STATE OF NORTH CAROLINA COUNTY OF GUILFORD	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 07 CVS 11310
JEFFREY A. and LISA S. HILL, individually and on behalf of all others similarly situated, Plaintiffs, v. StubHub, Inc. d/b/a "StubHub!" and/or "stubhub.com", "John Doe Seller 1", and "John Doe Sellers 2, et. al." Defendants.	MEMORANDUM IN OPPOSITION TO DEFENDANT STUBHUB, INC.'S MOTION TO DISMISS

PLAINTIFFS Jeffrey A. and Lisa S. Hill, on behalf of themselves and members of the class, respectfully submit this Memorandum in Opposition to Defendant StubHub, Inc.'s Motion to Dismiss.

INTRODUCTION

Plaintiffs have asserted claims for civil conspiracy, tortious action in concert, and unfair and deceptive trade practices. These claims arise out of StubHub's unfair and deceptive conduct and its violations of N.C.G.S. § 14-344, which makes it unlawful to sell or offer to sell tickets for an amount "greater than the combined face value of the ticket, tax, and the authorized service fee" not to exceed $3.00 per ticket. StubHub does not dispute that its customers purchase tickets to North Carolina events at prices far exceeding face value plus $3.00. What is in dispute in this lawsuit is whether StubHub bears legal responsibility for these unlawful ticket sales.

In its Motion to Dismiss, StubHub contends it is immune from liability under Section 230 of the Communications Decency Act (hereinafter "CDA" or "Section 230"), which states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). StubHub labors to cast itself as a "neutral forum" that third parties may use for proper, or improper, purposes. In doing so, StubHub disputes the well-pleaded facts of, and presents matters outside the four corners of, Plaintiffs' complaint. This alone provides sufficient grounds to deny StubHub's Motion to Dismiss.

Furthermore, the allegations of Plaintiffs' complaint – which must be taken as true – show that StubHub is a retail website doing online what it cannot not lawfully do as a brick-and-mortar business, namely selling tickets to North Carolina events in excess of face value plus $3.00. The North Carolina General Assembly, through the anti-scalping statute enacted over fifty years ago, has deemed that ordinary consumers should not be forced to decide between foregoing the pleasure of attending live entertainment events, at venues their tax dollars support, or paying greedy ticket brokers inflated prices for resold tickets. As alleged in the complaint, StubHub engaged in activity, on its own and in concert with ticket resellers, that thwarted this protection. For this affirmative conduct by StubHub – conduct not immunized by Section 230 – Plaintiffs, on behalf of themselves and similarly situated North Carolina consumers, ask this Court for relief. Accordingly, StubHub's 12(b)(6) Motion to Dismiss should be denied.

FACTUAL SUMMARY

Plaintiffs Jeff and Lisa Hill are parents of a young girl who expressed her sincere desire to attend the "Miley Cyrus as Hannah Montana" concert on November 25, 2007 at her home town Coliseum in Greensboro, North Carolina. (First Amended Complaint ¶ 8) (hereinafter "FAC"). Despite being online the minute tickets went on sale, Plaintiff Lisa Hill was unable to obtain any tickets to the show at face value through the Greensboro Coliseum's website or its authorized ticket agents.[1] (FAC ¶ 9).

She immediately began searching ticket resale websites, including www.stubhub.com (a website dedicated exclusively to the resale of tickets to live entertainment events), for Hannah Montana tickets. (FAC ¶¶ 5, 9). She located four tickets costing $149.00 each on StubHub's site and acted quickly to purchase them before they too sold out; she had no knowledge of their actual face value. (FAC ¶ 9). Upon receiving the tickets in the mail, Plaintiffs learned that their face value was $56.00 each. (*Id.*). In addition to paying $372.00 more than face value ($93.00 per ticket), Plaintiffs also paid StubHub a commission of $59.60 and a "shipping and handling" charge of $11.95. (*Id.*).

Plaintiffs have alleged that StubHub not only sold these tickets to Plaintiff through its website, but was also directly involved in and responsible for all aspects of the transaction. In ordering the tickets, Plaintiffs authorized StubHub to charge their

[1] This surprised Plaintiffs, but not StubHub. Spokesperson Sean Pate publicly mocked "novice ticket buyers" like Plaintiffs as "parents shopping for their children, who don't realize it's nearly impossible to buy tickets for these hot acts anywhere from resellers" like StubHub. (FAC ¶ 11).

credit card account. (FAC ¶ 9). When Plaintiffs received the tickets from StubHub, the FedEx envelope bore StubHub's return address and account number. (FAC ¶ 10). The envelope also indicated that a StubHub employee caused the shipment to occur. (*Id.*). Plaintiffs were the beneficiaries of StubHub's "Fan Protect Guarantee," under which StubHub assumed the risk of loss of Plaintiffs' tickets, promising to provide equal of better tickets if theirs were not received or invalid. (*Id.*). In every step of the transaction, Plaintiffs dealt only with StubHub. They were never informed of the identity of, nor did they interact with, any supposed third-party ticket "owner." (*Id.*). Accordingly, Plaintiffs have alleged as a factual matter that StubHub is a ticket seller and that it offered for sale and sold the tickets at issue to Plaintiffs. (FAC ¶¶ 10-13).

