would have had to conclude that, on the record of this case, there was no agency relationship between LeadClick and any of the publishers.

Moreover, in resolving the cross-motions for summary judgment, the district judge held that LeadClick was not entitled to CDA immunity because, she held, it was an information content provider notwithstanding the undisputed evidence that LeadClick did not create any of the offensive content. She also held that LeadClick was liable under the FTC Act for the statements of the publishers. Accordingly, the district judge held LeadClick responsible for a remedy in excess of $11 million.

This Court should correct the district judge's errors. If the Court agrees with LeadClick on either point, it should vacate the judgment in

favor of the FTC and either render judgment in favor of LeadClick itself or remand the case for entry of judgment in favor of LeadClick.

STATEMENT OF THE ISSUES PRESENTED[9]

1. Whether the district judge erred as a matter of law in denying LeadClick immunity under Section 230 of the CDA.

2. Whether the district judge erred as a matter of law in imposing liability on LeadClick for violating the FTC Act when it is undisputed that LeadClick did not create the deceptive content and the deceptive content was not attributed to LeadClick.

3. Whether the district judge erred as a matter of law by finding an agency relationship between LeadClick and publishers where (a) the FTC neither pleaded agency nor sought leave to amend its complaint to assert an agency theory, (b) the district judge applied an incorrect legal standard regarding agency and (c) the relevant contracts and factual record could not support such an agency finding when analyzed according to the correct legal standard.

[9] All of the issues LeadClick presents for review are questions of law for which the Court exercises *de novo* review. *See Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 142 (2d Cir. 2005).

STATEMENT OF THE CASE

Nature of the Case

LeadClick appeals from the decision of the Honorable Janet C. Hall of the District of Connecticut granting summary judgment in favor of the FTC and against LeadClick and its parent company, CoreLogic. In resolving cross-motions for summary judgment, Judge Hall held LeadClick liable for violating Section 5 of the FTC Act and a parallel provision of the Connecticut Unfair Trade Practices Act (the "Connecticut Act").

Background Information

LeadClick was an entity that operated an affiliate-marketing network through its "eAdvertising" division until the company closed in September 2011.[10]

LeanSpa, a company wholly separate from LeadClick, sold weight-loss products exclusively through websites it owned and operated.[11]

LeanSpa used the services of various affiliate-marketing networks, of which LeadClick was one. LeanSpa used those networks to connect with independent, third-party publishers who advertised

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10 Deposition of Richard Chiang at 11-12. (R. at 150a)

11 LeanSpa sold products under the names LeanSpa™, LeanSpa™ with Acai, LeanSpa™ with HCA and LeanSpa™ Cleanse, among others. Deposition of Boris Mizhen at 124-125 (R. at 173-174a); LeadClick Answer, ECF No. 255, Case No. 3:11cv1715(JCH). (R. at 175a)

LeanSpa's products.[12] In late 2010, LeanSpa contracted to use LeadClick's network.[13]

Pursuant to that contract, LeanSpa was to pay LeadClick a set amount—typically $35 to $45—each time a publisher's advertisement first directed an online consumer to LeanSpa's landing page and the consumer enrolled in LeanSpa's "free-trial" program.[14] Of the set amount that LeanSpa was obligated to pay to LeadClick for each transaction, LeadClick would advance 85 to 90 per cent to the publisher responsible for directing that particular consumer to the LeanSpa website.[15] The structure of the affiliate-marketing industry required LeadClick to pay the publishers even before it received amounts due from LeanSpa and other merchants.[16]

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[12] Deposition of Andrew Davidson at 19-20, 26-27, 179-80) (R. at 208a-09a, 217a); Chiang Depo. at 177-178 (R. at 170a); Deposition of Quintin Redmond at 162-163. (R. at 239a)

[13] Chiang Depo. at 26-29 (R. at 152a); Chiang Depo. Exh. 2 at LCM00000112 (LeanSpa entered into its first contract with eAdvertising on September 3, 2010). (R. at 240a)

[14] Chiang Depo. at 141-145 (R. at 166-67a); in this context, the term "landing page" refers to the merchant's page to which the consumer is ultimately linked. As part of LeanSpa's continuity program, online consumers received an initial supply of the "weight-loss" product on an initial trial basis, followed by monthly shipments of product for $79.99 to be charged monthly. Davidson Depo. at 38, 65-66, 110 (R. at 210-11a); Chiang Depo. at 113 (R. at 165a); Deposition of Daniel Chelew at 110-111 (R. at 346a); Deposition of Sallie Schools at Exh. 1, 12 [ECF No. 11, Case No. 3:11cv1715(JCH) at 13]. (R. at 353-369a)

[15] Chelew Depo. at 281 (R. at 352a); Chiang Depo. at 26-28, 36-37, 141-145. (R. at 152, 154-55, 166-67a)

[16] As a result of these advances, LeadClick in fact suffered a significant financial loss from the publishers' use of LeadClick's affiliate

LeadClick's affiliate network was operated on a technical platform that not only provided the mechanism to link publisher advertisements and merchant pages, it also recorded statistics so that merchants and publishers could track advertising campaigns, transactions and fees earned.[17] LeadClick did this by using computer software licensed from WebApps, LLC ("WebApps").[18] LeadClick ran software known as "HitPath" on a server that WebApps provided to LeadClick.[19] The HitPath software was the technical mechanism by which consumers were routed from a publisher's advertisement, through LeadClick's "eadvtracker.com" domain, to the website of a merchant such as LeanSpa.[20] From the online consumer's perspective, LeadClick was invisible.[21]

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network to market LeanSpa's products when LeanSpa failed to pay LeadClick. *See* Chiang Dep. at 181 (R. at 171a; Chelew Depo. at 280-282 (351-52a); Davidson Depo. at 200-201 (R. at 221-22a); eAdvertising Premium Network Publisher Agreement, ECF No. 157-2, Case No. 3:11cv1715(JCH). (R. at 370-77a)

17 Deposition of Samuel Prokop at 12, 76, 80-84 (R. at 379, 383, 384-85a); Deposition of Jamie Olsen at 25 (R. at 388a); Redmond Depo. at 21-22 (R. at 234a); Chelew Depo. at 27, 35, 51, 161-162, 280-281, 285. (R. at 342-44, 347, 351-52a)

18 Prokop Depo. at 82. (R. at 385a)

19 Prokop Depo. at 82. (R. at 385a)

20 Prokop Depo. at 10-11. (R. at 379a)

21 Report of Bret Padres of Stroz Freidberg, LLC ("Stroz Report") at ¶ 11 (R. at 397a); Davidson Depo. at 191 (R. at 220a); Prokop Depo. at 21. (R. at 382a)

Long before LeanSpa became a client of LeadClick in late 2010, publishers that advertised products for sale on the Internet (both products sold by LeanSpa and myriad other online merchants) employed a form of advertising that utilized "news sites" to market the merchants' products.[22] While the origin of this type of marketing is not known, its use predates the activity at issue in this case and the relationship between LeadClick and LeanSpa.[23] Importantly, not only did the idea and use of such "news sites" predate LeadClick's business with LeanSpa, but those pre-existing advertisements contained the precise representations at issue in this lawsuit.[24]

Course of Proceedings

In November 2011, the FTC filed this case against LeanSpa and certain of its principals alleging deceptive sales and advertising practices in the operation of that company's merchant business.[25] As

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[22] Davidson Depo. at 180-182 (R. at 217-18a); Schools Depo. at 98; First Amended Complaint, ECF No. 90, Case No. 3:11cv11715(JCM) at Exh. A (R. at 354a); Davidson Depo. at 178 (R. at 217a)

[23] The Court has likely seen similar advertisements in print publications such as magazines and newspapers with the label "Advertorial"—meaning a blend of an advertisement and an editorial. *See* Webster's Dictionary (online) ("Advertorial: an advertisement that is written and presented in the style of an editorial or journalistic report."). Viewers of daytime and late-night television often see a similar blend of advertising and editorial content in what, in that medium, are referred to as "infomercials."

