

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

ROSLYN J. JOHNSON,

Plaintiff,

v.

JONETTA ROSE BARRAS, *et al.*,

Defendants.

No. 2007 CA 001600 B

Judge Gerald I. Fisher

Calendar 1

Next event:  
Scheduling Conference  
July 20, 2007

**NOTICE OF FILING OF REPLY IN SUPPORT OF THE  
DCWATCH DEFENDANTS' MOTION TO DISMISS**

Pursuant to leave of Court granted June 21, 2007, defendants Gary Imhoff, Dorothy A. Brizill and DCWatch file herewith their reply in support of their motion to dismiss. (The same document was previously attached to their motion for leave to file.)

Respectfully submitted,

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June 24, 2007

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**REPLY IN SUPPORT OF THE  
MOTION TO DISMISS ALL CLAIMS AGAINST DEFENDANTS  
DOROTHY BRIZILL, GARY IMHOFF AND DCWATCH**

Pursuant to Superior Court Rule 12(b)(6), defendants Gary Imhoff, Dorothy A. Brizill and DCWatch (collectively the “DCWatch Defendants”) have moved for the dismissal, with prejudice, of all claims filed against them on the ground that plaintiff Roslyn Johnson’s complaint fails to state any claim on which relief can be granted against them. The DC Watch Defendants hereby submit this reply to plaintiff’s opposition to their motion to dismiss.

**INTRODUCTION**

This case concerns an embittered former employee of the District of Columbia who was fired from her job as a result of her own improper actions, and now attempts to use the legal system to hold others liable for the resulting harm to her reputation. Drawing all inferences in the plaintiff’s favor, as the Court must when considering a motion to dismiss, the pleadings and motions filed in this action show that plaintiff Roslyn Johnson submitted a resume that contained inaccurate information when she

applied for a position with the D.C. Department of Parks and Recreation (“DPR”). Ms. Johnson chooses to call it a “draft unofficial resume,” but she admits that she submitted it to DPR when seeking the job that she ultimately obtained. *See* Complaint ¶ 12; Plaintiff’s Opposition to Defendants’ Gary Imhoff, Dorothy A. Brizill, and DCWatch Motion to Dismiss the Complaint (hereinafter “Plaintiffs’ Opp.”) at 18-19 (“ . . . whether Plaintiff submitted a resume with inaccuracies is irrelevant to this discussion. . . .”) (“ . . . an unintentional, erroneous submission, which was what occurred with the first resume submission . . .”).

Thereafter, defendant Jonetta Rose Barras, a journalist investigating DPR’s hiring practices, obtained certain “personal and confidential information” about plaintiff from either DPR or the D.C. Office of Personnel. Complaint ¶ 30; Plaintiffs’ Opp. at 5. Ms. Barras subsequently published a series of articles on her website, [www.jrbarras.com](http://www.jrbarras.com), and on the DCWatch website, [www.dccwatch.com](http://www.dccwatch.com), stating that plaintiff had secured her position with DPR on the basis of an inflated resume. Complaint ¶¶ 53-57, 70-76; Plaintiffs’ Opp. at 6-7. Plaintiff contends that the District of Columbia terminated her employment as a result of Ms. Barras’ allegations. Complaint ¶ 39; Plaintiffs’ Opp. at 7.

A subsequent report issued by the D.C. Inspector General on DPR’s hiring practices concluded, *inter alia*, that plaintiff did in fact provide inflated information on the first resume she submitted for her position with DPR. Motion to Dismiss All Claims Against Defendants Dorothy A. Brizill, Gary Imhoff and DCWatch (hereafter “DCWatch Mot. Dismiss”) Exhibit A at 25.<sup>1</sup> Nonetheless, plaintiff has filed suit against the

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<sup>1</sup> Despite plaintiff’s protestations, it is well established that the Court may take judicial notice of matters of public record—including records of administrative agencies—when considering a motion to dismiss. *In re Estate of Barfield*, 763 A.2d 991, 995

DCWatch Defendants, Ms. Barras, Talk Media Communications LLC and the District of Columbia, alleging that they committed tortious acts that caused the termination of her employment. *See* Complaint ¶¶ 44-107.