Prior to the November 2007 concert, Plaintiffs filed this lawsuit to enforce their statutorily protected right to purchase tickets to North Carolina events at face value. With specificity, Plaintiffs have alleged that StubHub violated N.C.G.S. §§ 14-344 and 75-1.1 through its own conduct in charging unlawful service fees on ticket sales, in selling tickets at unlawful prices, and in acting in concert with ticket resellers who have done the same. In response, StubHub filed a Motion to Dismiss under Rule 12(b)(6). In support of its motion, StubHub offers only emphatic denials of Plaintiffs' allegations, contending that it is does not sell tickets, that it does not know the face value of tickets sold through its website, and that unnamed and unidentified third-party "wrongdoers" are to blame.[2] To bolster its denials, StubHub offers a "Declaration," with references

[2] See Memorandum in Support of Defendant StubHub, Inc.'s Motion to Dismiss Amended Complaint p. 19 (hereinafter "Memorandum") (claiming that "liability should rest with the actual wrongdoers . . . the ticket sellers who sell tickets to North Carolina residents for North Carolina venues at prices above face value. Plaintiffs must seek recourse against them, not StubHub."). On at least three occasions, Plaintiffs have

to its website "as of April 17, 2008." (Siegel Declaration p. 1). These references, which do not even purport to refer to the relevant time period of September 2007, are matters outside the pleadings and not properly considered upon this Motion.

Although StubHub suggests in its motion papers that it is nothing more than a "fan to fan" ticket exchange, this image is flatly contrary to facts alleged in Plaintiffs' complaint. StubHub has not sold over ten million tickets since its inception in 2000 by simply putting together individual "fans" to exchange tickets. Rather, StubHub is an on-line ticket retailer, and in this capacity – as alleged in the complaint – StubHub employs, and makes aggressive use of in conducting its business, unfair business tactics that are substantially injurious to North Carolina consumers.

As Plaintiffs plainly allege, StubHub possibly employs – or at a minimum partners with and solicits professional ticket resellers who employ – sophisticated computer programs[3] that allow ticket resellers to cut in line ahead of ordinary consumers when purchasing tickets electronically and to circumvent other ticket purchasing rules. (FAC ¶¶ 5, 12). This allows ticket resellers to buy up online vast quantities of tickets literally seconds after they go on sale. The use of this ticket-acquisition software explains how hundreds of tickets for the 2007 "Hannah Montana" concert at the Greensboro Coliseum vanished moments after being offered for sale by authorized ticket sellers, who sell at face value in compliance with North Carolina law, only to reappear almost

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asked StubHub to identify these supposed "actual third party sellers." StubHub has refused, contending that it is "immune."

[3] At least one federal court has enjoined the use of this computer system because of its harm it "harms the public" in denying them the opportunity to buy tickets at their fair price. See Ticketmaster, LLC v. RMG Techs., Inc. 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

instantaneously on StubHub's website for sale at prices greatly exceeding face value. (FAC ¶¶ 9, 12).

Plaintiffs' Hannah Montana ticket experience is not an isolated occurrence. Indeed, StubHub's spokesperson has publicly admitted that while "[m]any fans have been recently disappointed when despite logging online the minute an on-sale begins, no tickets were available for purchase. It's an unfortunate reality of the primary distribution of tickets today." (FAC ¶ 12).

ARGUMENT

Having been called to account for its violations of North Carolina's anti-scalping statute, StubHub's response is to try to avoid liability at the initial pleadings stage by misusing Section 230 and by pointing the finger at others. However, Plaintiffs' complaint easily passes muster under Rule 12(b)(6). *First*, in moving to dismiss, StubHub improperly disputes the well-pleaded facts of the complaint and improperly relies upon matters outside the complaint. *Second*, StubHub's Section 230 defense is not the proper subject of a Rule 12(b)(6) motion. *Third*, even if an affirmative defense were properly considered at this stage, Section 230 is inapplicable here because Plaintiffs claims do not treat StubHub as the publisher of third-party speec. Plaintiffs have asserted claims against StubHub for its own conduct, not for the content of others. *Fourth*, even if Plaintiffs' claims triggered Section 230 immunity, StubHub has no immunity here because StubHub remains liable for unlawful content *it* creates or that it encourages *third parties* to provide.

I. PLAINTIFFS' COMPLAINT CANNOT BE DISMISSED UNDER RULE 12(b)(6) ON THE BASIS OF DISPUTED FACTS AND MATTERS OUTSIDE THE COMPLAINT.

This is not a case in which the parties disagree over the legal effect of undisputed facts. Rather, in moving to dismiss the complaint, StubHub disputes facts alleged by Plaintiffs that go to the very heart of their claims against StubHub – that StubHub itself sells, and offers to sell, tickets, that StubHub acts in concert with professional ticket resellers in selling tickets at inflated prices on its website, and that StubHub knowingly profits tickets purchases on its website exceeding face value. Moreover, StubHub disputes these facts – alleging that it is not in fact a ticket seller – either outright in its Memorandum or by relying on matters outside the complaint. Rule 12(b)(6) forecloses this approach, which warrants denial of StubHub's Motion to Dismiss.

In deciding a 12(b)(6) motion, the Court must treat the allegations of the complaint as true and construe them liberally in a manner favorable to the pleader. See Hoover v. Ronwin, 466 U.S. 558, 587, 104 S.Ct. 1989, 80 L.Ed. 590 (1984); Griner v. Griner, 652 S.E.2d 72 (N.C.App. 2007). A complaint is not subject to Rule 12(b)(6) dismissal "unless it appears beyond a reasonable doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief." Holloman v. Harrelson, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2002)(citations omitted). In moving to dismiss under 12(b)(6), a defendant cannot rely on conclusory denials of matters alleged in the complaint, nor can it rely on matters outside the four corners of the complaint. See Williams v. Chase Manhattan Mortg. Corp. 2005 WL 2544585 p. 5

(W.D.N.C. 2005).