[24] First Amended Complaint, ECF No. 90, Case No. 3:11cv11715(JCM) at Exh. A (R. at 453-58a); Davidson Depo. at 178 (R. at 217a), Exhs. 6, 13 at 11. (R. at 224-29a; 230-32a)

[25] Initial Complaint, ECF No. 1, Case No. 3:11cv11715(JCH). (R. at 460-99a)

noted in the preliminary statement to this brief, the FTC's claims focused on LeanSpa's conduct regarding charges to consumers' credit cards, LeanSpa's statements about its products and the fake news sites created and used by publishers.

In July 2012, nearly a year after LeadClick ceased business, the FTC amended the complaint to add LeadClick as a defendant, alleging that LeadClick's actions with respect to the fake news sites constituted a deceptive act or practice in violation of Section 5 of the FTC Act and parallel provisions of the Connecticut Act.[26] Specifically, the amended complaint alleged that the fake news sites represented that (1) "objective news reporters have performed independent tests demonstrating the effectiveness of [LeanSpa's products]" and (2) "comments following these 'news reports' express the views of independent consumers" when in fact no reporters performed any tests and the comments on the advertisements were actually part of the advertisement rather than comments from actual consumers.[27]

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[26] First Amended Complaint, ECF No. 90, Case No. 3:11cv11715(JCH). (R. at 409-59a)

[27] By means of a later amendment, the FTC added LeadClick's parent company, CoreLogic, as a "relief defendant" alleging no wrong-doing by CoreLogic but seeking to disgorge certain funds that CoreLogic received from LeadClick. The FTC contended that CoreLogic had no legitimate claim to the funds at issue. The State of Connecticut did not join the FTC in pursuing this claim. The district court awarded summary judgment to the FTC on the "relief defendant" claim and CoreLogic has taken its own appeal and is filing its own briefs.

The FTC's claims against LeanSpa were resolved by consent, with judgments entered against LeanSpa for more than $30 million, leaving LeadClick as the only defendant that allegedly violated the law.[28]

LeadClick and the FTC filed cross-motions for summary judgment. In its motion papers, LeadClick argued (among other things) that it could not be liable under the FTC Act because it did not create the content that fell into the challenged categories, because the FTC Act does not allow aiding and abetting liability and, in any event, because LeadClick was entitled to immunity under Section 230 of the Communications Decency Act.

The Decision Below

On March 5, 2015, the district judge granted summary judgment in favor of the FTC and against LeadClick.[29]

With respect to LeadClick, the district judge held that, while LeadClick did not create the offensive content, the company could be

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[28] As noted elsewhere in this brief, the FTC also filed at least one lawsuit against a publisher that actually created the fake news sites. The FTC obtained a multi-million-dollar consent judgment in that case. *See* http://www.ftc.gov/sites/default/files/documents/cases/2012/10/121019circastiporder.pdf (last visited July 17, 2015).

[29] *See Federal Trade Comm'n v. LeanSpa, LLC,* No. 3:11-CV-1715 (D. Conn. March 5, 2015) (the "Opinion"). LeadClick's citations to the Opinion are to the typescript. The opinion is available on Westlaw but not in the Federal Supplement. *See FTC v. LeanSpa, LLC,* No. 3:11-CV-1715, 2015 WL 1004240 (D. Conn. March 5, 2015).

held liable under the theory that the publishers who had created the offensive content were LeadClick's agents.[30]

The district judge rejected LeadClick's claim to CDA immunity because, she concluded, LeadClick was itself an "information content provider" as defined by that statute and, as such, not entitled to immunity.[31]

The district judge wrote that "LeadClick must disgorge the amount of consumer payments it received from LeanSpa … LeadClick admits that it received payments totaling over $11.9 million from LeanSpa."[32]

The district court entered a final judgment on March 6, 2015, and LeadClick and CoreLogic filed timely notices of appeal on April 2, 2015.[33]

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30 *See* Opinion at 23-26. (R. at 23-26a) As LeadClick notes elsewhere in this brief, the FTC first suggested an agency theory in its reply brief in support of its motion for summary judgment.

31 *Id.* at 26-29. (R. at 26-29a)

32 *See* Opinion at 33. (R. at 33a)

33 LeadClick Notice of Appeal, ECF No. 342, Case No. 3:11cv11715(JCH) (R. at 98-103a); CoreLogic Notice of Appeal, ECF No. 343, Case No. 3:11cv11715(JCH). (R. at 104-09a)

SUMMARY OF THE ARGUMENT

The district judge should have granted LeadClick's motion for summary judgment and denied the FTC's cross-motion for summary judgment.

First, LeadClick was entitled to summary judgment on the basis of CDA immunity. An interactive service provider is entitled to statutory immunity unless it is also an information content provider. The FTC conceded that LeadClick did not create any of the offending content and that publishers were using the challenged fake news sites on other affiliate networks before they ever began to use them on the LeadClick network.[34] Thus, LeadClick could not have been an information content provider, and the district court erred in deciding otherwise. LeadClick was entitled to CDA immunity and, on that basis, the district judge should have granted summary judgment to LeadClick rather than to the FTC.

Even if LeadClick were not entitled to CDA immunity, it would nonetheless be entitled to summary judgment on the FTC's substantive claims. Under the "bright-line" test this Court has employed to

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[34] *See* Oral Argument Tr. at 18 ("We agree that the fake news sites were not originated with LeadClick.") (R. at 96a); *see also,* FTC Response to LeadClick's Statement of Material Facts in Support of Motion for Summary Judgment at ¶¶ 15-17 (admitting that a publisher had run the same fake news site on another affiliate network before he ran it on the LeadClick network) (R. at 512-14a); Davidson Dep. (PX 56) at 178-80 (testifying that he used the same fake news site on another network before using it on LeadClick's affiliate network). (R. at 217a)

determine who could be liable under an analogous statute, LeadClick could only have been liable under the FTC Act if it created the offensive content or that material was attributed to it. The evidence does not support either bases for liability.

Because it was unable to make a case against LeadClick for direct liability under the FTC Act, the FTC sought to impose vicarious liability. The district court accepted that theory, but the court's analysis does not withstand scrutiny.

As an initial matter, the district court should never have considered the FTC's late-in-the-day agency theory. The FTC never pleaded the existence of an agency relationship, and it first introduced the idea in its reply brief in support of its motion for summary judgment—long after the conclusion of discovery and without ever seeking leave for what amounted to a *de facto* amendment of the complaint. Moreover, had the FTC moved for leave to amend, that motion should have been denied since discovery had ended and there was no justifiable reason for the FTC's unreasonable delay.

On the substance of the issue, the district court relied on an incorrect legal standard to determine agency and, had it applied the correct legal standard, would have had to reject the FTC's allegation that there was such an agency relationship. Simply stated, LeadClick and the publishers never manifested assent to an agency relationship—indeed, they expressly disclaimed such a relationship—and LeadClick

did not have the sort of control over the publishers necessary to establish agency.

Because LeadClick was entitled to CDA immunity and could not be liable under the FTC Act either directly or through an agency theory, the district court erred. This Court should vacate the judgment and either render judgment in favor of LeadClick or remand the case with instructions for the district judge to enter judgment in favor of LeadClick.

ARGUMENT

Broadly speaking, the district court erred in two fundamental ways. First, the district judge erred as a matter of law in rejecting LeadClick's right to immunity under Section 230 of the CDA. Second, it imposed liability on LeadClick despite the undisputed evidence that LeadClick did not create the deceptive advertising content at issue. The district judge reached that determination by applying an incorrect legal standard to conclude that LeadClick was liable under an agency theory for the misdeeds of publishers—persons and entities whose only connection to LeadClick was an arms-length contract that expressly disclaimed agency.

If this Court agrees with LeadClick on either point—and it should agree on both—it should vacate the judgment for the FTC, reverse the district judge's summary judgment determination and either render

judgment itself in favor of LeadClick or remand for the district judge to enter judgment in favor of LeadClick.

