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 REPLY BRIEF OF APPELLANT LEADCLICK MEDIA, LLC (SUCCESSOR TO LEADCLICK MEDIA, INC.)

Walter P. Loughlin
K&L GATES LLP
599 Lexington Ave.
New York, NY 10022
(212) 536-3900
walter.loughlin@klgates.com

Counsel for Appellant LeadClick Media, LLC (successor to LeadClick Media, Inc.)

(additional counsel listed on next page)

Elisa J. D'Amico
K&L GATES LLP
Southeast Financial Center
200 South Biscayne Blvd.
Suite 3900
Miami, FL 33131
(305) 539-3300
elisa.damico@klgates.com

David R. Fine
K&L GATES LLP
17 North Second St.
Harrisburg, PA 17101
(717) 231-4500
david.fine@klgates.com

Of Counsel:

Paul F. Hancock
K&L GATES LLP
Southeast Financial Center
200 South Biscayne Blvd.
Suite 3900
Miami, FL 33131
(305) 539-3300
paul.hancock@klgates.com

David A. Bateman
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
(206) 370-6682
david.bateman@klgates.com

Additional Counsel for Appellant LeadClick Media, LLC (successor to LeadClick Media, Inc.)

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.

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. In defending the district judge's denial of CDA immunity, the FTC misstates both the law and the evidentiary record. 3

- A. The FTC's argument that LeadClick did not provide an interactive computer service seeks to read into the statute a requirement nowhere in the text or in any judicial opinion interpreting the statute. 4
- B. The FTC's argument that LeadClick was an information content provider relies on inapposite cases that in fact demonstrate the opposite. 7
- C. The FTC's argument seeks impermissibly to impose publisher liability on LeadClick. 14

II. In defending the district judge's conclusion that LeadClick could be liable for violating the FTC Act, the FTC ignores its own pleadings and misstates the law and the record. 16

- A. The FTC's argument that LeadClick could be directly liable under the FTC Act misstates both the law and the record and, in essence, asserts aiding-and-abetting liability. 18
- B. The FTC's argument that LeadClick could be vicariously liable for content created by third parties misstates both the law and the record. 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Federal Cases

1-800 Contacts, Inc. v. Lens.com, 722 F.3d 1229 (10th Cir. 2013) 24

FTC v. Accusearch, Inc., 570 F.3d 1187 (10th Cir. 2009) 8, 9, 10, 11

Am. Online, Inc. v. National Health Care Discount, Inc., 121 F. Supp.2d 1255 (N.D. Iowa 2000) 6

Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003) 13, 15

Ben Ezra, Weinstein & Co., Inc. v. Am. Online Inc., 206 F.3d 980 (10th Cir. 2000) 10

Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994) 25

Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003) 3, 4, 8

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 19, 20

Cleveland v. Caplaw Enterprises, 448 F.3d 518 (2d Cir. 2006) 24

FTC v. Direct Mkt'g Concepts, Inc., 569 F. Supp.2d 285 (D. Mass. 2008) 22

Fair Hous. Council of San Fernando Co. v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) 8, 12

FTC v. Freecom Communications, Inc., 401 F.3d 1192 (10th Cir. 2005) 20

Johnson v. Priceline.com, Inc., 711 F.3d 271 (2d Cir. 2013) 23, 25

Jones v. Dirty World Enter. Rec. LLC, 755 F.3d 398 (6th Cir. 2014) 8

FTC v. Magui Publishers, Inc., 9 F.3d 1551 (9th Cir. 1993) 22

FTC v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010) 22

Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963) 22

Ricci v. Teamsters Union Local 456, 781 F.3d 25 (2d Cir. 2015) 3, 4

Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3rd Cir. 1998) 20, 21

Shapiro v. Cantor, 123 F.3d 717 (2d Cir. 1997) 20

Universal Communications Systems, Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007) 4

United States v. Vilar, 729 F.3d 62 (2d Cir. 2013) 14

FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922) 22

Wright v. Ernst & Young LLP, 152 F.3d 169, 174 (2d Cir. 1998) 19

Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997) 9, 28

State Cases

Vazquez v. Buhl, 90 A.3d 331 (Conn. App. 2014) 19

Federal Statutes

Communications Decency Act, 47 U.S.C. § 230 .... *passim*

Computer Fraud and Abuse Act, 1030(a)(2)(C) 6

FTC Act, 15 U.S.C. §45 .... *passim*

Other Authorities

Oxford English Dictionary 6

Restatement (Third) of Agency § 1.01 cmt. f. 26, 27

Webster's II New College Dictionary (1995)... 6

PRELIMINARY STATEMENT

The FTC's brief highlights a central point LeadClick made in its opening brief: in pursuing this action, the FTC has overreached both in terms of the facts and the law in an effort to impose FTC Act liability in a circumstance no court has ever approved and to deny CDA immunity where it plainly applies.[1]

Although the FTC seeks in its brief to obscure the weakness of its legal position by constant repetition of the phrase "fake news site," it cannot avoid the undisputed fact that LeadClick—the provider of the online marketplace that connected publishers, consumers and merchants—did not make or contribute to either of the two statements the district judge concluded were deceptive in the "fake news sites": that a reporter had independently tested LeanSpa's products and that consumer comments on those sites were real.[2] The FTC points to snippets of evidence that LeadClick personnel had occasional discussions with publishers about *other* parts of fake news sites.[3] But

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[1] LeadClick uses here the same defined terms it used in its opening brief.