Here, Plaintiffs have in good faith alleged multiple "set[s] of facts" that will support their claims. They have alleged that StubHub itself sold, and substantially participated in selling, the tickets at issue by pointing to specific facts, such as: (1) they purchased the tickets on StubHub's website, which identified the event, date and venue; (2) Plaintiffs dealt only with StubHub – no ticket "owner" other than StubHub was identified; (3) StubHub charged the purchase price to Plaintiffs' credit card; (4) StubHub shipped the tickets to Plaintiffs in a label bearing StubHub's return address and FedEx account; and (5) StubHub guaranteed Plaintiffs ticket purchase, promising that *it would* supply equal or better tickets in the event of a problem. (FAC ¶ 9).

Plaintiffs have alleged that StubHub acts in concert with ticket resellers to acquire large inventories of tickets ahead of ordinary consumers to resell on StubHub's website for substantial profit. Plaintiffs have also alleged that StubHub and/or those acting in concert with StubHub employ sophisticated computer software to acquire tickets electronically in this fashion. Plaintiffs further allege that StubHub's business model depends upon buying up large quantities of tickets in this fashion, then selling them to consumers who do not realize they are paying scalped prices. Finally, Plaintiffs have alleged that StubHub has full knowledge that its conduct violates anti-scalping statutes in North Carolina and elsewhere.

Responding to the complaint, StubHub cannot dispute or deny these facts, whether through self-serving disclaimers allegedly posted on its website or otherwise. Instead, it must take these allegations as true and argue that they nonetheless fail to

state a cognizable claim for relief . StubHub has not and cannot put forward such an argument here, which defeats its Motion to Dismiss as a matter of course.

II. STUBHUB'S SECTION 230 DEFENSE IS NOT THE PROPER SUBJECT OF A RULE 12(b)(6) MOTION BECAUSE IT IS AN AFFIRMATIVE DEFENSE AND TURNS UPON DISPUTED FACTS.

In moving to dismiss, StubHub argues that an affirmative defense – Section 230 immunity – defeats Plaintiffs' claims. However, federal courts considering Section 230 immunity have regularly held that it "constitutes an affirmative defense, [and a]s the parties are not required to plead around affirmative defenses, such an affirmative defense is generally not fodder for a Rule 12(b)(6) motion." Novak v. Overture Servs., Inc. 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).[4]

Although StubHub cites several cases in support of its assertion that "Section 230 immunity is properly addressed in a motion to dismiss," each case is distinguishable because the plaintiff failed to protest the appropriateness of Rule12(b)(6), failed to demand an opportunity for discovery, or failed to assert that defendant could not satisfy the elements required for immunity. For example, in Doe v. GTE Corp. and Genuity, Inc., the Seventh Circuit goes out of its way to explain: what [defendants] sought, and what the district court granted, is dismissal under Fed. R. Civ.

[4] See also; Gucci America, Inc. v. Hall & Assocs., 135 F.Supp. 2d 409, 412 (S.D.N.Y. 2001) (pivotal issue is "whether Plaintiff's complaint would withstand a motion to dismiss even in the absence of § 230. . . [T]he answer to this question is 'yes.' "); Curran v. Amazon.com, Inc. 2008 WL 472433 at *12 (S.D. W. Va. Feb. 19, 2008) (defendant "relies upon the absence of facts not pled in the complaint and seeks to place the onus on the plaintiff to plead around affirmative defenses, which [plaintiff] need not do. . .CDA immunity is a question awaiting discovery and exploration . . ."); Doctor's Assocs., Inc. v. QIP Holders, LLC, 2007 WL 1186026 (D. Conn. April 19, 2007) (holding "this court finds it cannot decide whether [defendant] is entitled to immunity at this [12(b)(6)] stage of the proceeding;" whether defendant is "information content provider" is question awaiting further discovery).

P. 12(b)(6) for failure to state a claim on which relief may be granted. Yet the reason behind the district court's ruling is not failure to state a claim, but an affirmative defense provided by § 230(c). Affirmative defenses do not justify dismissal under Rule 12(b)(6); litigants need not try to plead around defenses. Plaintiffs do not protest the district court's use of Rule 12(b)(6). . . Nor do they seek a better notice or a crack at discovery.. . . [Thus, the Court] turn[ed] to that question without fussing over procedural niceties to which the parties are indifferent. 347 F.3d 655, 657 (7th Cir. 2003) (citations omitted).[5]

In contrast, in cases where plaintiffs contested the applicability of Section 230 or asserted facts that would render the defense inapplicable, courts have refused to adjudicate the defense at the initial pleadings stage. See Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006) (denying 12(b)(6) motion where plaintiff "alleges that Yahoo! *creates* false profiles, not merely fails to delete them."); Curran 2008 WL 472433 at *12 (denying 12(b)(6) motion where plaintiff contends that defendant is an information content provider rather than a mere interactive computer

