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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

18 EDROP-OFF CHICAGO LLC, *et al.*,

19 Plaintiffs,

20 v.

21 NANCY R. BURKE, *et al.*

22 Defendants.

Case No. 2:12-cv-04095-GW-FMOx

**AMICUS CURIAE BRIEF OF
ELECTRONIC FRONTIER
FOUNDATION IN SUPPORT OF
DEFENDANT MIDLEY, INC., D/B/A
PURSEBLOG.COM**

Date: June 1, 2012

Time: 8:30 a.m.

Courtroom 10, Spring St.

The Honorable George H. Wu

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STATEMENT OF INTEREST

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported digital civil liberties organization. As part of its mission, EFF has served as counsel or *amicus curiae* in key cases addressing user rights to free speech, privacy, and innovation as applied to the Internet and other new technologies. With more than 16,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil liberties information at www.eff.org.

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EFF has a substantial interest in this case because it concerns the scope of federal protections for Internet service providers as well as California’s anti-SLAPP statute, both of which affect online free speech rights. To that end, EFF supports the expansive interpretation of Section 230 of the Communications Decency Act. This law has played a vital role in allowing millions of people to create and disseminate user-generated content through the Internet, enriching the diversity of online offerings. EFF is particularly concerned that the law not be used to chill free expression on the Internet by holding online services liable where the content in question originates with a third party.

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EFF also has an interest in the sound and principled application of California’s anti-SLAPP statute, California Code of Civil Procedure §§ 425.16, *et seq.* A broad interpretation of that law promotes free expression by ensuring that baseless

1 litigation intended to suppress participation in public debates is not only swiftly
2 terminated, but also deterred.

3 Defendant Midley Inc., doing business as Purseblog, has consented to the
4 filing of this brief. Plaintiffs do not consent to the filing of this brief.
5

6 INTRODUCTION

7 In this case, plaintiffs eDrop-Off Chicago LLC and Corri McFadden seek to
8 chill the free speech rights of defendant Purseblog and California residents who read
9 the web site. The plaintiffs bear a heavy burden, however, as the Supreme Court has
10 long held that any attempt to suppress expression in the form of a prior restraint is
11 presumptively unconstitutional under the First Amendment. The California
12 Constitution is even less tolerant of attempts to squelch speech, since its provisions
13 protect a broader range of expression than the federal Constitution.
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17 California's anti-SLAPP statute (California Code of Civil Procedure § 425.16)
18 and binding Ninth Circuit precedent interpreting the Communications Decency Act,
19 47 U.S.C. § 230, offer substantive legal protections unique to California that protect
20 free speech and discourage frivolous lawsuits. In passing these laws, Congress and
21 the state legislature made a deliberate choice to shelter online expression and put a
22 quick end to frivolous litigation filed for the sole purpose of curtailing it. A decision
23 granting the plaintiffs' request for voluntary dismissal will send a dangerous message
24 to future litigants that, in contravention of clear public policy and law, a plaintiff
25 may avoid the consequences of filing baseless, speech-chilling litigation by simply
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1 dismissing the suit and re-filing it in a “friendlier” forum when the defendant raises
2 the specter of Section 230 immunity and California’s anti-SLAPP law.

3 If this Court dismisses this case without prejudice to allow the plaintiffs to
4 pursue their claims in federal court in Illinois, Purseblog will be forced to spend
5 more time and money defending this lawsuit despite the fact that binding Ninth
6 Circuit precedent should result in immediate dismissal of the plaintiffs’ claims with
7 prejudice under Section 230.
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10 Equally concerning is that Purseblog will lose the benefits of the California
11 state anti-SLAPP statute, which is designed to hold plaintiffs accountable when they
12 file improper lawsuits that impact public participation. The loss of these substantive
13 protections will have the perverse effect of encouraging Purseblog and other online
14 services (including those based in California and those located elsewhere but read by
15 California residents) to censor themselves and their users to avoid the expense of
16 having to defend against litigation in the future, even where the plaintiffs have no
17 likelihood of prevailing on the merits.
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21 EFF respectfully urges the Court not to reward such blatant gamesmanship
22 and reject the plaintiffs’ attempt to get a second bite at a more appealing apple after
23 being called on their speech-chilling litigation tactics.
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ARGUMENT

1
2 The Internet is the most powerful medium of communication ever developed.
3 It hosts a massive amount of information on virtually every subject known to
4 mankind. The Internet enables people to quickly and easily access information about
5 products, activities, and others' experiences, regardless of geographic location. It
6 also makes it possible for individuals throughout the world to connect with each
7 other directly and share information about anything they choose, including frank or
8 unpopular opinions presented with hyperbole, invective and sharp criticism.
9