[2] In its opening brief and in this reply brief, LeadClick uses the FTC's pejorative term "fake news site" as a shorthand designation for the web sites created and posted by publishers who designed them in the format used online by news organizations. Importantly, the district judge did not make any determination that the fake news sites were inherently deceptive. At the FTC's request, she focused on the two types of content described in the text above.

[3] For example, at Page 8 of its appellate brief, the FTC cites e-mail correspondence in which a publisher discusses certain content with a LeadClick employee. But that evidence, PX-68 (R. at 787-99a), plainly

the agency's strategy serves only to underscore the weakness of its position. For purposes of both FTC Act liability and designation as an information content provider under the CDA, the focus must be on the content alleged to be deceptive, and the evidence ineluctably demonstrates that LeadClick had no role in creating that content.[4]

Unable to point to record evidence to show that LeadClick was directly liable under the FTC Act or an information content provider for purposes of the CDA, the FTC seeks refuge in a theory of agency, contending that the publishers who created the offensive content were LeadClick's agents. As the briefs and record reveal, the FTC has now abandoned the incorrect standard for agency it urged on the district court (which accepted and then used that inappropriate standard). But even the FTC's revised agency theory remains legally incorrect. Moreover, the evidence—viewed in light of the proper standard—does not support the FTC's contention or the district judge's conclusion on the issue of LeadClick's alleged liability through agency.

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discusses attributes of the web site different from the ones the district court found to be deceptive. Moreover, the correspondence, taken as a whole, demonstrates that LeadClick was conveying to publishers guidelines from advertisers who wanted to be sure the web sites were not misleading. The advertiser guidelines required the fake news sites to be labeled "advertisement" or "advertorial" on all pages in type no smaller than 12 points. *Id.*

[4] The FTC's characterization of the factual record is misleading. While LeadClick could catalogue here all of those mis-citations, doing so would take up an undue amount of space and, ultimately, be unnecessary because, even if the facts were as the FTC alleges, the law would still require judgment to be entered in LeadClick's favor.

This Court should vacate the judgment below and either enter judgment itself in favor of LeadClick or instruct the district judge to do so.[5]

ARGUMENT

I. In defending the district judge's denial of CDA immunity, the FTC misstates both the law and the evidentiary record.

The FTC's discussion of CDA immunity ignores the actual language of Section 230 and the cases interpreting it.

This Court has held that the statutory term "interactive computer service" is to be broadly construed, but the FTC asks this Court to reverse that approach and instead adopt a restrictive definition at odds with the statutory text and the relevant authorities.[6] On the other hand, courts have held that "information content provider" should be narrowly construed and focused on the specific content alleged to be offensive.[7] The FTC, however, argues for a definition of "information content provider" far broader than the statute or any existing case law can or should support.

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[5] Such a result would hardly leave the FTC or any affected consumers without a remedy because the persons and entities that actually made the deceptive statements have exposure to FTC Act liability (and, indeed, the FTC has already sued and settled with several of them, including LeanSpa and its principals).

[6] *See Ricci v. Teamsters Union Local 456,* 781 F.3d 25, 27-28 (2d Cir. 2015).

[7] *See, e.g., Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1123 (9th Cir. 2003).

A. *The FTC's argument that LeadClick did not provide an interactive computer service seeks to read into the statute a requirement nowhere in the text or in any judicial opinion interpreting the statute.*

In making its argument that LeadClick was not an interactive computer service, the FTC is forced to ignore the well-established principle that the CDA "defines 'interactive computer service' expansively ..." so that the definition should be read broadly.[8] Instead, the agency quibbles.

The FTC does not deny the facts LeadClick has described, and it has never offered expert evidence to counter the unambiguous conclusion of LeadClick's expert, a leading forensic firm:

> I was asked to determine whether LeadClick provided or enabled computer access by multiple users to a computer server in connection with its operation of an affiliate network. As discussed below, the answer to the question is "Yes." Affiliate network software in general, and LeadClick's licensed software platform in particular, runs on a server that acts as an intermediary between publishers' advertisements and the webpages of online merchants on whose behalf the publishers advertise.[9]

It is, therefore, unsurprising that, with respect to the affiliate marketing network, the FTC concedes that, typically, "[a] publisher placed that link [provided by LeadClick] on its website, and when a

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[8] *See Ricci, supra; see also, Carafano,* 339 F.3d at 1123; *Universal Communications Systems, Inc. v. Lycos, Inc.,* 478 F.3d 413, 419 (1st Cir. 2007).

[9] Report of Bret Padres of Stroz Freidberg, LLC (the "Stroz Report"), at ¶ 3. (R. at 396-97a) The designer of the system concurred. *See* Deposition of Samuel Prokop at 11, 80-82. (R. at 379, 384-85a)

customer clicked on it, he was directed to the HitPath server, which then tabulated the click and forwarded the consumer to the underlying merchant's website."[10]

That concession would seem inarguably to put to rest any argument that LeadClick was not an "interactive computer service." However, the FTC strains to build an argument that LeadClick was not an "interactive computer service" because "consumers did not 'access' the HitPath server for purposes of the statutory definition."[11] To support its counter-textual argument, the FTC points to the fact that the HitPath server was invisible to consumers and, so, consumers did not attempt to navigate to it and had "no meaningful 'interaction'" with it.[12]

The FTC cites no legal authority to support this argument, and there is none. The statutory definition requires only that the service provide multiple users with "access" to a server, not that the users specifically seek to use the service or that they even know that the service provides their access to the server. Nor would the invited judicial amendment to the statute make sense either as a matter of statutory interpretation or technology. All computer networks have aspects that are invisible to users.