[5] The plaintiffs in other cases relied upon by StubHub likewise failed to point to any factual dispute underlying the defendant's Section 230 defense or otherwise failed to argue that their claims did not trigger Section 230. See Universal Commc'n Sys., Inc. v. Lycos, Inc. 478 F.3d 413 (1st Cir. 2007) (affirming dismissal where plaintiff "fail[ed] to explain to the district court its need for discovery" and did not even suggest that defendant was "responsible, even in part, for the creation or dlopment of the alleged [illegal] information"); Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003) (holding there was "no real dispute that [plaintiff's] fundamental tort claim is that [defendant] was negligent in . . . monitoring, screening, and deletion of content from its network," not for creating or jointly creating content); Doe v. Bates 2006 WL 3813758 (E.D. Tex. December 27, 2006) (dismissing action where plaintiff's complaint acknowledged that defendant was *not* responsible for creation or development of information at issue); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002) (affirming demurrer where plaintiff did not dispute that third-party dealers, not defendant, chose content at issue).

service); Children of Am., Inc. v. Edward Magedson, No. CV 2007-003720 (Ariz. Super. Ct. Oct. 31, 2007) (holding 12(b)(6) dismissal inappropriate where plaintiffs alleged that defendant authored content and was thus information content provider).

Unlike the plaintiffs in cases cited by StubHub, Plaintiffs here do contest the propriety of dismissal under Rule 12(b)(6) and they do seek discovery on a host of factual topics directly related to their claims. Critically, Plaintiffs also contend that StubHub cannot satisfy the requirements of Section 230 immunity because the well-pleaded facts of the complaint establish (1) that Plaintiffs seek to hold StubHub liable for *conduct* and *actions* taken alone and in concert with others, not for content created by third parties; and (2) to the extent Plaintiffs are seeking to hold StubHub liable for content, StubHub itself created that content and encouraged others to do so.

In short, StubHub has prematurely raised a statutory defense in hopes that it can extricate itself from this lawsuit prior to discovery. Plaintiffs are entitled to explore in discovery at least the following topics before dispositive motions are heard:

- StubHub's purchase and resale of tickets through its website
- StubHub's acquisition of tickets directly from artists and event promoters for resale on its website
- StubHub's solicitation and encouragement of others, including ticket resellers, to acquire and resell tickets through its website
- StubHub's relationships and communications with LargeSellers who use its website
- StubHub's knowledge that consumers purchase tickets from StubHub at prices far exceeding face value
- StubHub's use of software that enables immediate ticket acquisition online and evasion of ticket purchasing rules
- StubHub's purchase of tickets to satisfy its FanProtect Guarantee
- StubHub's efforts, if any, to bring its conduct and website into compliance with anti-scalping statutes
- StubHub's efforts to repeal anti-scalping statutes
- StubHub's changes to its website in response to this lawsuit and others

Only after discovery has served its intended goal of information exchange, on these and other topics, can Plaintiffs and the Court meaningfully assess StubHub's claims that: (1) it has not sold, or offered to sell, tickets in violation of N.C.G.S. § 14-344; (2) it has not engaged in unfair or deceptive conduct in violation of N.C.G.S. § 75-1.1; and (3) Section 230 shields it from liability.[6]

III. PLAINTIFFS CAN ASSERT A PRIVATE RIGHT OF ACTION FOR DEFENDANTS' VIOLATIONS OF SECTION 14-344.

StubHub, claiming that N.C.G.S. § 14-344 offers Plaintiffs no private right of action, misunderstands Plaintiffs' claims, North Carolina law, or both. Plaintiffs' claims are for unfair and deceptive trade practices, civil conspiracy, and tortious action in concert – claims which *are* afforded a private right of action. Defendants' violations of N.C.G.S. § 14-344 are merely the wrongful act *giving rise* to Plaintiffs' claims, not the statutory or common law supplying them with a right of action. North Carolina case law clearly provides aggrieved plaintiffs a cause of action for civil conspiracy and tortious action in concert. See e.g. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 646 S.E.2d 790 (N.C.App. 2007) (listing elements of action for civil conspiracy); Stetser v TAP Pharm. Prods., Inc., 165 N.C. App. 1, 598 S.E.2d 570 (2004)(defining elements of claim for tortious action in concert). Plaintiffs' claims for civil conspiracy and tortious action in concert are based on StubHub's agreements with the John Doe Seller Defendants to violate North Carolina anti-scalping laws.

[6] Among the many questions here is whether StubHub is protecting the John Doe Sellers' identities because they are profitable business allies or because they are StubHub itself. In ruling on a similar discovery matter in New England Patriots, L.P. v. StubHub, Inc. *et al.*, 2007 WL 2367748 (Mass. Super. July 31, 2007), Justice Van Gestel granted plaintiffs' motion to compel StubHub to produce documents identifying "individuals" who sold tickets to Patriots' home football games using its website.

Moreover, in enacting North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1, the General Assembly intended that aggrieved consumers have a "private cause of action to redress Chapter 75 violations." Hyde v. Abbott Labs., 123 N.C. App. 572, 577, 584, 473 S.E.2d 680, 684, *disc. review denied,* 344 N.C. 734, 478 S.E.2d 5 (1996). A defendant's violations of criminal or consumer protection statutes can constitute unfair and deceptive acts, giving rise to a cause of action under Chapter 75. See, e.g., Kewaunee Scientific Corp. v. Pegram, 130 N.C. App. 576, 581, 503 S.E.2d 417 (1998) (Plaintiffs entitled to bring action for defendants' violations of criminal, commercial bribery statute because "[j]ust as a violation of a regulatory statute can constitute an unfair and deceptive act, a violation of a criminal statute can constitute an unfair and deceptive act as well."); State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 641, 624 S.E.2d 371, 378 (2005) ("[V]iolations of statutes designed to protect the consuming public and violations of established public policy may constitute unfair and deceptive practices.").