I. The district judge erred as a matter of law in denying LeadClick immunity under Section 230 of the Communications Decency Act.

As LeadClick demonstrates in Sections II and III below, the undisputed facts of record demonstrate that there is no basis for the district court's holding LeadClick liable for a violation of the FTC Act. But there is a threshold point: the district court should never have reached the merits of that statutory claim because the Communications Decency Act provides broad immunity to interactive internet service providers such as LeadClick.[35] The statute provides immunity not just from liability but from having to participate in litigation at all.[36] LeadClick, as an interactive service provider, was entitled to that immunity.[37]

A. Section 230 provides interactive computer service providers with broad immunity from claims based on content created by third parties.

Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any

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35 47 U.S.C. § 230.

36 *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 254 (4th Cir. 2009).

37 LeadClick raised CDA immunity by means of a motion to dismiss at the outset of the case, but the district judge denied that motion on the ground that the issue should be deferred until after discovery. *See* Ruling Denying LeadClick's Motion to Dismiss, ECF No. 198, Case No. 3:11cv11715(JCH). (R. at 43-62a)

information provided by another information content provider."[38] Other circuits have held that "Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties."[39] The statute bars "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."[40]

Those courts have developed a three-part test. Section 230 bars a claim if (1) the defendant asserting immunity is an interactive computer service provider, (2) the particular information at issue was provided by another information content provider, and (3) the claim seeks to treat the defendant as a publisher or speaker of that information.[41] Because an interactive computer service provider can also be an information content provider, an interactive computer service provider is not entitled to immunity if it is "responsible, in whole or in part, for the creation or development of [the] information."[42]

Before turning to each of the three parts of the test, it is important to note at the outset a point on which courts are in agreement: Congress

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38 47 U.S.C. § 230(c)(1).

39 *Jones v. Dirty World Entertainment Recordings LLC,* 755 F.3d 398, 406 (6th Cir. 2014).

40 *Zeran v. AOL,* 129 F.3d 327, 330 (4th Cir. 1997).

41 *See Jones,* 755 F.3d at 409.

42 47 U.S.C. ¶ 230(f)(3).

intended Section-230 immunity to be broad.[43] The Ninth Circuit has held that "close cases … must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties."[44]

B. LeadClick is entitled to CDA immunity.

In its brief discussion of CDA immunity, the district court focused almost exclusively on the second element of the test, concluding that "[n]o reasonable jury could deny that LeadClick was an 'information content provider.'"[45] The district judge's legal analysis on that point was wrong. Moreover, because all three requirements are met, LeadClick is entitled to CDA immunity as a matter of law.

1. As a matter of law, LeadClick was an "interactive computer service provider."

The district judge did not question whether LeadClick was an "interactive computer service provider," and for good reason: the definition is broad and LeadClick fell well within its borders.

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43 *See Jones,* 755 F.3d at 406-07; *see also, Almeida v. Amazon.com,* 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").

44 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc).*

45 Opinion at 29. (R. at 29a)

Section 230(f)(2) defines an interactive computer service provider as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[46] Courts have interpreted "interactive computer service" broadly.[47] While this Court has had few opportunities to address CDA immunity, it recently held in *Ricci v. Teamsters Union Local 456* that "the statute defines 'interactive computer service' expansively …"[48]

LeadClick meets the test. LeadClick provided the technical platform on which the affiliate network operated. That technical platform included software that ran on a computer server and that allowed consumers to click on a hyperlink in a publisher's advertisement to be routed through LeadClick's "eadvtracker.com" web domain to the website of a particular merchant.[49] Simply stated, the affiliate network provided multiple consumers with access, through the Internet, to a computer server (the server on which the HitPath

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46 47 U.S.C. § 230(f)(2).

47 *See Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1123 (9th Cir. 2003).

48 781 F.3d 25, 27-28 (2d Cir. 2015).

49 *See* Prokop Depo. at 11, 80-82. (R. at 379, 384-85a); Stroz Report at ¶¶ 3, 12-13. (R. at 394-95; 397-98a)

software "resided") and that directed them to merchant websites. That is all the statute requires. Courts have regularly held that website operators are providers of interactive computer services if they enable multiple computer users to have access to a server (generally the server that hosts the website).[50] While LeadClick's affiliate-marketing network was not a website, it had the same attribute that courts have found critical: through the LeadClick network, multiple users had access to the server that ran the HitPath software and from which they were directed to merchant sites.

LeadClick was a provider of an interactive computer service.[51]

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[50] *See, e.g., Universal Communications Systems, Inc. v. Lycos, Inc.,* 478 F.3d 413, 419 (1st Cir. 2007) (definition requires only a system that allows multiple users to have access to a server); *Batzel v. Smith,* 333 F.3d 1018, 1030 (9th Cir. 2003) (same).

[51] In the district court, the FTC quibbled about this straightforward analysis by making three irrelevant contentions. First, the FTC argued that LeadClick did not own the computer server at issue. It is true that WebApps, not LeadClick, owned the server, but that fact is irrelevant. The statute does not impose a server-ownership requirement, and nothing about the purpose of the statute would suggest one should be read into the text. Second, the FTC questioned whether consumers "accessed" the WebApps server since that server did not itself display advertising or anything else to the consumers but, instead, served as a home for the HitPath software and acted as a conduit between the publishers' pages and the merchants' webpages. Prokop Depo. at 82. (R. at 385a). But the FTC never explained how "access" for purposes of CDA immunity requires that the WebApps server display content to consumers. The statute defines an interactive computer service provider as "any information service, system, or access system provider *that provides or enables computer access by multiple users to a computer server* …" 47 U.S.C. § 230(f)(2) (emphasis added). "Access" means only "[a] means of approaching." Webster's II New College Dictionary at 6 (1995). Consumers undeniably "approached" the WebApps server because, when they clicked on a link on a publisher's cite, their

2. As a matter of law, LeadClick was not an "information content provider" with respect to any actionable content, and the district judge erred in concluding otherwise.

While courts broadly define "interactive computer service provider," they narrowly define "information content provider."[52] Importantly, while an interactive computer service provider may also be an information content provider, it will lose CDA immunity only if it is an information content provider *with respect to the specific content that is actionable.*[53] Thus, a provider "may be immune from liability for some of the third-party content it publishes but be subject to liability for the content that it is responsible for as a creator or developer."[54]

The district judge wrote that "[t]he degree to which an entity must be involved in the creation of the content to make that entity 'responsible' is somewhat unclear."[55] But the district judge's statement—like the court's analysis—sweeps too broadly. The case law

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computers were directed to the WebApps server and on to a merchant's site. Third, the FTC asserted that the HitPath software did not "enable" consumers to gain access to the merchant sites because there were other ways consumers could gain that access. While it would be a simple matter to demonstrate how the FTC's definitions contradict both the language of the statute and common definitions, it is in this case unnecessary. The statute defines an interactive-computer system as one that "provides or enables." The FTC did not and could not challenge the fact that the HitPath software "provided" consumers with access to the WebApps server.

52 *See Carafano,* 339 F.3d at 1123.

53 *See id.*; *Jones,* 755 F.3d at 408.

54 *Id.* at 408-09.

55 Opinion at 27. (R. at 27a)

lacks no clarity. It sets out guideposts that make the determination of immunity straightforward.

Because an interactive computer service provider will only lose immunity if it is an information content provider with respect to the actually offending content, the first step in the analysis is to determine which content is—or is alleged to be—offending.

In this case, the FTC contended, and the district judge found, that there were two misleading aspects of the publishers' pages: the assertion that a reporter had conducted independent tests of the LeanSpa products and the inclusion of comments that appeared to be from independent consumers.[56]

Thus, the immunity analysis must focus on whether LeadClick was responsible for the creation or development of the marketing statements about a reporter's conducting independent tests or the comments that were inaccurately attributed to independent consumers.