The DCWatch Defendants have moved to dismiss the claims against them, because plaintiff's allegations fail as a matter of law. First, plaintiff's claims are barred by the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c) ("Section 230"), which does not allow Internet publishers to be held liable for content created and provided by third parties. Second, plaintiff's claims are barred by the First Amendment, which protects speech about public officials that is substantially true.

In an attempt to defeat the DCWatch Defendants' motion, plaintiff makes essentially three arguments. First, plaintiff asserts in her opposition—although she never alleged in her complaint—that Ms. Barras was an agent of DCWatch and/or had apparent authority to write on DCWatch's behalf because she is listed on the DCWatch website as a guest columnist in connection with an article she wrote nearly a decade ago about the 1998 District of Columbia mayoral election. Plaintiffs' Opp. at 9-14. Second, plaintiff argues that the DCWatch Defendants do not qualify for Section 230's immunity because DCWatch is not an interactive computer service or a user of such a service. *Id.* at 14-18. Finally, Johnson asserts that the First Amendment does not protect the DCWatch Defendants' publication of Ms. Barras' articles because it is irrelevant whether plaintiff

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(D.C. 1999) ("the trial court is entitled to take judicial notice of matters of public record"); *Taylor v. England*, 213 A.2d 821, 823 (D.C. 1965) (taking judicial notice of a fact in records maintained by the D.C. Department of Motor Vehicles). Plaintiff complains that the Court may not take judicial notice of the Inspector General's findings of fact because they are disputed. Plaintiff's Opp. at 9 n.3. However, plaintiff also cites to the report's findings in support of her arguments. *Id.* at 20. Obviously, plaintiff cannot have it both ways.

actually submitted an inaccurate resume for her position with DPR. *Id.* at 18-21. Instead, plaintiff claims, her causes of action rely on Ms. Barras’ statements that plaintiff’s submission of the inflated resume “intentionally misle[d] others” and was “intentional, unethical, and possibly illegal.” *Id.* at 18.

Plaintiff’s arguments are unavailing, as we show below. First, plaintiff has made no arguments that defeat the DCWatch Defendants’ entitlement to immunity under Section 230. Second, plaintiff’s new agency theory is not connected to the allegations of her complaint, and indeed is contrary to the facts alleged in her complaint; in any event, Section 230 preempts any attempt to ground liability on a common law theory of agency. Finally, the alleged fact that Jonetta Rose Barras characterized plaintiff’s actions as “intentional” and “unethical” and “possibly illegal” does not change the fact that, as a matter of law, liability is foreclosed by the First Amendment.

## ARGUMENT

### I. Section 230 Immunizes the DCWatch Defendants From Plaintiff’s Claims.

Section 230’s breadth is clear and unequivocal by its very terms:

TREATMENT OF PUBLISHER OR SPEAKER. 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.

...

*No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.*

47 U.S.C. §§ 230(c)(1); (e)(3) (emphasis added). To qualify for immunity under Section 230, the DCWatch Defendants must show only that: (1) they are “provider[s] or user[s] of an interactive computer service,” (2) plaintiff’s claims treat them as publishers or speakers of information on the Internet, and (3) they were not the “information content

provider” of the allegedly tortious material. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

Plaintiff does not dispute that her claims depend on treating the DCWatch Defendants as publishers or speakers of the allegedly tortious material. Nor does plaintiff dispute that Ms. Barras alone created and provided the content that is the basis of plaintiff’s claims against the DCWatch Defendants. Plaintiff contends only that (1) the DCWatch Defendants are not “provider[s] or user[s] of an interactive computer service” within the meaning of Section 230, and (2) DCWatch (though not the individual defendants) should be treated as the publisher of the allegedly defamatory articles under a theory of agency. Plaintiff cannot prevail on these issues as a matter of law. The DCWatch Defendants are precisely the sort of publishers that Section 230 protects from liability, and the claims against them must therefore be dismissed with prejudice.