Plaintiffs are aware of only one case that has considered whether a defendant's violations of anti-scalping laws give rise to a civil cause of action under state consumer protection laws. That court answered with a resounding yes. In Herman v. Admit One Ticket Agency, LLC, No. 0656-CV-0368 (Mass. Dist. Ct. Sept. 17, 2007) (attached as Exhibit 1), the plaintiff attempted to purchase tickets to a Red Sox baseball game at face value, a right protected by Massachusetts statute. Upon learning that defendant offered tickets only at prices exceeding face value, plaintiff attempted to assert a private right of action against the defendant for its online scalping of Red Sox tickets. The

court allowed plaintiff's action to proceed, explaining:

> the legislation at issue reflects not only a concern for the welfare of the public, but also reflects the legislative intent to provide each individual consumer protection. . . [T]he acts of [defendant] in pricing of tickets for resale are clearly in violation of the language and legislative intent of the existing law, and, as such violative of Massachusetts Consumer Protection Law. Id. at 7.

IV. STUBHUB CANNOT SATISFY THE ELEMENTS OF § 230 IMMUNITY.

Section 230(c)(1) of the CDA provides: "No provider of an interactive computer service shall be treated as the publisher or speaker of any information[7] provided by another information content provider." 47 U.S.C. § 230(c)(1). "In order to succeed on a claim for Section 230 immunity, a defendant must establish that: 1) it is a 'provider or user of an interactive computer service;' 2) the claims asserted 'treat' the defendant as the publisher or speaker of information; and 3) the published information was provided by another information content provider (i.e., the defendant did not create or develop, in whole or in part, the information content at issue)." Federal Trade Commission v. Accusearch, Inc. Case No. 06-CV-105-D (D. Wyo. September 28, 2007) pp. 6-7 (attached as Exhibit 2). Asking this Court to find that Section 230 immunity is applicable to the facts alleged in this complaint is akin to trying to "fit a square peg into a round hole." Id. at 6.

[7] In addition to Plaintiffs' other arguments regarding StubHub's ability to satisfy the elements of CDA immunity, Plaintiffs also allege that tickets do not fit within any plausible definition of "information." In Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003), cert. denied, 540 U.S. 877 (2003), the Third Circuit cited Merriam-Webster's Dictionary and held that "information," as used in the CDA, is "knowledge obtained," "a signal or character," or "the communication or reception of knowledge or intelligence." Merriam-Webster's defines a ticket, in contrast, as "a document that serves as a certificate, license, or permit" or "a certificate or token showing that a fare or admission fee has been paid."

A. Plaintiffs Claims Do Not Seek to Treat StubHub as a Publisher.

Plaintiffs do not seek to hold StubHub liable for publishing anything, but rather for committing unlawful acts in the course of commerce, namely *selling and offering to sell tickets in violation of North Carolina law*. Courts tackling this particular immunity requirement have looked to Congress's intent in enacting Section 230. In Roommates, for example, the Ninth Circuit noted that the defendant's conduct:

> stands in stark contrast to Stratton Oakmont, the case Congress sought to reverse through passage of section 230. There, defendant Prodigy was held liable for a user's unsolicited message because it attempted to *remove* some problematic content from its website, but didn't remove enough. Here Roommate is not being sued for removing some harmful messages while failing to remove others; instead, it is being sued for the predictable consequences of creating a website designed to solicit and enforce [illegal] housing preferences . .

Roommates at 3466; see also Accusearch at 12 (Section 230 not triggered where conduct at issue involved advertising telephone records for sale, soliciting orders for telephone record sales, purchasing records from third-party sources for a fee, and then reselling records to end-consumers).

Likewise, Plaintiffs here have not sued StubHub for removing certain illegal content while failing to remove other content. Instead, Plaintiffs have sued StubHub for the predictable consequences of maintaining a website through which *StubHub itself sells* tickets at illegal prices and collects unlawful commissions on those sales. As such, Plaintiffs claims do not seek to treat StubHub as a publisher within the meaning of Section 230(c).

Thus, while StubHub asserts that "plaintiffs' claims that StubHub is a ticket seller. . . fail as a matter of law" (Memorandum p. 15), StubHub misunderstands or

misstates Plaintiffs' claims for relief. Plaintiffs allege in two distinct ways that StubHub's conduct falls within the scope of N.C.G.S. § 14-344: (1) StubHub actually sells tickets; and (2) StubHub's substantial involvement in selling tickets renders it a ticket seller.

1. StubHub is an Actual Ticket Seller.

Plaintiffs allege as a factual matter that StubHub itself, not a third party, actually sold them Hannah Montana tickets at a price violating N.C.G.S. § 14-344. See, e.g., FAC ¶ 16 ("By *StubHub, Inc.'s sale* of the subject tickets . . ."") (emphasis added). Plaintiffs further allege that StubHub, not a third party, actually sold numerous tickets to members of the class at prices violating N.C.G.S. § 14-344. See, e.g., FAC ¶ 36 ("By *their sale* ... [to] the class members ... Defendant StubHub, Inc. ... violated N.C.G.S. § 14-344..."") (emphasis added).[8] Plaintiffs' factual contention that StubHub is liable for selling tickets in violation of N.C.G.S. § 14-344 takes their claims outside the reach of Section 230 immunity. These facts cannot be disputed at this stage of litigation.