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[10] *See* FTC Br. at 34.

[11] *Id.*

[12] FTC Br. at 34.

When Congress has used the word "access" in similar contexts, courts have agreed with LeadClick's interpretation of the word. Section 1030(a)(2)(C) of the federal Computer Fraud and Abuse Act (the "CFAA") requires proof that the defendant "access[ed]" a protected computer. Courts have interpreted the word "access" in the CFAA broadly to include essentially any use of a computer's resources. For instance, in *Am. Online, Inc. v. National Health Care Discount, Inc.*,[13] the court held that "when someone sends an e-mail message from his or her own computer, and the message then is transmitted through a number of other computers until it reaches its destination, the sender is making use of all those computers, and is therefore 'accessing' them."

In a footnote, the FTC raises a dueling-dictionaries argument. In its opening brief, LeadClick referred to the definition of "access" as "[a] means of approaching."[14] The FTC chides LeadClick for using this definition and instead offers a definition from the Oxford English Dictionary (the "OED"). But the FTC cites only the OED's definition of "access" as a verb. Section 230(f)(2) uses it as a noun ("provides or enables computer access"). The OED's definition of "access" as a noun supports LeadClick's interpretation: "The opportunity, means, or permission to gain entrance to or use a system, network, file, etc."[15] The

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[13] 121 F. Supp.2d 1255, 1272-73 (N.D. Iowa 2000).

[14] *See* Webster's II New College Dictionary at 6 (1995).

[15] *See* Oxford English Dictionary (online version, last viewed Oct. 23, 2015).

FTC cannot meaningfully challenge the conclusion that LeadClick provided or enabled consumers to have the "opportunity, means, or permission to gain entrance to or use" the HitPath server and subsequently the merchants' sites and, indeed, the FTC's brief admits as much.[16]

LeadClick's affiliate network was an interactive computer service provider.

B. The FTC's argument that LeadClick was an information content provider relies on inapposite cases that in fact demonstrate the opposite.

In the trial court, the FTC alleged and the district judge found that two aspects of the fake news sites were deceptive: the assertion that a reporter had conducted independent tests of the LeanSpa products and the inclusion of comments purporting to be from independent consumers.[17] The FTC admitted in the district court that the fake news sites and their content "were not originated with LeadClick" and that, in fact, the content was created before there was any involvement by LeadClick.[18]

Because courts have uniformly held that the term "information content provider" is to be narrowly construed and focused on the specific content alleged to be actionable, the FTC's admission should conclude

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16 *See* FTC Br. at 34.

17 *See* Opinion at 18. (R. at 18a)

18 *See* Oral Argument Tr. at 18 (R. at 96a)

the analysis.[19] The actionable content pre-existed LeadClick's involvement, and so LeadClick could not have been "responsible, in whole or in part, for the creation or development" of that content.[20] No court has ever held a defendant liable for "creation" or "development" of pre-existing unlawful content.[21]

In an attempt to avoid that straightforward conclusion, the FTC offers a new theory: "As in *Accusearch* and *Roommates.com,* LeadClick's responsibility under the CDA for the content of deceptive marketing arises not from its direct creation of the particular deceptive content, but from its deliberate recruitment and selection of fake news site marketers."[22] No court has embraced the FTC's new "recruitment-and-selection" theory, and for good reason. Such a rule would run directly counter to the CDA's well-established intention to create "federal immunity to any cause of action that would make service providers

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[19] *See, e.g., Carafano,* 339 F.3d at 1123-25 (definition is narrow and focuses on the content alleged to be actionable); *Jones v. Dirty World Enter. Rec. LLC,* 755 F.3d 398, 410 (6th Cir. 2014) (same).

[20] *See* 47 U.S.C. § 230(f)(3) (defining "information content provider").

[21] In *FTC v. Accusearch, Inc.,* 570 F.3d 1187 (10th Cir. 2009), the content at issue was telephone records, some of which perhaps existed before the defendant began operations. But the Tenth Circuit made clear that the records themselves were not inherently unlawful; the unlawfulness was in the defendant's improper acquisition and disclosure of them, and those activities of course did not precede the defendant's involvement.

[22] *See* FTC Br. at 40 (*citing Accusearch* and *Fair Hous. Council of San Fernando Co. v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008).

liable for information originating with a third-party user of the service."[23]

Importantly, the relevant cases, including the two decisions on which the FTC relies, explicitly or at least implicitly reject the theory the FTC now espouses.[24]

Accusearch, Inc. ("Accusearch"), operated a website known as "Abika.com" through which consumers could buy telephone records that were, in fact, protected from disclosure by federal law. A customer would place a search order with Accusearch, which would forward the order to a third-party researcher to gather the information and send it to Accusearch for delivery to the customer and posting on the customer's Akiba.com account.[25]

When the FTC sued Accusearch, the company claimed CDA immunity and argued it could not be an information content provider with respect to the telephone records because it did not create or develop them.