The analysis starts—and should end—with the undisputed facts that *the publishers, not LeadClick, created the offending content and they did so before LeanSpa contracted to use the LeadClick affiliate network.*[57] The offending content had been created, placed on websites

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[56] *See* Opinion at 18. (R. at 18a)

[57] Publisher Andrew Davidson, of Circa Direct, LLC, testified (without challenge) that he created the fake news site used to market LeanSpa products and originally used an affiliate network entirely unrelated to LeadClick's. Mr. Davidson testified that, when he later began using LeadClick's network, he copied his earlier content. *See*

and used to market LeanSpa products (as well as other products) *prior* to any involvement by LeadClick.[58]

But the district court essentially ignored this critical and undisputed evidence. Instead, the court focused on factual assertions that have little or nothing to do with the relevant inquiry. For example, the district judge wrote that "LeadClick solicited and hired the affiliate marketers to advertise LeanSpa products, knowing that affiliates used fake news pages."[59] But the district judge never explained how "knowing that [publishers] used fake news pages" proves—or even hints—that LeadClick itself had anything to do with creating the content on those webpages or even that LeadClick knew that content was actionably deceptive. The district judge's determination did not take into account the holding of other courts that "[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech."[60]

Davidson Depo. at 178-80. (R. at 217a) In his deposition, Mr. Davidson was asked the following: "And you didn't get that content from any networks and you didn't get it from anyone at LeadClick, correct?" He answered, "Right." *Id.* at 179-80. (R. at 217a) There is no contrary evidence from any publisher. Moreover, as noted earlier in this brief, the FTC has conceded that "the fake news sites were not originated with LeadClick." Oral Argument Tr. at 18. (R. at 95a)

58 *See* Davidson Depo. at 177-80. (R. at 217a)

59 Opinion at 29. (R. at 29a)

60 *Lycos, Inc.*, 478 F.3d at 420 (*citing Zeran,* 129 F.3d at 332-33). The breadth of Section-230 immunity has led courts to immunize defendants far more involved in the content of the offending websites than the FTC claims LeadClick was with the publishers' websites. In *Doe v. Backpage.com,* a website known as backpage.com was alleged to have

The district judge wrote that "LeadClick communicated with LeanSpa and with affiliates running fake news pages regarding which products should be advertised as the 'Step 1' and 'Step 2' products allegedly under independent investigation."[61] The district judge's description of the evidence is inaccurate, but this Court need not resolve the issue. This is so because, even if the evidence showed that LeadClick communicated with publishers regarding the "Step 1" and "Step 2" products, that fact would be irrelevant. To lose immunity, a provider of an interactive computer service must be responsible for the creation or development of the specific content found to be actionable.[62] The evidence is clear—indeed, it is undisputed—that LeadClick did not participate in creating or developing the statements about an

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hosted an online forum allowing sales of goods and services. *See Doe v. Backpage.com,* No. 14-13870 (D. Mass. May 15, 2015). A group of plaintiffs alleged that they were molested and raped after "being advertised as sexual wares" on backpage.com. *See Backpage.com,* Typescript at 1. The plaintiffs alleged that backpage.com took various steps that made it easier for sex traffickers to advertise while evading law enforcement, including stripping metadata from photographs shown on its website and filtering out certain illicit words but allowing clearly recognizable abbreviations of those illicit words. *Id.* at Typescript 3-4. After reviewing the complaint, Section 230 of the CDA and the applicable case law, the district judge agreed that the website was immune and dismissed the complaint. Simply stated, notwithstanding the disturbing allegations of harm to young victims in *Backpage.com,* the district court granted immunity to the webpage provider even though it had greater involvement with the offensive content than the district judge found in this case.

61 Opinion at 29. (R. at 29a)

62 *See Carafano,* 339 F.3d at 1123; *Jones,* 755 F.3d at 408.

independent reporter's investigation or actual consumer comments.[63] Yet, that is the content the district judge found actionable under the FTC Act.

The final evidence on which the district judge relied in determining that LeadClick was an information content provider is the "media buying" by which another division of LeadClick purchased advertising space on actual news sites and sold that space to publishers.[64] The district judge wrote that "LeadClick's media buying also materially contributed to the unlawful nature of the fake news sites by providing affiliates running fake news sites with a way to direct consumers from genuine news sites to fake news sites."[65] Again, the district judge drew an entirely unsupportable conclusion from the evidence—that the media buying "contributed to the unlawful nature of the fake news sites." For CDA-immunity purposes, the question is whether LeadClick was responsible for the creation or development of the offensive content itself. The district judge never explained how the media buying amounted to evidence that LeadClick created any of the offensive content on the fake news sites. At most, LeadClick made available to publishers a means for them to gain more exposure for their sites, but that has nothing to do with who created the actionable

63 *See* Chiang Depo. at 177-78 (R. at 170a); Davidson Depo. at 171, 179-80, 190-91, 203-4. (R. at 216-17, 220a)

64 *See* Opinion at 29. (R. at 29a)

65 *Id.*

content on the fake news sites. Consequently, such evidence does not support the conclusion that LeadClick was an information content provider.[66]

Not only does the evidence on which the district judge relied fail to support the conclusion that LeadClick was an information content provider with respect to the offensive statements, such evidence implicates one of the key protections of CDA immunity. Section 230 of the CDA bars "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."[67] Rather than appreciating that such conduct supports immunity, the district judge erroneously interpreted such conduct as evidence that immunity did not apply.

In *Roommates,* the Ninth Circuit cautioned that close cases should be resolved in favor of immunity so that interactive service providers would not "face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties."[68] The district judge's analysis in this case failed to heed the Ninth Circuit's admonition and poses the danger

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66 *See FTC v. Commerce Planet, Inc.,* 878 F. Supp.2d 1048, 1077 (C.D. Cal. 2012) (increasing traffic to website not sufficient to deprive company of immunity).

67 *Zeran*, 129 F.3d at 330; *Jones,* 755 F.3d at 407.

68 521 F.3d at 1174 (9th Cir. 2008).

against which it warned. LeadClick did not create the content found to violate the FTC Act. Despite that undisputed fact, the district court found LeadClick liable for the actionable conduct of others when the evidence, stretched to its maximum limits, reflected at most that LeadClick tacitly assented to or assisted in promoting the conduct of those third parties. As the Ninth Circuit and other courts of appeals have held, such conduct does not overcome the broad immunity the CDA confers on entities such as LeadClick.[69]

There is a final point on the information content provider analysis that warrants brief treatment. Although the district court did not explain its reasoning in any detail, it alluded in its opinion to the language in the CDA immunity provision that allows a defendant to be designated an "information content provider" not only when it "creates" offensive content but when it "develops" that content.[70] Some courts have concluded that the statute's reference to "creation or development" of offending content means that the two terms must have different meanings.[71] This Court has not addressed this issue, and it need not do so in this case because LeadClick did not "develop" the offensive content even measured by the standard some courts have employed.

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69 Other courts of appeals have agreed with the Ninth Circuit on this point. *See, e.g., Jones,* 755 F.3d at 409 (Sixth Circuit); *Nemet Chevrolet,* 591 F.3d at 257-58 (Fourth Circuit); *Lycos, Inc.,* 478 F.3d at 420 (First Circuit).

70 *See* Opinion at 29. (R. at 29)

71 *See Roommates.com,* 521 F.3d at 1167.

In *Roommates.com,* for example, the plaintiff alleged that the defendant's online system, which sought to match people with rental properties, violated various statutes, including the Fair Housing Act, because its user profiles elicited information about personal characteristics such as the user's gender, family status and sexual orientation.[72] The defendant contended that it was not an information content provider with respect to those profiles because the users themselves provided the content. The Ninth Circuit majority concluded otherwise when it found that, because it required users to answer specific questions that elicited the offensive content, Roommates.com "developed" the offensive content.[73] There is, of course, no equivalence between that holding and the circumstances of this case. LeadClick did nothing to cause the publishers to create or develop the offensive content, which undisputedly already existed prior to the inception of LeadClick's business dealings with LeanSpa.[74]

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72 *Id.* at 1165-66.