10
11 Congress recognized both the Internet's incredible potential and the crucial
12 role that Internet intermediaries play in creating forums for both free speech and
13 commerce online. It also realized that the only way to foster these forums is to
14 ensure that intermediaries remain protected from legal claims. The centerpiece of
15 Congress' approach was the Communications Decency Act, 47 U.S.C. § 230. By
16 shielding intermediaries against most legal claims arising from speech by others on
17 forums that they host, the law both encourages intermediaries to police speech on
18 their forums and protects them if they cannot do so — a situation that is increasingly
19 common for intermediaries that host a great deal of public speech.
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24 Section 230 has worked as Congress anticipated. It has encouraged the growth
25 of the Internet by allowing the free exchange of ideas and information throughout
26 online communities. It has also allowed the flourishing of online services, including
27 online auction websites like eBay and discussion forums such as Purseblog. When
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1 combined with California’s anti-SLAPP statute, Section 230 maximizes protections
2 for the values enshrined in the First Amendment. Indisputably a provider of an
3 “interactive computer service” squarely protected by the federal statute, Purseblog
4 should not have been dragged into this litigation, a dispute between the plaintiffs and
5 an individual who posted criticism of the plaintiffs.
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8 **I. The First Amendment and California Constitution Disfavor Prior**
9 **Restraints and Other Legal Infringements That Chill Speech.**

10 This lawsuit fundamentally targets Purseblog’s online speech. The plaintiffs
11 seek to use the judicial system to force Purseblog to remove content from the
12 Internet and ban the site from publishing speech in the future. Compl. 15-16. As the
13 United States Supreme Court has long held, however, prior restraints on speech and
14 publication are presumptively unconstitutional because they are “the most serious
15 and the least tolerable infringement on First Amendment rights.” *Nebraska Press*
16 *Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *Freedman v. Maryland*, 380 U.S. 51, 57
17 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Moreover, Purseblog
18 readers within California and elsewhere enjoy a constitutional right to receive
19 information through Purseblog. *See Stanley v. Georgia*, 394 U.S. 557, 568-69 (1969)
20 (recognizing “the individual’s right to read or observe what he pleases.”).
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25 As strong as these federal constitutional safeguards against censorship are, the
26 California Constitution’s protections for free speech are even more “definitive and
27 inclusive” than those of the federal Constitution. *Wilson v. Superior Court*, 13 Cal.
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1 3d 652, 658 (1975). Article I, Section 2 of the state Constitution provides, “every
2 person may freely speak, write and publish his or her sentiments on all subjects,
3 being responsible for the abuse of this right. A law may not restrain or abridge
4 liberty of speech or press.” The speech published on Purseblog may not be core
5 political expression, but it enjoys protection under the California Constitution. *Wong*
6 *v. Jing*, 189 Cal. App. 4th 1354, 1366-67 (2010); *Wilbanks v. Wolk*, 121 Cal. App.
7 4th 883, 898-99 (2004).
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10 The plaintiffs’ litigation implicates myriad free speech interests. Congress and
11 the California Legislature have made clear policy choices to protect these rights and
12 quickly terminate lawsuits attempting to suppress them. The Court should ensure that
13 those protections are appropriately enforced here, in the jurisdiction invoked by the
14 plaintiffs.
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17 **II. The Communications Decency Act Broadly Shields Online Service**
18 **Providers Against State Law Claims Based on Statements Made By**
19 **Third Parties.**
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21 By its very terms, Section 230 provides online service providers like
22 Purseblog a federal immunity against any cause of action that would hold them
23 responsible for material supplied by third-party users of those services. *Zeran v.*
24 *America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937
25 (1998). As the California Supreme Court has noted, Congress intended this statutory
26 protection to serve two important interests: to foster free expression online and to
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1 encourage those providing Internet services to make their own editorial decisions
2 about third-party content without fear of legal action or liability. *Barrett v.*
3 *Rosenthal*, 40 Cal. 4th 33, 62 (Cal. 2006).

4
5 **A. Section 230 of the Communications Decency Act Provides**
6 **Strong, Unequivocal Legal Protections for Online Service**
7 **Providers.**

8
9 Section 230 expressly protects people and entities that provide Internet
10 services from state law causes of action arising from those activities, placing legal
11 responsibility squarely where it belongs: on the parties who actually provide
12 information through these services. *Fair Housing Council v. Roommates.com LLC*,
13 521 F.3d 1157, 1162-63 (9th Cir. 2008).