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[23] *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997).

[24] Space does not permit LeadClick to provide an exhaustive list of the FTC's mis-citations of the factual record, but it is important to note that the FTC's repeated assertion that LeadClick deliberately sought out fake news sites for inclusion in the network is simply wrong. The evidence the FTC relies on says something quite different: LeadClick reviewed a "scouting report" that listed web entities selling certain sorts of products. *See* Chiang Depo. at 43-44. (R. at 156a) LeadClick was interested in entities selling certain sorts of products, not in fake news sites.

[25] 570 F.3d at 1191.

The Tenth Circuit rejected Accusearch's argument. It held that the gathered and disclosed telephone records themselves were the offending content and that Accusearch was responsible for developing them because it "solicited requests for such confidential information and then paid researchers to obtain it."[26] Importantly, in the course of its analysis, the appeals court explained that the proper inquiry is whether the defendant was "responsible for the development of the *specific content that was the source of the alleged liability*" and that "one is not 'responsible' for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content…"[27]

The Tenth Circuit distinguished its opinion in *Ben Ezra, Weinstein & Co., Inc. v. Am. Online Inc.*[28] There, the plaintiff corporation sued AOL for posting online incorrect information about the company's stock price and share volume. AOL compiled stock information from a third-party vendor. The Tenth Circuit held that AOL was entitled to CDA immunity. In *Accusearch,* the defendant argued its situation was analogous, but the court of appeals disagreed.

> But Accusearch takes too broad a view of what was the relevant information in *Ben Ezra.* Although America Online solicited stock quotations, the plaintiff's claim was based on *inaccuracies* in the solicited quotations. The "offending

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[26] *Id.* at 1199.

[27] *Id.* (emphasis added).

[28] 206 F.3d 980 (10th Cir. 2000).

> content" was thus erroneous stock quotations and, unsurprisingly, America Online did not solicit the errors … If the information solicited by America Online had been inherently unlawful—for example, if it were protected by contract or was child pornography—our reasoning would necessarily have been different.[29]

In this case, there is no allegation, no evidence and no finding that the fake news sites were inherently unlawful. Both the FTC and the district judge focused on two, specific parts of those sites: the claims of independent testing and the consumer comments. There is no evidence—nor has the FTC cited any—that LeadClick solicited these two types of statements from any publisher. Under *Accusearch,* LeadClick would not be adjudged an information content provider.

Roommates.com operated a web site that matched people with places to live. Roommates.com required users to answer an online questionnaire with pre-populated drop-down menus that sought information about gender, sexual orientation and children. Other users could then view the responses and use Roommates.com's search function to filter the responses. Housing rights groups sued Roommates.com and alleged that it violated the Fair Housing Act and other statutes by asking those questions, posting the answers and providing users with the ability to sort the responses according to discriminatory criteria. Roommates.com claimed CDA immunity.

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[29] *Accusearch,* 570 F.3d at 1199-1200 (emphasis original).

The *en banc* Ninth Circuit held that Roommates.com was plainly an information content provider with respect to the questions it had itself created and posted, and the court then examined at some length whether Roommates.com was an information content provider with respect to the responses and the search function. Since Roommates.com did not "create" the responses, the court focused on whether Roommates.com was "responsible" for the "development" of the content.

The Ninth Circuit made clear that a defendant could not be held responsible for development merely by "augmenting the content generally," but that it must "materially contribut[e] to its alleged unlawfulness."[30] The court held that Roommates.com was responsible for developing the unlawful content (the discriminatory responses) because it specifically required users to provide content that was intrinsically unlawful.[31]

Even had LeadClick in fact solicited the participation of fake news sites in the network, which it did not, there is no evidence that LeadClick sought out the content that the FTC alleged and the district judge found to be deceitful: the specific assertions about independent testing and consumer comments. All of the evidence demonstrates that the publishers—and the publishers alone—created that content themselves with no contribution by LeadClick.

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[30] 521 F.3d at 1167-68.

[31] *Id.* at 1169-70.

Thus, the two cases the FTC relies on, *Accusearch* and *Roommates.com,* in fact support LeadClick's position.

Finally, the FTC asserts that LeadClick could be an information content provider vicariously through some sort of theory by which the publishers who actually created the two types of offending content could be considered LeadClick's agents.[32] Again, it is uncontroverted that the publishers created the offending content *before* they ever sought to include their sites in LeadClick's network.[33]

Moreover, the FTC offers no legal authority that would support such a vicarious attribution. It points only to the Ninth Circuit's opinion in *Batzel v. Smith.*[34] The FTC's description of *Batzel* is misleading. The court did not "accept without question that agency-law principles apply under Section 230." Its discussion of CDA immunity was in one section focused on one defendant (III(C)).[35] Its discussion of agency was in a different section (IV) that focused on the potential liability of a different defendant for defamation and that included no discussion of the CDA.[36] The FTC has taken the Ninth Circuit's analysis out of context.

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[32] FTC Br. at 36-37.

[33] *See* Oral Argument Tr. at 18. (R. at 96a)

[34] 333 F.3d 1018 (9th Cir. 2003).

[35] 333 F.3d at 1026.