73 *Id.* at 1166.

74 As far back as April 2011, more than a year before it sued LeadClick, the FTC conceded that the "news sites" being complained of were created by third-party "information content providers," the publishers. *See* Declaration of Sallie S. Schools filed in *FTC v. Circa Direct LLC et al.*, No. 11-cv-02172-RMB-AMD (D.N.J. Apr. 16, 2011). (R. at 540-74a)

3. The claim seeks to treat the defendant as a publisher or speaker of that information.

The third element of the test for immunity is straightforward. Immunity applies where the claim seeks to treat the defendant as the speaker or publisher of the third-party content. In its complaint, the FTC made clear that its goal was to impose liability on LeadClick by treating it as a publisher or speaker of the offending content: "[T]he Leadclick Defendants, directly or through affiliates acting on their behalf or for their benefit *have represented* expressly or by implication" that certain websites advertising LeanSpa products contained objective news reports and independent consumer comments that were neither objective nor independent."[75]

Consequently, the third element for CDA immunity is satisfied.

In sum, CDA immunity is intended to be broad, and the definition of "information content provider" is intended to be narrow. The district judge stood those principles on their head while relying on evidence irrelevant to the settled standard for immunity. In doing so, the court erred in concluding that LeadClick was an information content provider. The undisputed evidence showed that, in fact, LeadClick was an interactive computer service provider with respect to the publishers, the merchants the publishers served, and the consumers who "clicked through" from the publishers' websites to the merchants' websites. The

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75 *See* Complaint at ¶¶ 82-84 (emphasis added). (R. at 435-36a)

undisputed evidence likewise showed that, with regard to the two types of representations the district judge determined to be deceptive, LeadClick was in no sense an information content provider.

Because the FTC sought to hold—and the district judge subsequently held—LeadClick liable as a publisher of the deceptive statements on the fake news sites, LeadClick was and is entitled to CDA immunity with respect to the claims in this case. This Court should reverse the district judge's contrary determination and either render judgment itself in favor of LeadClick or remand the case for the district court to enter judgment in favor of LeadClick.

II. The district judge erred in imposing liability on LeadClick under the FTC Act when there is no proof (and the district judge made no finding) that LeadClick created the deceptive statements and when the deceptive statements were not attributed to LeadClick.

Even assuming, *arguendo,* that LeadClick were not entitled to CDA immunity, this Court should nonetheless vacate the judgment below because the district judge erred in imposing liability on LeadClick under the FTC Act.[76] Section 5(a)(1) of the FTC Act prohibits "unfair or

[76] In this brief, LeadClick focuses on the FTC Act because the Connecticut Act provides that it should be interpreted consistently with Section 5(a)(1) of the FTC Act, thereby obviating the need for a separate analysis. *See* Connecticut General Statutes § 42-110b(b). At oral argument in the district court on the cross-motions for summary judgment, counsel for the State of Connecticut ceded his argument time to counsel for the FTC because "the State's argument is identical to the FTC." Oral Argument Tr. at 4. (R. at 95a)

deceptive acts or practices in or affecting commerce … are … unlawful."[77]

To establish a deceptive act or practice under Section 5(a), the FTC must prove that there was (1) a representation (2) that is likely to mislead consumers relying reasonably under the circumstances and (3) the representation was material.[78]

The district judge found all three elements were satisfied by virtue of two statements in the publishers' advertisements: (1) that a reporter had conducted independent tests of the LeanSpa products and (2) that the comments following the fake news stories were from actual consumers.[79]

But the district judge's conclusions, even assuming an evidentiary basis for the findings, support only imposition of liability against the publishers who created and made the deceptive statements—not against a wholly separate entity that the FTC concedes did not make the challenged statements.[80]

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77 15 U.S.C. § 45(a)(1). In this case, the FTC has asserted only that there were deceptive acts or practices, not that there were "unfair" acts or practices.

78 *See FTC v. Verity Int'l,* 443 F.3d 48, 63 (2d Cir. 2006).

79 *See* Opinion at 17-21. (R. at 17-21a)

80 "We agree that the fake news sites were not originated with LeadClick." *See* Oral Argument Tr. at 18 (answer of the FTC's counsel to question by the district judge). (R. at 96a)

Most of the challenged "fake news sites" were labeled as "advertorials" and, while the publishers took great liberty in editorial content, it should be noted that the FTC, particularly at the time of these events,

The FTC brought this lawsuit and bears the burden of proof. One would expect that the agency would have articulated and maintained a clear and well-supported legal theory for imposing liability on LeadClick for the conduct of independent third parties. But the FTC did not do so and, indeed, still has not done so.

From the outset of its action against LeadClick, the FTC seemed to allege that LeadClick aided and abetted the publishers' conduct. However, when confronted with LeadClick's summary judgment

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had provided no guidance on the permissible limits of the "Advertorial" approach to marketing, and no court had found the "fake news sites" to be actionable. Thus, even if LeadClick had some obligation—which it did not—to "police" the industry to ensure that advertorials contained accurate information, it would have had no legal standards to apply.

Of course, the FTC's assertion that the marketing approach was designed "to lure consumers" (*see* Complaint at 9 (R. at 416a, 418-19a, 422a) to the merchant's web page merely states the objective of all advertising. But there remains a serious factual dispute as to whether the alleged "fake news sites"—however inaccurate they might have been—were the cause of the injury to the great majority of consumers for whom the FTC sought restitution. In prosecuting this case in the district court, the FTC relied to a great extent on consumer complaints, more than 95 per cent of which had to do with the credit-card billing practices of LeanSpa, with no contention that the "fake news sites" were the cause of consumer injuries. *See* Plaintiff's Local Rule 56(a)(1) Statement of Fact (sealed) at 46 stating:

> From August 2010 through October 2011, more than a thousand consumers complained to the Connecticut Better Business Bureau against LeanSpa for recurring charges they incurred on their credit or debit cards after they had purchased a trial sample but could not cancel recurring product shipments. (R. at 969a)

See also Declaration of Joanne Zak at ¶¶ 8-11, 13-14 (ECF No. 11-5, Case No. 3:11-1715(JCH). (R. at 575-82a) *See also, Commerce Planet, Inc.,* 878 F. Supp.2d at 1077 (consumer injury occurred from misrepresentation on the "landing page").

motion, which showed beyond question that there is no aiding and abetting liability under the FTC Act, the agency pivoted away from that theory.[81] The FTC then invented an argument that LeadClick could be held liable through an agency theory by which it was the principal and the publishers were its agents.

LeadClick demonstrates below that the district judge—at the FTC's invitation—applied an incorrect legal standard to evaluate the FTC's eleventh-hour agency theory and that application of the correct legal standard to the record evidence leads to the conclusion that no agency relationship existed between LeadClick and the publishers.

Preliminarily, it is important that the Court appreciate the extraordinary lengths to which the FTC went to find a novel and unprecedented rationale to support its effort to fix a multi-million-dollar judgment on LeadClick for the actions of others.

A. The FTC Act imposes liability only when the defendant creates the deceptive content or the deceptive content is attributed to the defendant.

The FTC Act does not, by its terms, identify or define who can be a proper defendant, but both logic and analogous case law demonstrate that, to be liable for a "primary" violation of the statute, a defendant must either have made the deceptive statement itself or the deceptive statement must be attributed to that defendant.

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81 "The Court: So you don't think they aided and abetted? Mr. Lubetzky: No." Oral Argument Tr. at 22. (R. at 97a)

The Supreme Court's interpretation of Section 10(b) of the Securities Exchange Act of 1934 (the "Securities Act") in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A*, is instructive.[82] Section 10(b), like Section 5(a) of the FTC Act, broadly prohibits deceptive practices.