Nevertheless, StubHub attempts to "prove" its assertion that "StubHub is Not a Ticket Seller," by referencing its own website, which states "neither StubHub.com nor StubHub, Inc. is the ticket seller." (Memorandum p. 5). If offering such self-serving disclaimers – which Plaintiffs dispute – could alone prove contested facts, online sellers of any state-regulated product (cigarettes, prescription drugs, loans, firearms, lottery tickets, fireworks, etc.) could insulate themselves from liability by layering their websites

[8] StubHub tries to skirt Plaintiffs' allegations that it is the seller by making the absurd suggestion that Plaintiffs "acknowledg[ed] that StubHub has no ownership interest in the tickets." (Memorandum p. 5). But what Plaintiffs *actually* allege in their complaint is that "StubHub *claims* to have no ownership of said tickets." (FAC ¶ 10) (emphasis added).

with disclaimers. All StubHub's disclaimers prove is that StubHub *claims* not to be the seller. Courts considering whether a defendant can rely on its own website to prove its allegations have concluded that "it is generally imprudent to rely exclusively on a party's own website in support of its motion to dismiss" because "a party's website is self-serving and there is no assurance that the content is authentic." Curran at *14 (citations omitted). "Relying on a party's website in support of its argument is akin to relying on their memoranda." Id.

Of course, at this early stage of litigation Plaintiffs are not required to prove their allegations. See, e.g., Chao v. Rivendell Woods, Inc., 415 F.3d 342, 349 (4th Cir. 2005). But through their investigation without the benefit of discovery, Plaintiffs offer the Court much more objective proof that StubHub is a ticket seller and that StubHub is not only being dishonest with these Plaintiffs and this Court about its role as a ticket seller, but has also been dishonest with other plaintiffs and other courts of law.[9]

According to a pleading filed in a case pending against StubHub in Massachusetts, StubHub's initial Answer:

> declared emphatically that "StubHub at no time itself resells tickets." Ans. At 1. However, after the Court ordered that StubHub produce transactional data concerning resales of tickets to Patriots home games, the data in fact showed that StubHub's initial emphatic declaration was wrong. (StubHub then quietly amended its answer to remove that statement. Am. Ans. At 1).

Reply Memorandum in Support of Plaintiff's Motion to Compel p. 1 n. 1 (attached as

[9] Plaintiffs refer to public documents – pleadings from other lawsuits pending against StubHub – to refute StubHub's argument that Plaintiffs' allegations regarding StubHub's role as a seller are "merely conclusory, unwarranted deductions of fact. . ." (Memorandum p. 6). See Norfolk Fed'n of Bus. Dist. v. HUD, 932 F. Supp. 730, 736 (E.D. Va. 1996) (some matters of public record may be considered on Rule 12(b)(6) motion to dismiss).

Exhibit 3); see also Memorandum in Support of Plaintiffs' Motion to Compel p. 19 (attached as Exhibit 4) and Affidavit of Brandon Bigelow p. 3 (attached as Exhibit 5) (stating that data produced by StubHub identifies **StubHub as a seller** of tickets to Patriots games at prices in excess of face value). Similarly, in a complaint brought by Ticketmaster against StubHub in California, Ticketmaster contends that StubHub acquired "artist hold" tickets, in violation of Ticketmaster's contracts with artists, and resold them through its website for substantial profit. Plaintiff's Amended Complaint for Damages and Other Relief p. 2) (attached as Exhibit 6).

2. StubHub's Substantial Involvement in the Ticket Sale Renders It a Ticket Seller Under N.C.G.S. § 14-344.

There are many definitions of the term "seller." For example, Black's Law Dictionary defines "seller" as one "who sells or contracts to sell goods." (6th ed. 1990) p. 1360. Further, "[t]he test of whether a person is a 'seller' of unregistered securities, so as to be liable to the buyer under the Securities Act, is whether such person is the 'proximate cause' of the sale." Id. Plaintiffs have with specificity alleged conduct that renders StubHub a seller.

In particular, Plaintiffs have alleged conduct showing StubHub is the proximate cause of the ticket sales, to them and class members, including that StubHub: (1) markets and offers tickets for sale; (2) ships tickets to buyers in its own name in an envelope bearing its return address; (3) acts as the sole contact with buyers for ticket sales and even forbids buyers from contacting "actual sellers;" (4) directly charges buyers' credit cards, which appear on their statements as a sale from StubHub; (5) takes possession of buyers' money before deducting its commissions and tendering a

StubHub company check to "John Doe Sellers;" (6) assumes the risk of loss; and (7) sometimes takes physical possession of tickets in North Carolina at Last Minute Pick Up Hubs. (FAC ¶¶ 10-11). These facts – which must be taken as true at this stage – further demonstrate that Section 230 does not apply because Plaintiffs seek to hold StubHub liable for its own *activity* violating N.C.G.S. § 14-344, not for the *content* of others.