**A. The Case Law Establishes Unequivocally That the DCWatch Defendants Are Providers and Users of an Interactive Computer Service For Purposes of Section 230 Immunity.**

Federal and state courts across the country have held that websites like *dcwatch.com* are interactive computer services, and that website operators such as the DCWatch Defendants qualify for statutory immunity as both providers and users of such services. *See* DCWatch Mot. Dismiss at 9-12. DCWatch’s website fits the statutory definition of an “interactive computer service”<sup>2</sup> because it “enables computer access by multiple users to a computer server,” namely, the server that hosts the DCWatch web site.

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<sup>2</sup> Section 230(f)(2) of the CDA defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

As numerous courts have concluded, “web site operators . . . are providers of interactive computer services within the meaning of Section 230.” *Universal Communication Systems, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). *See also, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F. 3d 1119, 1123 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1030-31 (9th Cir. 2003); *Corbis v. Amazon.com*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash. Ct. App. 2001); *Dimeo v. Max*, 433 F. Supp. 2d 523, 529-530 (E.D. Pa. 2006); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. App. Div. 2005); *Ramey v. Darkside Products, Inc.*, No. 02-730 (GK), 2004 U.S. Dist. LEXIS 10107 (D.D.C. 2004).

Plaintiff makes no attempt to distinguish these cases or to present any argument for the modification or reversal of this long line of precedent. She does not even acknowledge that these cases exist. Instead, she cites a New Jersey district court decision that was based upon the defendant’s failure to provide authority in support of its argument. Plaintiffs’ Opp. at 14-15 (citing *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295 (D.N.J. 2006) (“The only authority cited in support of GoTo qualifying for this designation is an unpublished Superior Court of California case where it was undisputed that eBay qualified as an ‘interactive computer service.’”)).<sup>3</sup> Here, by contrast, the DCWatch Defendants have provided this Court more than a dozen cases, including decisions of several federal circuits, the Supreme Court of California, and the U.S. District Court for the District of Columbia, to show that website operators like the DCWatch Defendants are providers and users of an interactive computer service within

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<sup>3</sup> The unpublished California case is likely *Stoner v. eBay, Inc.*, 2000 WL 1705637 (Cal.Super. 2000).

the meaning of Section 230.<sup>4</sup>

Indeed, numerous courts, including two federal circuits, have rendered holdings squarely contradicting plaintiff's contention that a defendant must directly provide Internet access to be eligible for Section 230 immunity. The First Circuit, in *Universal Communication Systems, Inc.*, 478 F.3d 413 (1st Cir. 2007), easily dispensed with the very same argument plaintiff makes here:

[W]eb site operators, such as Lycos, are “provider[s] ... of an interactive computer service[.]”

...

There is no merit to [plaintiff] UCS's suggestion that Lycos might not be a provider of an interactive computer service and so is not entitled to Section 230 immunity. The statute defines “interactive computer service” to be “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” 47 U.S.C. § 230(f)(2). A web site, such as the Raging Bull site, “enables computer access by multiple users to a computer server,” namely, the server that hosts the web site. *Therefore, web site operators, such as Lycos, are providers of interactive computer services within the meaning of Section 230.*

UCS argues that Lycos might not be such a provider because it “does not provide user access to the internet.” Providing access to the Internet is, however, not the only way to be an interactive computer service provider. While such providers are “specifically” included, there is no indication that the definition should be so limited. Other courts have reached the same conclusion. *See, e.g., Carafano*, 339 F.3d at 1123.

478 F.3d at 419 (emphasis added). Likewise, the Ninth Circuit has flatly rejected plaintiff's argument:

The district court concluded that only services that provide access to the Internet as a whole are covered by this definition. But the definition of

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<sup>4</sup> The DCWatch Defendants respectfully refer the Court to their motion to dismiss for a full recitation of the federal and state cases on point. *See* DCWatch Mot. Dismiss at 8-12.