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facilities of any national securities exchange—
> …
> (b) To use or employ, in connection with the purchase or sale or any security … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe.[83]

In *Central Bank of Denver,* the Court rejected any notion that the Securities Act permits aiding and abetting liability. "If … Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."[84] The Court supported its statutory analysis by noting that Section 10(b) of the Securities Act requires a showing that someone relied on the defendant's deceptive statements.[85] To allow aiding and abetting liability, the Court concluded, would evade that requirement because

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82 511 U.S. 164 (1994).

83 15 U.S.C. § 78j.

84 511 U.S. at 177.

85 *Id.* at 180.

"the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions."[86]

In the years since *Central Bank of Denver,* this Court has developed a test for determining when a defendant may be liable for a "primary" violation of the Securities Act. In *Wright v. Ernst & Young LLP,* the Court set out what it has called the "bright line" test: to be liable, a defendant must itself have made the deceptive statements or those deceptive statements must have been attributed to the defendant.[87] In 2010, this Court reaffirmed the bright-line test.[88]

While neither the Supreme Court nor this Court has addressed what is required to prove a violation of Section 5 of the FTC Act, the bright-line test informs the analysis. The statutes include similar text:

FTC Act	**Securities Act**
Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.	It shall be unlawful … [t]o use or employ, in connection with the purchase or sale or any security … any manipulative or deceptive device or contrivance …

86 *Id.*

87 152 F.3d 169, 174 (2d Cir. 1998).

88 *See Pac. Inv. Mgmt. Co. LLC v. Mayer Brown LLP,* 603 F.3d 144, 149-50 (2d Cir. 2010).

Moreover, as noted above, both statutes require proof of reliance, an important factor in *Central Bank of Denver*, and neither statute includes in its text the words "aid" or "abet."[89]

Therefore, for the same reasons articulated in *Central Bank of Denver* and *Wright,* a defendant should only be liable for a violation of Section 5 of the FTC Act if it makes the deceptive statement itself or the deceptive statement is attributed to it—anything short of that is simply "aiding and abetting," which is nowhere found in the statute.[90]

B. The FTC conceded that LeadClick did not create the deceptive content and the deceptive content is unambiguously not attributed to LeadClick.

As the district judge recognized, the FTC conceded during summary judgment briefing that LeadClick did not create the fake news sites and that it was the fake news sites that were deceptive.[91]

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89 *See FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1205–06 (10th Cir. 2005) (collecting cases) (FTC Act requires proof of reliance).

90 In pointing to *Central Bank of Denver* and *Wright,* LeadClick does not ask this Court to make any significant jurisprudential leap. Even without reference to those decisions, the language of the FTC Act, as well as common sense, support LeadClick's argument. Section 5 of the FTC Act cannot be violated on a claim that the defendant aided and abetted a third party's Section-5 violation. The FTC has effectively acknowledged this by asking Congress, so far unsuccessfully, to amend the statute to add aiding and abetting language. *See* Prepared Statement of the FTC, S. Comm. on Commerce, Science, and Transportation, William Kovacic (April 8, 2008) (R. at 583-85a); Letter from Hon. Jon Leibowitz, Chairman, Federal Trade Commission, to H. Comm. on Energy & Commerce (Oct. 26, 2009). (R. at 586-89a)

91 *See* Opinion at 21, *quoting* Plaintiffs' Reply Br. at 1 ("Plaintiffs never said LeadClick …created [fake news sites] for the affiliates.") (R. at 21a); *see also,* Oral Argument Tr. at 18 ("We agree that the fake news sites were not originated by LeadClick"). (R. at 96a)

The district judge made no finding—nor could she have—that any deceptive statements on the fake news sites were attributed to LeadClick. The webpages are in the record, and this Court can, if it wishes, satisfy itself that they make no mention of LeadClick.[92] Indeed, LeadClick's role was invisible to consumers: not only was there nothing in the advertisements attributed to LeadClick, consumers were not even aware that LeadClick existed.[93]

III. The district judge erred as a matter of law by finding an agency relationship between LeadClick and publishers.

Confronted with the plain fact that LeadClick did not create the offensive content, the FTC conjured up an argument that LeadClick could be liable through an agency theory.

In its reply brief in support of its motion for summary judgment, the FTC introduced a new theory by which it asked the district judge to impose liability on LeadClick for the conduct of others. Although it had not suggested it before, the FTC now urged the district judge to find LeadClick could be liable for the conduct of the publishers through an agency theory.

The district judge accepted the FTC's agency theory. However, in doing so, the district judge improperly allowed the FTC to make a *de*

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92 *See* Complaint, ECF No. 1, Case No. 3:11cv11715(JCH), Exh. "A." (R. at 495-99a)

93 *See* Prokop Dep. at 16, 21-22 (R. at 380, 382a); Chiang Dep. (PX 22) at 39-40 (R. at 155a); Stroz Report at ¶¶ 11-12. (R. at 397-98a)

facto amendment to its complaint after the close of discovery. Having allowed the eleventh-hour introduction of a new theory, the district judge then applied an incorrect legal standard to that theory and relied on facts that do not support the conclusion that any of the publishers were LeadClick's agents or that LeadClick was their principal.

A. The district judge erred in allowing the FTC to make a de facto *amendment to its complaint to introduce a new theory after the close of discovery.*

It is important to note at the outset that the FTC never pleaded the existence of an agency relationship between LeadClick and any publisher. Confronted at the summary judgment stage with twin obstacles that the actionable statements were not LeadClick's and that the FTC Act does not permit accessorial liability, the FTC was forced to devise an entirely new theory of liability in its reply brief in support of its motion for summary judgment. The FTC did not seek leave to amend its complaint to add its new theory, perhaps because of the authority in this circuit against allowing such amendments after the close of discovery and in response to a summary judgment motion.[94] Because the FTC never timely pleaded the existence of an agency relationship, the district judge should not have considered that theory. It is well established that a party may not amend its complaint implicitly

[94] *See Ansam Assoc., Inc. v. Cola Petroleum Ltd.*, 760 F.2d 442 (2d Cir. 1985).

through argument made in opposition to a motion for summary judgment.[95]

B. The district judge erred as a matter of law by applying an incorrect legal standard to her agency analysis.

The district judge also applied the wrong legal standard to the agency question. Although the FTC's theory was that one corporation can be vicariously liable for the conduct of third parties, the district judge borrowed a standard used to determine when individual officers or owners may be held liable for the conduct of the corporations with which they are affiliated: "Courts have held individual defendants liable for a corporation's conduct where they '(1) participated in the acts or had the authority to control the corporate defendant and (2) knew of the acts or practices."[96] That is not the legal standard for the circumstances

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[95] *See Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co.,* 292 F.Supp.2d 535, 544 (S.D.N.Y.2003) ("A summary judgment opposition brief is not a substitute for a timely motion to amend the complaint."); *see also, Gilmour v. Gates, McDonald & Co.,* 382 F.3d 1312, 1315 (11th Cir. 2004) (same).

[96] Opinion at 22 (citations omitted). (R. at 22a) The district court employed a standard the FTC has urged on courts for many years, but there should be considerable doubt that the standard remains valid for any purpose in the wake of *Meyer v. Holley,* 537 U.S. 280 (2003). In *Meyer,* the Supreme Court considered and expressly rejected the Ninth Circuit's holding that the Fair Housing Act "made corporate owners and officers liable for the unlawful acts of a corporate employee simply on the basis that the owner or officer controlled (or had the right to control) the actions of that employee." *Id.* at 286. Among the Court's reasons for rejecting the Ninth Circuit's approach was that there was nothing in the Fair Housing Act to suggest that Congress intended to expand the traditional requirements for vicarious liability. *Id.* The same is true for the FTC Act.

presented by this case, where the issue is whether one business is the agent of another.[97]

Recognizing the FTC's unorthodox and novel theory of liability, the district judge challenged counsel for the FTC during oral argument on the summary judgment motions: "Can you give me any case in which a defendant was held directly liable for the deception … when the defendant was not the one making, adopting or contributing to the deceptive quality?"[98] The FTC responded by mentioning three decisions, none of which supports the standard the FTC urged the district judge to apply.