Indeed, StubHub cannot and does not contend that Secton 230 immunizes its conduct of charging service fees in violation of state law. N.C.G.S. § 14-344 provides that a "service fee may not exceed three dollars ($3.00) for each ticket. . ." It is indisputable that StubHub charged Plaintiffs a commission of $14.90 per ticket, in violation of § 14-344. (FAC ¶ 9 and FAC ¶ 16). The commission StubHub charges buyers, 10% of the purchase price, would be legal in North Carolina only with respect to tickets with face values of $30 or less. Plaintiffs expect to prove through discovery that nearly all of the thousands of tickets sold to class members exceeded $30 and thus that StubHub's commission violated § 14-344. (FAC ¶ 36). Whether StubHub calls its profit a commission, a service fee, or something else is irrelevant. As the Massachusetts court explained in Herman, that defendant's attempt to legalize his profit by calling it a "membership fee" was illusory. (Exhibit 1 at p. 6). Defendant's mark-up, the court explained, is nothing more than a "15% profit margin on each ticket sale which is not contemplated by statute." Id.

StubHub further violates § 14-344 by taking a 15% commission from "actual sellers" knowing that the sellers will, and even encouraging the sellers to, price tickets

to cover the 15% commission. StubHub earned a $22.35 per ticket commission on Plaintiffs' ticket purchase. And for every ticket sold to members of the class exceeding a price of $20.00, StubHub earned a commission in excess of the $3.00 service fee allowed by § 14-344. Upon information and belief, StubHub sometimes even adds the 15% commission to the ticket price for the "actual seller." (FAC ¶12) ("StubHub, Inc. on a regular basis takes 'data feeds' of the ticket inventories of Professional Ticket Resellers, increases those ticket prices by 15% to cover [its] commission and then lists the tickets for sale. . .). No reading of the CDA, no matter how creative or broad, could result in immunizing StubHub for its own action of routinely taking a substantial profit margin not contemplated by – and in fact expressly prohibited by – North Carolina statute.

StubHub's activity as alleged in the complaint goes far beyond that of eBay and other service providers in the cases relied upon by StubHub.[10] As set forth above, Plaintiffs have alleged a wide range of conduct by StubHub that marks it as an actual ticket seller and not a mere online intermediary. As a result, Section 230 is not applicable.

B. StubHub Is an Information Content Provider With Respect to Price Listings on Its Website.

An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the

[10] Citing Stoner v. eBay, Inc. 2000 WL 1705637 (Cal.Super. 2000)(which granted summary judgment *after* plaintiff had benefit of discovery), StubHub asks this Court to treat it exactly like eBay because it is a "wholly owned subsidiary of eBay." (Memorandum p. 17 n.10). *One* critical difference between eBay and StubHub is that eBay buyers and sellers openly communicate, leaving no doubt about who is the "actual seller."

Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). As one court recently held in denying ISP's motion to dismiss, "[n]o case of which this court is aware has immunized a defendant from allegations that *it* created tortious content." Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006) (emphasis in original). StubHub offers this Court no compelling reason why it should be the first defendant immunized from Plaintiffs' allegations that it created tortious content.

StubHub relies heavily on Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, No. 04-56916, slip op. 3445 (9th Cir. Apr. 3, 2008) to conclude that it is not an information content provider because "StubHub Does Not Create or Develop Unlawful Content as a Matter of Law." (Memorandum p. 8). Remarkably, in reaching this bold conclusion, a conclusion more properly reached by the fact finder, StubHub blatantly misstates the Roommates holding as: "[A] 'website would be immune, so long as it does not *require* [the unlawful content.]' " (Memorandum p. 10) (emphasis in original). To be sure, there is language throughout Roommates admonishing *that* defendant for *requiring* users to input unlawful content *because that was what was at issue in that case*. However, the Roommates court clearly holds that an ISP that *either encourages or requires* the creation or development of illegal content loses immunity. Lest there be any confusion, in its final words the Ninth Circuit reiterates:

> The message to website operators is clear: If you *don't encourage* illegal content, *or* design your website to require users to input illegal content, you will be immune. We believe that this distinction is consistent with the intent of Congress to preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement *of other important state* and federal laws. When Congress passed section 230 it didn't intend to prevent the enforcement of all laws online . . .

Id. at 3474-75 (emphasis added). Obviously, the full extent to which StubHub is an information content provider can only be determined through discovery. But even without the benefit of discovery, Plaintiffs have sufficiently alleged that StubHub itself creates, and encourages others to create, illegal content in that it: (1) actually sells tickets; (2) solicits and partners with "actual" ticket resellers; and (3) plays an active role in shaping and creating ticket listings.

1. StubHub's Sale of Tickets Renders it an Information Content Provider.

Obviously, to the extent that StubHub actually sold tickets or directly and palpably participated in the sale so as to render it a seller – as alleged in the complaint – StubHub is an information content provider with respect to prices listed on its website for those tickets.

2. StubHub's Solicitation of and Partnership With Ticket Sellers Also Makes It an Information Content Provider.

Plaintiffs further allege, and expect to prove more fully through discovery, that StubHub's relationship with LargeSellers (more commonly known as scalpers) makes it an information content provider. (FAC ¶ 12). Via its LargeSeller program, described at www.stubhub.com LargeSeller tab, StubHub encourages resellers who have significant quantities of ticket inventory to sell them at www.stubhub.com by offering tailored tools, dedicated 'Large Seller Account Managers,' and *performance-based benefits."* (FAC ¶12) (emphasis added).

The plaintiff in Hy Cite Corp. v. Badbusinessbureau.com, LLC, 418 F. Supp. 2d 1142 (D. Ariz. 2005), similarly alleged that defendant ISP's relationship with reporters

rendered it an information content provider because it encouraged users to become regular reporters on its website, suggested that they might be compensated, and included a website tab containing information for interested reporters. The Hy Cite court concluded that such "allegations arguably could support a finding that defendants are 'responsible. . . for the creation or development of information' " and thus not entitled to immunity. Id. at 1149.