“interactive computer service” on its face covers “any” information services or other systems, as long as the service or system allows “multiple users” to access “a computer server.” Further, the statute repeatedly refers to “the Internet and *other* interactive computer services,” (emphasis added), making clear that the statutory immunity extends beyond the Internet itself. §§ 230(a)(3), (a)(4), (b)(1), (b)(2), and (f)(3). Also, the definition of “interactive computer service” after the broad definitional language, states that the definition “*includ[es]* specifically a service or system that provides access to the Internet,” § 230(f)(2) (emphasis added), thereby confirming that services providing access to the Internet as a whole are only a subset of the services to which the statutory immunity applies.

*Batzel*, 333 F.3d at 1030 (emphasis original). *See also Schneider*, 31 P.3d at 40

(“Congress intended to encourage self-regulation, and immunity is the form of that encouragement. We can discern no difference between web site operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material on the Internet.”).<sup>5</sup>

In an attempt to bolster her argument, plaintiff cites a case from the California Court of Appeals, *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntington Animal Cruelty USA, Inc.*, 143 Cal.Ap.4th 1284, 1301 (Cal. 2006). Plaintiffs’ Opp. at 17. But

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<sup>5</sup> These broad judicial interpretations of “interactive computer service” reflect the policy goals underlying Section 230, which include promoting the free exchange of ideas over the Internet and discouraging government regulation of online speech. *Zeran*, 129 F.3d at 330 (“Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”). As the California Supreme Court noted, it is just as important for users to benefit from Section 230 immunity as providers of interactive computer services:

[T]he congressional purpose of fostering free speech on the Internet supports the extension of section 230 immunity to active individual “users.” It is they who provide much of the “diversity of political discourse,” the pursuit of “opportunities for cultural development,” and the exploration of “myriad avenues for intellectual activity” that the statute was meant to protect.

*Barrett v. Rosenthal*, 146 P.3d 510, 516 (Cal. 2006) (quoting 47 U.S.C. § 230(a)(3)).

plaintiff fails to mention that the appeals court's holding on this point was effectively superceded by the California Supreme Court's decision shortly thereafter in *Barrett v.*

*Rosenthal*, 146 P.3d 510 (Cal. 2006).<sup>6</sup> As the *Barrett* court explained:

Section 230(f)(2) defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . .” Section 230(a)(2) notes that such services “offer users a great degree of control over the information that they receive,” and section 230(b)(3) expresses Congress’s intent “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.” Thus, Congress consistently referred to “users” of interactive computer services, specifically including “individuals” in section 230(b)(3).

There is no reason to suppose that Congress attached a different meaning to the term “user” in section 230(c)(1). . . . [Defendant] Rosenthal used the Internet to gain access to newsgroups where she posted [a third party’s] article about [one of the plaintiffs]. She was therefore a “user” under the CDA, as the parties conceded below. Nor is there any basis for concluding that Congress intended to treat service providers and users differently when it declared that “[n]o provider or user of an interactive computer service shall be treated as [a] publisher or speaker . . . .” (§ 230(c)(1).) We cannot construe the statute so as to render the term “user” inoperative. . . . *We note that in cases where an individual’s role as operator of a Web site raised a question as to whether he was a “service provider” or a “user,” the courts found it unnecessary to resolve the issue because the statute confers immunity on both. (Batzel v. Smith, supra, 333 F.3d at p. 1030; Donato v. Moldow, supra, 865 A.2d at p. 719; see also Barrett v. Fonorow, supra, 799 N.E.2d at pp. 919, 922.)*