14
15 The statute unequivocally says that “no provider or user of an interactive
16 computer service shall be treated as the publisher or speaker of any information
17 provided by another information content provider.” 47 U.S.C. § 230(c)(1)¹; *see also*
18 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102-05 (9th Cir. 2009) (explaining in detail
19 that Section 230 shields all “publication decisions”). Furthermore, it makes clear that
20 online service providers cannot be held liable for their decisions to restrict access to
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24 ¹ The statute expressly provides users and providers of an interactive computer
25 service the same immunity. *See Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003)
26 (“the “language of § 230(c)(1) confers immunity not just on ‘providers’ of such
27 services, but also on ‘users’ of such services.”); *see also Barrett*, 40 Cal. 4th at 56-57
28 (“By declaring that no ‘user’ may be treated as a ‘publisher’ of third party content,
Congress has comprehensively immunized republication by individual Internet
users.”).

1 information: “No provider or user of an interactive computer service shall be held
2 liable on account of . . . any action voluntarily taken in good faith to restrict access to
3 or availability of material that the provider or user considers to be obscene, lewd,
4 lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether
5 or not such material is constitutionally protected[.]” 47 U.S.C. § 230(c)(2); *Barnes*,
6 570 F.3d at 1105. Section 230 goes on to require that “[n]o cause of action may be
7 brought and no liability may be imposed under any State or local law that is
8 inconsistent with this section.” *Id.* at § 230(e)(3).

11 As courts interpreting section 230 have found, its breadth is clear and
12 unequivocal: “By its plain language, § 230 creates a federal immunity to any cause
13 of action that would make service providers liable for information originating with a
14 third-party user of the service.” *Zeran*, 129 F.3d at 330. Courts throughout the
15 country, including the Ninth Circuit, have applied its immunity broadly to encourage
16 free speech on the Internet. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123
17 (9th Cir. 2003); *Barrett*, 40 Cal. 4th at 39; *Nemet Chevrolet, Ltd. v.*
18 *Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *Doe v. MySpace, Inc.*,
19 528 F.3d 413, 418 (5th Cir. 2008); *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d
20 413, 415 (1st Cir. 2007).

25 Critical to this case, binding Ninth Circuit precedent holds that Section 230
26 preempts state law intellectual property and business torts, which are claims the
27 plaintiffs have made against Purseblog here. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d
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1 1102, 1118-19 (9th Cir. 2007); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169,
2 1177 (9th Cir. 2009). The Seventh Circuit does not have equivalent precedent.

3 Section 230 does not not only shield providers from *liability* based on their
4 decisions surrounding hosting of third party content, it also immunizes them from
5 *suit* based on those decisions. 47 U.S.C. § 230(e)(3) (“*No cause of action may be*
6 *brought* and no liability may be imposed under any State or local law that is
7 inconsistent with this section.”) (emphasis added); *see also Carafano*, 339 F.3d at
8 1125 (“Congress intended that service providers . . . be afforded immunity from
9 suit”); *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980, 983 (10th Cir. 2000)
10 (holding Internet service provider “immune from suit under § 230”).
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14 This substantive protection ensures that online service providers do not have
15 to waste valuable time and money defending against claims that have no likelihood
16 of success in light of Section 230. Without this protection, the vast majority of
17 service providers would simply choose to self-censor rather than risk protracted and
18 expensive fact-intensive legal battles, a result that runs counter to Section 230’s
19 policy goals and undermines free expression online. *See, e.g., Nemet Chevrolet*, 591
20 F.3d at 254-255 (Section 230 immunity “is effectively lost if a case is erroneously
21 permitted to go to trial.”) (citation and internal quotation marks omitted).
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**1. The Legislative History of the Communications
Decency Act Shows That Congress Intended the Statute
to Promote Free Speech and Self-Regulation.**

Congress had two objectives in enacting Section 230: to promote online speech and to encourage online services to regulate their own activities. The policy motivations underlying Congress’s actions are written directly into the law. The findings Congress published to explain Section 230 provide, “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity[.]” 47 U.S.C. § 230(a)(3). Moreover, “the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation[.]” *Id.* at § 230(a)(4). Consistent with those findings, the courts have consistently interpreted Section 230 expansively “to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” *Zeran*, 129 F.3d at 330; *Batzel*, 333 F.3d at 1027 (“Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.”); *see also Barrett*, 40 Cal. 4th at 56 (Section 230 is “a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.”).