[36] *Id.* at 1035.

The FTC's failure to provide legal authority or even argument why this Court should apply agency principles to Section 230 constitutes a waiver of the point.[37]

There is another reason the Court should not consider whether agency principles could make a defendant a "vicarious" information content provider: there is no need to reach that issue. As LeadClick demonstrated in its opening brief (and below in Section II(B)), the evidence could not support a determination that any publisher acted as LeadClick's agent at all, much less with respect to the creation or development of the offending content.

LeadClick was not an information content provider for purposes of Section 230 of the CDA.

C. The FTC's argument seeks impermissibly to impose publisher liability on LeadClick.

The Ninth Circuit's decision in *Batzel* does not support the proposition for which the FTC offered it, but it is helpful nonetheless. The third consideration in determining whether a defendant is entitled to CDA immunity is whether a claim is made that seeks to hold the defendant liable as a publisher of the offending content.[38] *Batzel* addresses this point:

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[37] *See United States v. Vilar,* 729 F.3d 62, 79 n.8 (2d Cir. 2013).

[38] *See* LeadClick Op. Br. at 31-32. Notably, the FTC ignores this issue in its brief.

> … a central purpose of the [CDA] was to protect from liability service providers and users who take some affirmative steps to edit the material posted. Also, 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.
>
> The "development of information" therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication.[39]

The FTC is mistaken when it labels LeadClick an information content provider because it allegedly "required affiliates to change their pairing of products in fake news sites," told publishers not to market diet products "without the merchant's approval of that marketing," "reached out to affiliate marketers that it knew used fake news sites," "recruited them to promote LeanSpa's products" and paid them for sales generated by them.[40] Under the legal authority on which the FTC itself relies, such activities are not those of an information content provider but of a "publisher" as that term is defined in Section 230 and *Batzel*—

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[39] 333 F.3d at 1031.

[40] *See* FTC Br. at 29-31. At Page 37 of its appeal brief, the FTC asserts vaguely—and without support or accuracy—that LeadClick "actively managed [the publishers'] activities." As LeadClick demonstrates in this brief and in its opening brief, its role with respect to the publishers was limited and certainly did not include "management" of anything.

making editorial suggestions, selecting material for publication and paying for marketing results.[41]

The district court erred in denying LeadClick immunity under the CDA.

II. In defending the district judge's conclusion that LeadClick could be liable for violating the FTC Act, the FTC ignores its own pleadings and misstates the law and the record.

The FTC's retreat from its own pleadings and the district judge's conclusions is perhaps nowhere as evident as in its discussion of FTC Act liability.

In its amended complaint, the FTC focused its FTC Act claims against LeadClick on two parts of the fake news sites: that a reporter had conducted independent testing and that purported consumer comments were real.[42] Accordingly, the district judge focused her analysis on those two elements of the fake news sites, which she then held to be deceptive.[43]

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[41] *See* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[42] First Amended Complaint, ECF No. 90, No. 3:11cv11715(JCH). (R. at 420a)

It is worthwhile to reiterate a point LeadClick made in its opening brief: more than 95 percent of the consumer complaints that form the basis of the claim for restitution did not address fake news sites in any respect (let alone the two allegedly deceptive statements) and, instead, focused on LeanSpa's credit-card billing practices. There is no allegation that LeadClick had any role in billing consumers.

[43] *See* Opinion at 17-21. (R. at 17-21a) In its brief in this Court, the FTC inaccurately asserts that "LeadClick does not challenge the district

Now, on appeal, confronted with LeadClick's demonstration that the record could not support imposing on it either direct or vicarious liability, the FTC backs away from the allegations on which it relied for years and, instead, asserts (often inaccurately) that LeadClick should be held liable in some general way for interacting with the fake news site publishers. In other words, while expressly denying that it is trying to impose aiding and abetting liability, the FTC implicitly makes just that argument.

The FTC likewise retreats from the incorrect definition of agency it urged on the district judge. However, the FTC still misstates the applicable law.

LeadClick did not make the offending statements, the offending statements were not attributed to LeadClick and the persons and businesses that in fact made the offensive statements were not LeadClick's agents.[44]

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court's conclusion that the use of fake news sites to market LeanSpa products was a deceptive practice." FTC Br. at 18. As noted, the district judge reached no such broad conclusion. *See* Opinion at 18-19. (R. at 18-19a)

[44] Because the Connecticut state statute on which the State of Connecticut sued parallels the FTC Act, the parties have no need to address the state statute separately.

A. *The FTC's argument that LeadClick could be directly liable under the FTC Act misstates both the law and the record and, in essence, asserts aiding and abetting liability.*

The FTC conceded long ago that LeadClick did not make either of the deceptive statements because those sites and the text in them was created before LeadClick had any business involvement with LeanSpa or those sites.[45]

For most of the proceedings in the district court, the FTC sought to evade that most elemental problem with its case by pursuing evidence that would, had it been true, suggest an aiding and abetting claim against LeadClick. When LeadClick demonstrated that the FTC Act cannot support aiding and abetting liability, the FTC denied it sought to employ such a theory, and it continues that denial on appeal.