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<sup>6</sup> As counsel for Novartis noted in urging that the *Novartis* decision not be republished, “*Barrett* not only post-dated the *Novartis* opinion, it addressed Communications and Decency Act [*sic*] issues in detail, where the *Novartis* court had no need to do so. To assume that a lower-court opinion that briefly discusses these complicated issues in a cursory fashion would function as precedent, when the Supreme Court of California has clearly spoken on the issue, is unfounded.” Novartis Vaccines and Diagnostics, Inc. Response and Objection to Request for Depublication, at 5, available at [http://www.eff.org/legal/cases/novartis\\_v\\_SHAC/response\\_objection\\_to\\_request.pdf](http://www.eff.org/legal/cases/novartis_v_SHAC/response_objection_to_request.pdf)

*Id.* at 526-527 (some internal citations omitted) (emphasis added).<sup>7</sup>

Finally, plaintiff suggests that Section 230(c) is somehow not applicable unless the defendant complies with Section 230(d), which requires providers of interactive computer services to notify customers about the commercial availability of parental control measures to restrict access to information that is harmful to minors. *See* Plaintiffs' Opp. at 15. Plaintiff's argument is meritless. Plaintiff has cited no authority to support her contention that Section 230's immunity provision is contingent upon compliance with Section 230(d), for there is no such authority in the statute or in case law. Nothing in the language of Section 230(c) indicates that the immunity it confers is conditioned on the fulfillment of any other law, nor does Section 230(d) state that compliance with its requirements is a prerequisite for Section 230(c) immunity.

When Congress wishes to impose such conditions precedent upon immunity from liability, it does so explicitly. For example, when Congress enacted the Digital Millennium Copyright Act ("DMCA") in 1998—the same year the CDA was amended to add Section 230(d)—it provided Internet service providers immunity from liability for third-party copyright infringement in certain circumstances. 17 U.S.C. § 512. In the DMCA, Congress specifically chose to condition this immunity upon the satisfaction of certain requirements by service providers. *See* 17 U.S.C. § 512(i) ("The limitations on liability established by this section shall apply to a service provider only if ..."). The

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<sup>7</sup> The first case cited by plaintiff in her opposition is authority that actually *supports* the proposition that a website operator is entitled to immunity under Section 230. *See* Plaintiff's Opp. at 9, citing *Whitney Information Network v. Xcentric Ventures LLC*, 199 Fed. Appx. 738, 742 (11th Cir. 2006) ("the amended complaint . . . alleged that Defendants 'were the authors of some of the statements on their website,' not merely publishers of third-party statements. . . . By alleging that Defendants authored some of the statements posted on the website, Whitney indicated that Defendants were themselves an 'information content provider' and thus not necessarily immune under the CDA.").

difference is plain, and judicial authority concurs. The U.S. District Court for the District of Columbia has squarely held that an Internet publisher of third-party content need not comply with any other obligations imposed by the CDA in order to qualify for Section 230(c) immunity: “[w]hile it appears to this Court that [defendant provider] AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit[.]”

*Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998).<sup>8</sup>

**B. The Common Law of Agency Does Supersede Section 230’s Grant of Immunity.**

Grasping at straws to salvage her claims against defendant DCWatch, plaintiff argues that Jonetta Rose Barras was actually DCWatch’s “agent and/or had apparent authority to act as [DCWatch’s] agent.” Plaintiffs’ Opp. at 9.<sup>9</sup> There are two major problems with that argument. First, it is flatly contrary to the factual allegations of the complaint. Second, it is legally unavailing, even if true.

As an initial matter, the complaint not only fails to allege that Ms. Barras was an actual or apparent agent of DCWatch, it affirmatively alleges that Ms. Barras was the

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<sup>8</sup> In addition to the cases discussed in the text of this reply, plaintiff cites two other Internet-related opinions for the proposition that she should survive the motion to dismiss on the question of whether a website is an interactive computer service. See Plaintiff’s Opp. at 17, citing *Ben-Tech Indus. Automation v. Oakland University*, No. 247471, 2005 Mich. App. LEXIS 32 (Mich. App. Jan. 11, 2005) and *Fedders Corp. v. Elite Classics*, 279 F. Supp. 965 (S.D. Ill. 2003). But these decisions are irrelevant to the question of whether Section 230(c) applies to immunize the DCWatch Defendants because the Section 230 defense was *not even raised* by the defendants in those cases.