Sw. Sunsites, Inc. v. FTC held only that a principal may be held liable for the actions of its agents.[99] The court did not describe how agency should be determined, and it did not apply the agency standard the FTC persuaded the district judge to apply in this case.

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97 It should be noted that the FTC invited the district judge to use that incorrect legal standard. As noted in the text, the cases from which the FTC and the district judge drew the standard did not involve vicarious liability but instead addressed the potential liability of corporate owners or officers who were themselves involved in the corporation's misdeeds. The district judge acknowledged that her analysis was predicated on case law involving "individual defendants [held] liable for a corporation's conduct," but she brushed aside this point, observing that she saw "no reason why this test should apply to individual defendants but not to corporate entities." Opinion at 22-23. (R. at 22-23a)

98 Oral Argument Tr. at 22 (R. at 97a)

99 785 F.2d 1431 (9th Cir. 1986).

FTC v. Five-Star Auto Club, Inc., is similar.[100] It held that a principal is liable for its agent's actions, but it did not use the standard the district judge used in this case. Moreover, the business held liable, Five-Star Auto Club, Inc., specifically held out as its representatives the two individuals who made the misrepresentations.[101] There is, of course, no parallel fact in this case.

FTC v. Med. Billers Network, Inc., dealt not with the question of vicarious liability but with the distinct question of when an individual corporate officer may be held liable for the violations of the corporation.[102] Since the court determined that the individual actually drafted the offending content, the court had no cause to consider vicarious liability.[103]

In her opinion in this case, the district judge referred to only one of the cases the FTC offered—*Med. Billers Network*—and she relied on it for the legal standard she applied to decide agency. However, as noted above, that case is not a vicarious-liability case. The district judge cited three other cases for the same standard—*FTC v. Crescent Publishing Group, Inc.*;[104] *FTC v. Amy Travel Service, Inc.,*[105] and *FTC v. Iab*

100 97 F. Supp.2d 502 (S.D.N.Y. 2000).

101 97 F. Supp.2d at 527.

102 543 F. Supp.2d 282, 320 (S.D.N.Y. 2008).

103 *Id.*

104 129 F. Supp.2d 311 (S.D.N.Y. 2001).

105 875 F.2d 564 (7th Cir. 1989).

Marketing Assoc., LP[106]—but those cases, like *Med. Billers Network,* dealt with the distinct legal issue of when a corporate officer could be held liable for the corporation's actions where the corporations were closely held and the individuals were directly involved in the deceptive conduct—facts not present in this case.[107]

Simply stated, the cases on which the district court relied for the legal standard it applied to the agency determination were not, in fact, analogous, vicarious-liability cases, and they offer no help.

The FTC Act does not explicitly permit imposition of liability based on agency principles. The Supreme Court has explained that, when vicarious liability is read into a statute by implication, it should be assessed according to common-law principles set out in the Restatement of Agency.[108]

Under Section 1 of the Restatement, agency is "the fiduciary relationship that arises when one person (a 'principal') manifests assent

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106 746 F.3d 1228 (11th Cir. 2014).

107 LeadClick relegates to a footnote *FTC v. Neovi, Inc.,* 604 F.3d 1150 (9th Cir.2011). Contrary to the FTC's case against LeadClick, *Neovi* involved an allegation of unfair practices, not deception, and because it analyzed FTC-Act liability in terms of facilitation and substantial assistance, it relies on the aiding and abetting theory of liability the FTC expressly disclaimed in this case. *See* Oral Argument Tr. at 22. (R. at 97a)

108 *Meyer v. Holley,* 537 U.S. at 285. The American Law Institute has published the Restatement (Third) of Agency. However, there is no need for this Court to choose between the two iterations since their definition of "agency" is materially the same. *See Johnson v. Priceline.com, Inc.,* 711 F.3d 271, 277 (2d Cir. 2013). This brief will cite to the Restatement (Third) of Agency and refer to it as the "Restatement."

to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or other consents so to act."[109] This Court has construed that language to require the party alleging agency to prove three things: (1) a manifestation by the principal that the agent will act for him; (2) an acceptance by the agent of the undertaking and (3) an understanding between the parties that the principal will be in control of the undertaking.[110]

The third element merits detailed treatment. The Restatement makes clear that the control necessary to establish agency is "a narrower and more sharply defined concept than domination or influence more generally."[111] "A position of dominance or influence does not in itself mean that a person is a principal in a relationship of agency with the person over whom dominance or influence may be exercised."[112]

The hallmark of control sufficient to evidence an agency relationship is the principal's power to give "interim instructions."

> The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. In many agreements to provide services, the agreement

109 Restatement (Third) of Agency, § 1.

110 *See Johnson,* 711 F.3d at 277.

111 Restatement (Third) of Agency § 1.01, cmt. f(1).

112 *Id.*

> between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make.... The fact that such an agreement imposes constraints on the service provider does not mean that the service recipient has an interim right to give instructions to the provider.[113]

Importantly, "[t]he right to veto another's decisions does not by itself create the right to give affirmative directives that action be taken, *which is integral to the right of control within common-law agency*."[114] In other words, parties do not have an agency relationship simply because one has a general right to approve certain aspects of the other's conduct. Agency requires that one party (the principal) have the power to control in a detailed way the performance of the other party (the agent) and, indeed, not simply to veto certain actions by the agent but also to instruct the agent to take affirmative steps in the way demanded by the principal.

C. The relevant contracts and factual record do not support the district judge's agency finding.

The district judge's use of an erroneous legal standard is critical because the factual record in this case, viewed in light of the correct

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113 Restatement (Third) of Agency § 1.01 cmt. f; *see also id.* cmt. g ("Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present.").

114 Restatement (Third) of Agency § 1.01 cmt. f (emphasis added).

legal standard, does not support a conclusion that any of the publishers were LeadClick's agents.[115]

In this connection, the district judge found the following facts to be determinative: (1) "LeadClick's affiliate managers were tasked with scouting for new affiliates";[116] (2) "Affiliate managers 'routinely gathered information about affiliates"[117] (3) "they would solicit affiliates to join eAdvertising";[118] (4) "LeadClick solicited and hired affiliate marketers using fake news sites to advertise LeanSpa's products";[119] (5) "[a]ffiliate marketers had to apply to join the eAdvertising Network, and LeadClick would decide which to accept"[120] and (6) the following language from what the district judge concluded was LeadClick's standard contract with the publishers:

> All websites, newsletters, companies, or individuals need official approval from eAdvertising before they can become a member of the Publisher Program. Only websites and newsletters that have been reviewed and approved are permitted to use the programs. eAdvertising reserves the right to withhold or refuse approval on any website,

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115 As noted in the text, the district court applied an incorrect standard to assess agency. However, even under that incorrect standard, the record evidence does not support the conclusion that LeadClick had an agency relationship with any publisher.

116 Opinion at 23. (R. at 23a) As noted earlier in this brief, the district judge in her opinion referred to the publishers as "affiliates."

117 *Id.* (R. at 23a)

118 *Id.* (R. at 23a)

119 *Id.* (R. at 23a)

120 *Id.* (quotation omitted). (R. at 23a)

> newsletter, company, or individual for any reason, whatsoever.[121]

The district judge also attached importance to LeadClick's purchase of advertising space on genuine news sites and sale of such space to publishers who advertised with fake news sites and LeadClick's communication with publishers about "product pairings," both of which the district judge regarded as evidence of LeadClick's having "participated in the deception."[122]

As demonstrated below, none of those facts (even if true) support the district judge's agency determination.

1. LeadClick did not manifest an agreement that any publisher would "act for" LeadClick, none of the publishers accepted an undertaking to "act for" Leadclick, and LeadClick and the publishers expressly disclaimed agency in the contract that defined their business relationship.