The FTC's appellate argument belies its denial. The FTC points to no evidence that LeadClick had any role in creating the offensive content. The evidence the FTC relies on would, if true, suggest at most aiding and abetting liability. For example, the FTC asserts that LeadClick "reached out to" and "recruited" publishers it knew used fake news sites "to drive traffic to LeanSpa's websites through LeadClick's network," that LeadClick "provided input to" publishers regarding their sites, that LeadClick "instructed them on requirements" for promoting LeanSpa products on their websites and that LeadClick bought space

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45 *See* Oral Argument Tr. at 18. (R. at 96a)

on third-party websites that it sold to publishers for them to use to advertise their fake news sites (the so-called "media buying").[46]

With respect to many of these allegations, the FTC has mischaracterized the evidence. Even if the allegations were correct, however, they describe at best aiding and abetting (and probably not even that).

In its opening brief, LeadClick explained why this Court should reject aiding and abetting liability under the FTC Act and apply the bright-line test it described in *Wright v. Ernst & Young LLP:* to be primarily liable, a defendant must have made the statement himself or had the statement attributed to him.[47] The Court developed the test following the Supreme Court's rejection of aiding and abetting liability under the Securities Exchange Act of 1934 in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[48]

The FTC argues against application of the bright-line test because, it says, the Securities Act requires actual reliance while the FTC Act requires that the statement be "likely to mislead."[49] The

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[46] The FTC's media-buying argument is also foreclosed by cases that make clear that a party does not lose CDA immunity when it enhances the visibility of offending content created by others. *See, e.g., Vazquez v. Buhl,* 90 A.3d 331 (Conn. App. 2014) (Section 230 provided immunity for CNBC when it included in an article a hyperlink to a third-party site that included defamatory statements).

[47] 152 F.3d 169, 174 (2d Cir. 1998).

[48] 511 U.S. 164 (1994).

[49] FTC Br. at 24.

agency fails, however, to explain why that difference is material, and the agency ignores this Court's rationale in establishing the bright-line test.[50]

In *Central Bank,* the Supreme Court held that "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."[51] The same is true of the FTC Act, which likewise makes no reference to aiding or abetting. In establishing the bright-line test, this Court explained that "[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b)."[52]

Other courts have relied on *Central Bank* to reject aiding and abetting liability with respect to other statutes that make no mention of the theory. For example, in *Rolo v. City Investing Co. Liquidating Trust,*[53] the Third Circuit held that an aiding and abetting claim under

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50 Moreover, as the FTC itself acknowledges, *see* FTC Br. at 24 n.8, the FTC Act in fact requires proof of reliance in order to establish a right to financial redress. *See FTC v. Freecom Communications, Inc.,* 401 F.3d 1192, 1206 (10th Cir. 2005).

51 511 U.S. at 177.

52 *Shapiro v. Cantor,* 123 F.3d 717, 720 (2d Cir. 1997) (quotation omitted).

53 155 F.3d 644, 657 (3rd Cir. 1998).

the civil provisions of RICO "cannot survive the Supreme Court's decision" in *Central Bank.*[54] The court held that, in *Central Bank,* "[t]he Court's analysis began and ended with a review of the language of the statute."[55] Because RICO includes no language suggesting aiding and abetting liability, *Central Bank* precluded that form of liability.[56]

All of the conduct the FTC alleges in this case would, if true, suggest only aiding and abetting, yet the FTC offers it under the guise of "direct" liability. In doing so, the agency errs.

In its remaining effort to prove LeadClick directly liable, the FTC points to a series of cases for the proposition that "a person is a wrongdoer [under the FTC Act] who so furnishes another with the means of consummating a fraud."[57] But the FTC twists the meaning of that holding and the cases on which it relies.

Consider *Winsted Hosiery,* the case the FTC first cites and that the remainder of the listed cases relied on. The defendant in that case manufactured underwear and labeled it as various types of wool even though it actually contained very little wool. The FTC alleged unfair competition. The defendant asserted that the retailers to whom it sold the goods would know that the labels were not literally true, but the

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54 155 F.3d at 656.

55 *Id.*

56 *Id.* at 657.

57 *Id.* at 20 (*quoting FTC v. Winsted Hosiery Co.,* 258 U.S. 483, 494 (1922).

Supreme Court rejected the argument.[58] It is not clear why the FTC believes *Winsted Hosiery* is relevant to this case since, there, the defendant itself actually committed the unfair trade practice when it incorrectly labeled the underwear while, here, it is undisputed that LeadClick did not make the deceptive statements. *Regina Corp. v. FTC*;[59] *FTC v. Magui Publishers, Inc.*;[60] *FTC v. Neovi, Inc.,*[61] and *FTC v. Direct Mkt'g Concepts, Inc.,*[62] are similarly distinguishable.[63]

The FTC's unsupported allegations, if true, would point only to aiding and abetting liability, which the FTC Act does not permit.

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[58] 258 U.S. at 494.

[59] 322 F.2d 765 (3d Cir. 1963).

[60] 9 F.3d 1551 (9th Cir. 1993).

[61] 604 F.3d 1150 (9th Cir. 2010).

[62] 569 F. Supp.2d 285 (D. Mass. 2008).

[63] In *Regina Corp.*, for example, the defendant published misleading price lists and provided them to retailers who passed them along to consumers. The defendant was not held liable for what anyone else did but for its own conduct in publishing the misleading price lists.