<sup>9</sup> Plaintiff does not assert that Ms. Barras was an agent of defendants Dorothy Brizill or Gary Imhoff, raising the agency argument solely with respect to defendant DCWatch.

*employee of a different entity, Talk Media Communications, LLC. Specifically, the complaint alleges:*

The above-described acts of Barras, Brizill, and Imhoff were committed within the scope of their employment with their *respective* employers, in that they committed them in furtherance of their *respective* employers' (Defendants Talk Media Communications and DC Watch) interests.

Complaint ¶ 86 (emphasis added). Thus, the theory of the complaint is that Ms. Barras was an employee of Talk Media Communications, and Ms. Brizill and Mr. Imhoff were employees of DCWatch ("their respective employers"), and that each was acting within the scope of his or her *respective* employment, for which his or her *respective* employer is liable under *respondeat superior*. This court must construe the allegations of the complaint in plaintiff's favor, but it is not required to accept ingenious arguments made in briefs filed by plaintiff's counsel that are *contrary* to the allegations of plaintiff's complaint. *See Duncan v. Children's National Medical Center*, 702 A.2d 207, 212-213 (D.C. 1997) (affirming dismissal of legal theory not supported by allegations of the complaint); *Ozerol v. Howard University*, 545 A.2d 638, 643-44 (D.C. 1988) (refusing to consider legal theory not pled).

Any allegation that Ms. Barras was acting as an actual or apparent agent of DCWatch is also contradicted by the very evidence plaintiff has attached to her opposition to the DCWatch Defendants' motion to dismiss. Plaintiff asserts that her new agency theory is supported by a webpage on the DCWatch website entitled *Columns*, attached to plaintiff's Opposition as Exhibit 2,<sup>10</sup> which lists Ms. Barras as "guest

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<sup>10</sup> Exhibits 1 and 2 to plaintiff's opposition to the DCWatch Defendant's motion to dismiss appear to be duplicative copies of the DCWatch *Columns* webpage. Because plaintiff refers to *Columns* as Exhibit 2 in the text of her opposition, the DCWatch Defendants also cite this webpage as Exhibit 2 to avoid confusion.

columnist” in connection with a single specific item entitled “Out with the Old, In with the New,” a piece about the 1998 D.C. mayoral election. But the webpage shows just the opposite. The page states at the top, “[a]rticles written by DCWatch columnists are *not edited for content*. DCWatch is *not responsible* for the opinions expressed by our columnists—some of them are barely responsible themselves.” *Id.* (emphases added). The page also states, “[o]ur columnists are true citizens of the nation’s capital: *they aren’t paid, they have no power or influence*, and they get no respect.” *Id.* (emphasis added).<sup>11</sup>

Nothing on that webpage shows that Ms. Barras had actual authority to act as an agent of DCWatch. Nor does it support plaintiff’s far-fetched alternative theory of apparent authority. Apparent authority “arises when a principal places an agent ‘in a position which causes a third person to *reasonably* believe the principal had consented to the exercise of authority the agent purports to hold.’” *Makins v. District of Columbia*, 861 A.2d 590, 593-94 (D.C. 2004) (quoting *Feltman v. Sarbov*, 366 A.2d 137, 139 (D.C. 1976) (emphasis added)). Thus, as the Restatement of Agency notes, apparent authority may arise “only to the extent that it is *reasonable* for the third person dealing with the agent to believe that the agent is authorized.” RESTATEMENT (SECOND) OF AGENCY § 8 cmt. c (1958) (emphasis added).