StubHub engages in additional acts with LargeSellers, well beyond those alleged in Hy Cite, making StubHub an information content provider with respect to ticket prices. For example, upon information and belief, StubHub "takes 'data feeds' of the ticket inventories of professional ticket resellers, *increases those ticket prices by 15%* to cover Defendant Stubhub, Inc.'s commission and then lists the tickets for sale on [its] website." (FAC ¶ 12) (emphasis added). StubHub also provides LargeSellers with the ability to upload their ticket inventory onto StubHub's website and "ask[s them] to upload a minimum of 10 times per day . . ." (See NPS, LLC and New England Patriots v. StubHub, Inc. Exhibit E to Defendant StubHub, Inc.'s Opposition to Plaintiffs' Motion to Compel "LargeSeller's Handbook January 2007" pp. 29-30) (attached as Exhibit 7). Only discovery will show the full extent to which StubHub manipulates data uploaded by LargeSellers, rendering it an information content provider for price listings drawn from that data.

3. StubHub's Active Participation in Creating Content Related to the Sale of Tickets Makes It an Information Content Provider.

Even in the unlikely event that discovery shows StubHub neither sold tickets nor partnered with LargeSellers, Plaintiffs have alleged other facts demonstrating

StubHub's active involvement in ticket pricing, which renders it an information content provider of ticket prices. For example, StubHub instructs sellers trying to list season tickets for sale to contact them because "we will need to help you set that up." (FAC ¶ 11). In addition, at the relevant time period in October 2007, StubHub's website inundated sellers with encouragement to price tickets in excess of face value. For example, StubHub encouraged sellers to "sell the tickets at their 'market value,' as determined by the sale price of comparable listings on Defendant StubHub, Inc.'s website and/or other ticket brokering sites. . ." (Id.).

Finally, for tickets sold via the Declining Price method, StubHub actually uses its own software to automatically adjust ticket prices. "With a declining price, you do not need to monitor or modify your ticket price. *We do it for you* daily." (FAC ¶ 11). Plaintiffs respectfully ask the Court to consider this example: Ticket bears $50 face value. Seller chooses the Declining Price method, setting an initial price of $300 to decline daily by $20. *StubHub* then uses its own software to decrease the price from $300, to $280, to $260, until the ticket finally sells at $240 – $190 above face value. Did not StubHub, at a minimum, actively *participate* in creating the illegal ticket price?

* * *

Contrary to StubHub's alarmist rhetoric, Congress did not enact Section 230 to "foster the unregulated development of *e-commerce*," (Memorandum p. 17) but to foster unregulated development of *free speech*. Section 230 was enacted to encourage ISPs and website operators to police and remove offensive third-party content, not to grant a

free-for-all to online businesses. Nevertheless, StubHub, much like the dissenting judges in the Roommates case, "prophesies doom and gloom" for its website if it is forced to comply with North Carolina law. (See, e.g., Memorandum pp. 18-19).

The Roommates court squarely answered StubHub's protests, pointing out that the "Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled." Online businesses like StubHub must comply with laws "applicable to brick-and-mortar businesses." Roommates at 3456 n. 15 & 3474 n. 39. The Roommates court elaborated as follows:

> actions which are unlawful when posed face-to-face . . . don't magically become lawful when [done] electronically online. The Communications Decency Act was not meant to create a lawless no-man's land on the Internet . . . [W]e must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability."

Id. at 3456 n.15; see also Chicago Lawyers' Comm. v. Craigslist, Inc. 519 F.3d 666, 670 (7th Cir. 2008) (230(c) is not a "grant of comprehensive immunity from civil liability." Such treatment "is incompatible with" Grokster, which held that 'information content providers' may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright." (citing Metro-Goldwyn-Mayer Studios, Inc. V. Grokster, Ltd., 545 U.S. 913, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005)).

Since StubHub cannot set up a brick-and-mortar business in North Carolina engaging in the complained of conduct, it cannot be permitted to do so online. Requiring StubHub to abide by the laws applicable to the only product it sells would not force StubHub to cease or restrict its operations. Only a handful of states have anti-scalping laws; if StubHub cannot, or will not, comply with those laws where they

exist – as in North Carolina – then perhaps it should stop doing business in those states.

CONCLUSION

For the reasons set forth above, StubHub's Motion to Dismiss should be denied so that the parties may proceed with discovery. StubHub's motion is deficient on its face because it depends upon StubHub's denial of facts alleged in the complaint and relies on matters outside the complaint. Moreover, StubHub's legal basis for denial – Section 230 immunity – fails. The facts alleged establish that Plaintiffs do not seek to treat StubHub as the publisher of third-party content but rather seek to hold StubHub liable for its own conduct and for unlawful transactions in which it actively participates. Finally, even if Plaintiffs were seeking to treat StubHub as a publisher, the facts alleged by Plaintiffs demonstrate that StubHub is a content provider with respect to unlawful ticket prices listed on its website.

This 22nd day of May 2008.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Defendant StubHub, Inc.'s Motion to Dismiss was served upon all counsel of record by electronic mail, and by express agreement of the parties that service via electronic mail is sufficient, as follows:

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

Exclusive of the case caption, any table of authorities, and any required certificates of counsel or of a party, this brief contains less than 7500 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

This the 22nd day of May, 2008.

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