In *Magui*, the Ninth Circuit held that it had no need to consider whether a publishing company aided and abetted the deceptive sale of prints allegedly by Salvador Dali because the company made deceptive statements itself and was, therefore, directly liable.

In *Neovi,* the defendant operated a website that allowed users to create and send checks. When users employed the site to commit fraud and the FTC sued, the website operator argued that it was the users who committed the fraud. The Ninth Circuit disagreed because the website operator itself printed and delivered the fraudulent checks.

Put simply, the FTC's cases are readily distinguishable from this one.

B. The FTC's argument that LeadClick could be vicariously liable for content created by third parties misstates both the law and the record.

The district judge accepted the FTC's eleventh-hour suggestion that LeadClick could be liable for violating the FTC Act under an agency theory.[64]

In its opening brief, LeadClick demonstrated that the district judge assessed agency under an incorrect legal standard.[65] The FTC apparently now agrees, since its appellate brief seeks to justify a finding of agency under a different standard. But the FTC still misstates the applicable standard, and the facts of record do not demonstrate agency when assessed against the right standard.[66]

The FTC concedes that, to impose vicarious liability on LeadClick, it would need to prove (1) LeadClick's intention that the publishers would act on LeadClick's behalf, (2) the publishers' acceptance of such an undertaking and (3) an understanding that LeadClick would be in control of the undertaking.[67] Having acknowledged the proper standard,

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[64] As LeadClick noted in its opening brief, the FTC first raised its agency theory in a reply brief in support of its motion for summary judgment. The district judge should not have allowed that *de facto* amendment of the complaint.

[65] *See* LeadClick Op. Br. at 41-44.

[66] The FTC devotes a footnote to its contention that there was an agency relationship between LeanSpa and LeadClick. *See* FTC Br. at 27 n.11. The FTC is wrong, but the point is in any event irrelevant.

[67] *See* FTC Br. at 26; *see also, Johnson v. Priceline.com, Inc.,* 711 F.3d 271, 277 (2d Cir. 2013).

though, the FTC's argument ignores how this Court and others have interpreted those elements, and the FTC distorts the factual record.[68]

In its opening brief, LeadClick pointed out that there is no evidence that LeadClick and any of the publishers manifested an agreement that a publisher would "act for" LeadClick and that, in fact, the standard publisher agreement disclaims any agency relationship.[69] The FTC's response is to focus only on the agreement and the cases that hold that such agreements are not determinative.[70] LeadClick acknowledged that authority, but it explained that the agreement "has particular evidentiary value because of the lack of any contrary evidence."[71] One would imagine that, given such an implicit challenge, the FTC would have responded by pointing to evidence of record demonstrating an agreement between LeadClick and any publisher to be principal and agent or for LeadClick to exercise sufficient control

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68 The FTC's approach to describing the relevant authority is often incautious. For example, it asserts that "the Tenth Circuit has deemed a merchant's use of affiliate marketing arranged through an affiliate network to be equivalent to a subagency relationship." The FTC cites *1-800 Contacts, Inc. v. Lens.com,* 722 F.3d 1229 (10th Cir. 2013). But the court specifically wrote that "[w]e need not resolve, however, whether the evidence was sufficient to establish an agency relationship between Lens.com and its affiliates" because the agency, even if it existed, would not have given the alleged agent the authority at issue in the case. *Id.* at 1251.

69 *See* LeadClick. Op. Br. at 48.

70 *See Cleveland v. Caplaw Enterprises,* 448 F.3d 518, 523 (2d Cir. 2006).

71 LeadClick Op. Br. at 49.

over a publisher to establish agency, if there were any such evidence. The FTC has not and could not do so.

The FTC's argument regarding the control element is no stronger.[72] To create an agency relationship, the control must be significant. For example, in *Johnson,* this Court cited with approval the Connecticut Supreme Court's statement that a critical feature is the principal's "right to control the day-to-day work of the alleged agent."[73] In *Johnson,* the Court adopted the Restatement (Third) of Agency's description that

> 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 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.[74]

Measured by that standard, the evidence—both the actual evidence and the FTC's mischaracterization of the evidence—falls well short of the mark.

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[72] The FTC seeks to draw a comparison between this case and *Cabrera v. Jakabovitz,* 24 F.3d 372 (2d Cir. 1994). *Cabrera* is unhelpful because the jury had before it pretrial admissions by both the principal and the agents that there was an agency relationship. *Id.* at 387.

[73] *Johnson,* 711 F.3d at 277.

[74] 711 F.3d at 278 (quotation omitted).

- The FTC points to the district judge's conclusion that "LeadClick has the authority to control the affiliate marketers' use of fake news pages."[75] The district judge's conclusion is not evidence and, as LeadClick demonstrated in its opening brief, the evidence on which the district judge relied for that conclusion in no way suggests the sort of control *Johnson* and the Restatement require for agency.[76] Moreover, of course, the focus of the analysis must be on the two statements found to be deceptive.