There is no evidence that LeadClick and any of the publishers manifested an agreement that a publisher would "act for" LeadClick, and the district court pointed to no such evidence. Had it applied the correct legal standard, the district court would have had to conclude that there was no agency relationship between LeadClick and the publishers because none of the involved parties manifested an agreement that any publisher would act for LeadClick.

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[121] Opinion at 24 (R. at 24a) (quoting from eAdvertising Premium Network Publisher Agreement (the "Agreement") § III (R. at 370-77a))

[122] *See* Opinion at 25-26. (R. at 25-26a)

LeadClick's standard agreement with publishers reinforces this point.[123] The parties expressly agreed that "[n]either of us may represent to any third party, or otherwise be deemed to be, an employee, agent, partners or joint venturer with respect to the other."[124] The Restatement explains that such language is relevant to the agency analysis.[125] While such contractual language disclaiming agency may not be "determinative," its presence in LeadClick's standard contract has particular evidentiary value because of the lack of any contrary evidence.

The evidence the district judge pointed to has nothing to do with any publisher's assenting to act on behalf of LeadClick. The evidence on which the court principally relied demonstrates, at most, that LeadClick employees looked for potential publishers, sought out information about them and determined which potential publishers to approve for contractual relationships.[126] Of course, none of that conduct expressly or implicitly suggests that LeadClick and any potential or actual publisher agreed to an agency relationship. It suggests only that

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123 In summary judgment briefing in the district court, LeadClick advised the court that the version of the Agreement to which it referred was not the one in effect during the relevant period. For purposes of this argument LeadClick will focus on the agreement the district judge believed was controlling. The difference does not affect the merits.

124 Agreement § 16.4 (R. at 376a)

125 *See* Restatement (Third) of Agency § 1.02, cmt. b.

126 *See* Opinion at 23. (R. at 23a)

LeadClick sought out, learned about and approved potential businesses with whom to enter into contracts. The Restatement makes clear that contractual relationships do not themselves give rise to agency.[127]

The language the district judge quoted from the Agreement speaks not at all to assent to agency. It refers instead to LeadClick's general right to approve what entities and what content could use the program. If anything, that language relates to the control element of the agency test. However, as set forth below, it falls short of the control necessary to justify agency liability.

With respect to the agency analysis, the district court included a seemingly unrelated paragraph in which it wrote that LeadClick "participated in the deception" by the publishers.[128] To support that contention, the district court pointed to the fact that LeadClick "purchased space on genuine news sites and sold it to affiliates advertising with fake news sites."[129] According to the district judge, such "media buying" lent credence to the fake news sites.[130] It is not clear why the district court included this discussion in its agency analysis since the media activity is irrelevant to either assent to agency or control.

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127 *See* Restatement (Third) of Agency § 1.01 cmts. f and g.

128 *See* Opinion at 25. (R. at 25a)

129 *Id.* (R. at 25a)

130 *Id.* at 25-26. (R. at 25-26a)

If the district court meant the paragraph to suggest that the media activity demonstrated some more direct LeadClick culpability, this was error. As noted above, liability under the relevant provision of the FTC Act requires proof that the defendant created the deceptive content or that the deceptive content was attributed to the defendant. The evidence of media buying is irrelevant to either of those issues. LeadClick could not be "directly" liable under the FTC Act as a matter of law since it had no role in creating the deceptive content and none of that content is attributed to LeadClick. The media activity demonstrates at most that LeadClick and some publishers had other, arms-length business dealings.

Simply stated, the only evidence regarding assent to agency is the language in the Agreement that disclaims agency. Consequently, had the correct legal standard been applied, the district judge would have concluded as a matter of law that there was no agency because there was no evidence of consent to agency.

2. LeadClick did not have or exercise the sort of control necessary to satisfy the "control" element of agency.

There is another reason for this Court to reverse the district judge's agency determination. The district judge's analysis of the "control" element of the agency test failed to take into account the requirements of the Restatement.

The district judge wrote that LeadClick personnel learned information about potential publishers, scouted for new publishers and approved entry into the eAdvertising network by potential publishers.[131] None of those actions demonstrates that LeadClick had control over any of the publishers in the way required by the Restatement.[132]

The district judge focused on the language in the Agreement that allowed LeadClick to veto certain websites or newsletters.[133] Similarly, the district judge noted that

> after the FTC began suing affiliate marketers in April 2011 for using fake news sites, LeadClick started to screen fake news pages by removing their ability to advertise certain products without approval from the merchant.[134]

But the Restatement makes clear that agency is not demonstrated by the ability of one party to a contract to veto conduct by another party.

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131 *See id.* at 23. (R. at 23a)

132 In the discussion of agency, the district judge at one point referred to LeadClick as LeanSpa's agent. *See* Opinion at 25. (R. at 25a). This was presumably an oversight. In any event, it is irrelevant because the FTC's theory of liability rests on saddling LeadClick with the offensive content created by publishers, not for anything done by a merchant such as LeanSpa. Moreover, there is no evidentiary support for the existence of an agency relationship between LeanSpa and LeadClick.

133 *See* Opinion at 24 (R. at 24a) (*citing* Agreement at § III) (R. at 371a)

134 Opinion at 24 (R. at 24a)

Moreover, the quoted language is more consistent with control by the merchants than by LeadClick.[135]

In sum, measured against the correct legal standard, the evidence not only does not support any finding that LeadClick had a principal/agent relationship with any publisher, it instead proves the opposite. The district court erred. First, it should never have considered the improperly and untimely introduced agency theory. Second, it applied a legally incorrect standard to determine agency. Third, the record evidence does not support a finding of agency under the correct legal theory.

Because LeadClick did not create the offensive content, the offensive content is not attributed to LeadClick and agency cannot provide a basis for imposing liability on LeadClick, this Court should vacate the judgment against LeadClick and either render judgment for LeadClick or remand the case for the district judge to do so.

* * *

As demonstrated above, the district judge erred in at least two fundamental and reversible ways.

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135 *See* Restatement (Third) of Agency § 1.01 cmt. f ("[t]he right to veto another's decisions does not by itself create the right to give affirmative directives that action be taken, which is integral to the right of control within common-law agency.").

First, the district judge erred in denying LeadClick the immunity to which it is entitled under Section 230 of the CDA. LeadClick was an interactive service provider, and it was not an information content provider with respect to any of the offending content. LeadClick was, therefore, entitled to CDA immunity.

Second, the district judge held LeadClick liable for a violation of Section 5 of the FTC Act despite the utter lack of evidence that LeadClick created (or had attributed to it) the deceptive statements on the fake news sites. In the course of imposing such liability, the district judge employed an unpleaded and incorrect legal standard to hold LeadClick liable through an eleventh-hour agency theory for content created wholly by the publishers. Considered through the lens of the correct legal standard, the evidence simply does not support the district judge's agency conclusion.

The Court should agree with LeadClick on both of these points, but it need not agree on both points for LeadClick to prevail in this appeal. If the Court agrees with LeadClick on either point, it should vacate the district court's judgment and either render judgment itself in favor of LeadClick or remand the case with instructions to the district judge to enter judgment for LeadClick.

CONCLUSION

For all the foregoing reasons, Appellant LeadClick Media, LLC, respectfully requests that this Court vacate the judgment of the district court dated March 6, 2015; reverse the order of March 5, 2015, granting summary judgment to the appellees and either render judgment for Appellant or remand the case with instructions for the district judge to do so.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limitation of Fed. R. App. P. 32(a)(7)(B) in that, according to the word-counting feature of Microsoft Word, it includes 13,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the typestyle requirement of Fed. R. App. P. 32(a)(6) in that it has been prepared in a proportionally spaced typeface using Microsoft Office's Century Schoolbook font.

/s/ Walter P. Loughlin

CERTIFICATE OF SERVICE

I certify that, on December 17, 2015, I filed the attached final form opening brief with the Court's ECF system such that the following will receive service automatically. I also certify that I sent one paper copy of the attached brief to the following by U.S. Mail, postage-prepaid, at the designated addresses:

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