The legislative history of Section 230 further reflects Congress’ goals in passing the law. Representative Christopher Cox noted that Section 230 would

1 “protect [online service providers] from taking on liability . . . that they should not
2 face . . . for helping us solve this problem” as well as establish a federal policy of
3 non-regulation to “encourage what is right now the most energetic technological
4 revolution that any of us has ever witnessed.” 141 Cong. Rec. H8470 (daily ed. Aug.
5 4, 1995). And as Congressman Bob Goodlatte explained when urging the House of
6 Representatives to pass the bill that eventually became Section 230:
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9 There is no way that any of those entities, like Prodigy, can take the
10 responsibility to edit our information that is going to be coming in to
11 them from all manner of sources onto their bulletin board. We are
12 talking about something that is far larger than our daily newspaper. We
13 are talking about something that is going to be thousands of pages of
14 information every day, and to have that imposition on them is wrong.
15

16
17 141 Cong. Rec. 22,046 (1995).

18 Indeed, the Supreme Court echoed the importance of keeping the Internet free
19 from regulation the next year when declaring that First Amendment protections
20 apply to online speech: “government regulation of the content of speech is more
21 likely to interfere with the free exchange of ideas than to encourage it.” *Reno v.*
22 *ALCU*, 521 U.S. 884, 885 (1997).
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24
25 Congress’s concern that imposing potential liability on providers who host
26 thousands or even millions of messages might lead to overly cautious web site
27 moderation or outright censorship is even more pressing today. When Section 230
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1 was passed, about 40 million people used the Internet worldwide, and commercial
2 online services in the United States had almost 12 million individual subscribers.
3 *Reno*, 521 U.S at 850. Today, the number of worldwide Internet users has exploded
4 to over 2 *billion* users.² The difficulties associated with policing third-party content
5 have grown astronomically along with the number of people now regularly
6 participating in discussions online.³ These are concerns that fundamentally affect
7 sites like Purseblog. The plaintiffs’ complaint alleges that Purseblog is one of the
8 forty “busiest” online forums in the world, with more than 300,000 registered
9 members and 18 million published entries. Compl. ¶ 26. Purseblog could not host
10 the content created by such an extensive Internet community if its operators were
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15 ² See “ITU Statshot,” International Telecommunication Union [UN agency for
16 information and communications technology], Issue 5 (Jan. 2011),
17 <http://www.itu.int/net/pressoffice/stats/2011/01/index.aspx>.

18 ³ See, e.g., news coverage and law enforcement attention to the problem facing
19 Internet platforms regarding businesses posting fake or paid-for reviews: “Attorney
20 General Cuomo Secures Settlement With Plastic Surgery Franchise That Flooded
21 Internet With False Positive Reviews,” Press Release, New York State Office of the
22 Attorney General, July 14, 2009, <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet>; “Firm
23 to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online ‘Consumer’
24 and ‘Independent’ Reviews,” Press Release, Federal Trade Commission, March 15,
25 2011, <http://www.ftc.gov/opa/2011/03/legacy.shtm>; Karen Weise, “A Lie Detector
26 Test for Online Reviewers: Fake Reviews are Proliferating, and Researchers are
27 Developing New Ways to Identify Them,” Bloomberg Businessweek, Sept. 29,
28 2011, <http://www.businessweek.com/magazine/a-lie-detector-test-for-online-reviewers-09292011.html>; David Streitfeld, “For \$2 a Star, an Online Retailer Gets 5-Star Product Reviews,” New York Times, Jan. 26, 2012, <http://www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html> (discussing problem of businesses paying users to place positive reviews).

1 forced to police all commentary posted there under threat of crippling legal
2 liability — nor could even larger services such as eBay, Yelp!, Facebook, Craigslist,
3 or Twitter.

4
5 Dismissal of the plaintiffs’ claims with prejudice in this case is consistent with
6 the policies underlying Section 230. Purseblog provides a venue where Internet
7 users can share their thoughts and feedback as consumers — including their
8 experiences purchasing products from sellers on eBay and elsewhere. Permitting this
9 kind of frank discourse without government intervention advances Congress’s goals
10 of promoting robust dialogue and encouraging self-regulation on the Internet.
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13 **B. The California Anti-SLAPP Statute Is Intended to Stop**
14 **Meritless Litigation Aimed at Chilling Constitutionally**
15 **Protected Expression.**
16

17 The California anti-SLAPP statute provides additional important speech
18 protections above and beyond those supplied by Section 230. This law targets
19 strategic litigation against public participation (“SLAPP”) lawsuits, which are
20 intended to “dissuade or punish the exercise of First Amendment rights of
21 defendants.” *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App.
22 4th 855, 858 (1995), *superseded by statute*, § 425.16, *as recognized in Damon v.*
23 *Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 477-78 (2000). In other words,
24 these cases may “masquerade as ordinary lawsuits,” but are “generally meritless suits
25 brought by large private interests to deter common citizens from exercising their
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1 political or legal rights or to punish them for doing so.” *Wilcox v. Superior Court*, 27
2 Cal. App. 4th 809, 816 (1984), *overruled on other grounds*, *Equilon Enterprises v.*
3 *Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002).