- The FTC asserts that "LeadClick had the contractual right to review the affiliates' webpages and 'to withhold or refuse approval on any website … for any reason, whatsoever.'"[77] The Restatement, however, makes clear that "[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."[78]

- The FTC asserts that LeadClick "required affiliates to change their pairing of products in fake news sites promoting a two-step weight-loss program."[79] The reference is to testimony that, on one occasion, the owner of LeanSpa asked LeadClick to tell publishers that, if they advertised two products at once, they should pair LeanSpa products only with other LeanSpa products.[80] The witness testified that LeadClick relayed the instruction because "[t]hat's within the purview of the advertiser, to demand whatever conditions he wants, including that…"[81] A single, relayed instruction unrelated to the allegedly unlawful conduct is not sufficient to demonstrate the sort of "day-to-day" control necessary to prove agency.

- The FTC asserts that, "after the FTC sued various affiliate marketers for using fake news sites in April 2011,

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75 FTC Br. at 29 (*citing* Opinion at 24).

76 *See* LeadClick Op. Br. at 47-48.

77 FTC Br. at 29.

78 Restatement (Third) of Agency § 1.01 cmt. f.

79 FTC Br. at 29-30. The Court will recall from LeadClick's opening brief that the district judge and the FTC use the term "affiliate" to refer to the publishers.

80 *See* Chiang Depo. at 58-60. (R. at 158-59a)

81 *Id.* at 60. (R. at 158-59a)

> LeadClick forbade its affiliates to advertise diet products without the merchant's approval of that marketing."[82] The testimony was that, when the FTC took action against certain publishers, LeadClick "realized that it was hard, if not impossible, for [it] to control, given [its] current standards, that behavior."[83] Thus, LeadClick allowed publishers to advertise diet products only if the merchant approved the site.[84] But that one-time action, taken when LeadClick's relationship with LeanSpa was nearing its end, is insufficient to demonstrate the level of control necessary to prove agency—particularly since the publishers created and posted the allegedly offending content long before. First, the witness testified that the very reason LeadClick implemented the policy was that it did not have sufficient control. Second, the Restatement explains that "setting standards in an agreement for acceptable service quality does not of itself create a right of control."[85] Third, the approval policy gave the veto right to the merchant, not to LeadClick and, in any event, a veto right does not make one a principal in an agency relationship.[86]

That is the sum and substance of the FTC's proffered evidence, and it falls far short of demonstrating the control necessary to establish agency.

The FTC's attempt to extend and contort agency principles should raise concerns even beyond the simple fact that it has no foundation in the law. Under the FTC's theory, a party could find itself subject to direct FTC Act liability simply for having a business relationship with someone whom the FTC alleges made deceptive statements. Moreover,

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82 FTC Br. at 30.

83 Chiang Depo. at 70. (R. at 160a)

84 *Id.* at 70-71. (R. at 160a)

85 Restatement (Third) of Agency § 1.01 cmt. f.

86 *Id.*

the FTC's suggestion that LeadClick should be held liable for taking steps to restrict potentially concerning website content is not only inappropriate as a matter of law but also of policy—as the CDA recognizes, interactive computer service providers should be encouraged and not penalized for exercising traditional editorial functions that, in many cases, limit offending content.[87]

* * *

The district court overreached in imposing FTC Act liability on LeadClick either directly or derivatively, and the FTC has failed to demonstrate otherwise. LeadClick did not make the deceptive statements at issue in this case, and it is not legally responsible for the conduct of those who did. This Court should conclude that the district judge erred in holding LeadClick liable under the FTC Act (and its Connecticut counterpart), and the Court should vacate the judgment.

CONCLUSION

The FTC has already sued and settled with the parties that made the deceptive claims and those who sold the products at issue and harmed consumers. Through this lawsuit, the FTC seeks to stretch the law past its breaking point to find other parties to blame notwithstanding the lack of legal or evidentiary support for such an effort. The Court should not sanction that effort. LeadClick is entitled to

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[87] *See Zeran,* 129 F.3d at 333 (undue limitations on CDA immunity impinge on statutory goal of encouraging self-regulation).

immunity under Section 230 of the CDA and, in any event, the undisputed evidence demonstrates that LeadClick is not liable under the FTC Act or the Connecticut statute.

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,

K&L GATES LLP

/s/ Walter P. Loughlin
Walter P. Loughlin
599 Lexington Ave.
New York, NY 10022
(212) 536-3900
walter.loughlin@klgates.com

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Additional counsel listed on next page

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-4500

Elisa J. D'Amico
K&L GATES LLP
Southeast Financial Center
200 South Biscayne Blvd
Suite 3900
Miami, FL 33131
(305) 539-3300

Of Counsel:

Paul F. Hancock
K&L GATES LLP
Southeast Financial Center
200 South Biscayne Blvd
Suite 3900
Miami, FL 33131
(305) 539-3300

David A. Bateman
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
(206) 370-6682

Counsel for Appellant LeadClick Media, LLC (successor to LeadClick Media, Inc.)

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 6,981 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 reply 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:

Michele Arington, Esq.
Assistant General Counsel for Litigation
United States Federal Trade Commission
Room H-576
600 Pennsylvania Avenue, NW
Washington, DC 20580
Counsel for Appellee Federal Trade Commission

Matthew F. Fitzsimmons, Esq.
Assistant Attorney General
Jonathan Blake, Esq.
Assistant Attorney General
Connecticut Office of the Attorney General
110 Sherman Street
Hartford, CT 06105
Counsel for Appellee State of Connecticut

Jonathan Hacker, Esq.
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
Counsel for Appellant CoreLogic, Inc.

/s/ Walter P. Loughlin