4
5 In order to discourage this abusive litigation, the California Legislature
6 enacted Section 425.16, which allows the defendant in such a suit to move to strike
7 it, and, if she prevails, recover attorneys’ fees expended in connection with the
8 motion. Even an attempt to voluntarily dismiss a SLAPP suit does not absolve a
9 plaintiff of responsibility for costs and fees a defendant incurs in striking the suit’s
10 claims. *See, e.g., eCash Techs., Inc. v. Guagliardo*, 210 F. Supp. 2d. 1138, 1154-55
11 (C.D. Cal. 2000); *Coltrain v. Shewalter*, 66 Cal. App. 4th 94, 106-7 (1999). The
12 statute has the dual benefit of ending a lawsuit quickly and imposing a real
13 penalty — in the form of fee shifting — to discourage further baseless litigation.
14 *Equilon Enterprises*, 29 Cal. 4th at 63; *Paul for Council v. Hanyecz*, 85 Cal. App. 4th
15 1356, 1364 (2001).

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19 Simply put, Section 425.16 has made California a less hospitable forum for
20 frivolous lawsuits by preventing the use of a meritless pleading to obtain “an
21 economic advantage over a citizen party by increasing the cost of litigation to the
22 point that the citizen party’s case will be weakened or abandoned, and of deterring
23 future litigation.” *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,
24 190 F.3d 963, 970-71 (9th Cir. 1999) (citation omitted) (applying statute’s
25 protections in diversity case); *see also* § 425.16(a) (“The Legislature finds and
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1 declares that it is in the public interest to encourage continued participation in
2 matters of public significance, and that this participation should not be chilled
3 through abuse of the judicial process.”). In keeping with that intent and California’s
4 constitutional commitment to protecting speech, the Legislature has stressed that the
5 statute should be construed broadly, thereby maximizing the protections for speech
6 in this state. *Id.* at § 425.16(a).
7

8
9 A dismissal without prejudice in this case would directly contravene that
10 intent. As set forth in greater detail in Purseblog’s supplemental brief at 6-9, it is
11 crystal clear that, if Purseblog were able to file a special motion to strike under
12 Section 425.16(b), the plaintiffs’ suit would be stricken and Purseblog would be
13 entitled to attorney’s fees. Simply put, the plaintiffs brought a frivolous suit against a
14 blog based on speech posted by a third party. If the case were to proceed here, the
15 plaintiffs would not only lose quickly, they would face serious consequences for
16 their impropriety — as the Legislature intended. This Court should not let the
17 plaintiffs dodge that bullet by dismissing this case without prejudice so that they can
18 pursue their baseless claims elsewhere, drawing out the time and expense Purseblog
19 has to spend defending against them.
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24 The plaintiffs may claim the request dismissal would nonetheless accomplish
25 at least one of California’s public policy goals in enacting Section 425.16 — “a fast
26 and inexpensive dismissal.” *Wilcox*, 27 Cal. App. 4th at 823. But that goal will not,
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1 in fact be accomplished if the plaintiffs can simply string out this litigation in another
2 forum, avoiding all consequences for its improper suit.

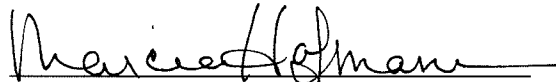
3 **CONCLUSION**

4
5 EFF urges this Court not to dismiss this case without prejudice so that the
6 plaintiffs can pursue their claims in Illinois. Without expansive interpretations of
7 Section 230 and the California anti-SLAPP statute, sites like Purseblog could not
8 exist because they would simply be sued out of existence. Every time a court allows
9 baseless litigation to proceed against an online service, the site's operators will feel
10 the need to limit their legal exposure by confining the site's discourse to "safe," less
11 controversial topics. That result hardly comports with the underlying policy of the
12 legal protections for free speech that Congress, California's Legislature, and the
13 courts have recognized, which are intended to create opportunities for the public to
14 learn information and participate in discussions about topics of public interest.
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19 DATED: May 25, 2012

Respectfully submitted,

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