No reasonable person would believe that the title “guest columnist” listed in connection with a single article published in 1998 is sufficient to establish that Jonetta Rose Barras had authority to speak on behalf of DCWatch on a wholly different subject

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<sup>11</sup> Plaintiff repeatedly refers to Ms. Barras as a DCWatch “columnist,” but the *Columns* page draws a clear distinction between a “columnist” and a “guest columnist,” and Ms. Barras falls in the “guest columnist” category. Plaintiff’s Opp., Exhibit 2. While the difference between the two labels is unclear from the text of the *Columns* webpage, a “guest columnist” is certainly even less likely to be mistaken for an agent of the organization than a “columnist” might be.

eight years later. The disclaimers at the top and bottom of the *Columns* webpage (“[a]rticles written by DCWatch columnists are *not edited for content*. DCWatch is *not responsible* for the opinions expressed by our columnists—some of them are barely responsible themselves,” and “[o]ur columnists are true citizens of the nation’s capital: *they aren’t paid, they have no power or influence, and they get no respect*”) further demonstrate that Ms. Barras could not be reasonably mistaken for an agent of the organization.

Regardless, even if the complaint were amended to allege that Ms. Barras was an agent of DCWatch or had apparent authority to speak on DCWatch’s behalf, plaintiff’s claims would still fail as a matter of law because they seek to impose liability on DCWatch as publisher in contravention of Section 230’s immunity. Agency law will not save plaintiff’s complaint because Section 230 explicitly preempts any state law that would impose liability upon any interactive computer service provider or user based upon its online publication of information from another information content provider. 47 U.S.C. § 230 (e)(3) (“[n]o cause of action may be brought and no liability may be imposed *under any State or local law* that is inconsistent with this section.” (emphasis added.))

In essence, the amended complaint that plaintiff implicitly proposes would continue to seek to hold DCWatch liable for choosing to publish Ms. Barras’ articles, despite the fact that plaintiff does not contend that DCWatch in any way helped to write or otherwise create or develop Ms. Barras’ material. While not making any agency allegations, the Complaint currently claims that DCWatch “*published* Ms. Barras’ defamatory articles on its website and on its weblog, to wit: *The Mail*,” Compl. ¶ 67, and

that “Ms. Barras has published, and has *received authority* to publish, several libelous statements in . . . The Mail [*sic*], under the *authority and approval* of the defendants herein.” Compl. ¶ 76. As fully discussed in the DCWatch Defendants’ motion to dismiss, Section 230 bars plaintiff’s claims because the allegations seek to hold DCWatch “liable for its exercise of a publisher’s traditional editorial roles—such as deciding whether to publish, withdraw, postpone, or alter content.” *Zeran*, 129 F.3d at 330.

In these circumstances, the attempt to use agency law to hold DCWatch liable for publishing Ms. Barras’ articles cannot be reconciled with the extensive precedent holding that Section 230 provides immunity for interactive computer service providers and users who actively choose to publish and edit content written by other people. *See, e.g., Batzel*, 333 F.3d at 1031 (“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.”) (emphasis added); *Carafano*, 339 F.3d at 1124 (“so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity [under Section 230] *regardless of the specific editing or selection process.*”) (emphasis added). Section 230’s preemption of any state or local law that would undercut its broad grant of immunity necessarily includes preemption of the common law of agency, to the extent it would interfere with Congress’ policy judgment that website owners may not be held legally responsible for posting the content of third parties. Plaintiff attempts to sidestep this inescapable conclusion by citing a series of cases that do not support her arguments. In *Whitney Information Network*, an unpublished Eleventh Circuit decision, the court merely determined that the lower court had erred in granting a motion to dismiss the

plaintiff's defamation claims against the defendant website operator because "Defendants' declarations do not adequately rebut the allegations of the amended complaint insofar as it pleads Defendants' involvement in *creating or developing* the alleged defamatory content of consumer complaints posted on their website. Thus, whether Defendants were entitled to CDA immunity remained in question, as did the issue of whether their conduct was tortious." *Whitney Information Network, Inc.*, 199 Fed. Appx. at 744 (emphasis added). Unlike the plaintiff in *Whitney*, the plaintiff here has not alleged that DCWatch had any part in the creation or development of Ms. Barras' material, which would be necessary for it to be considered an information content provider under the CDA. To the contrary, the Complaint is replete with allegations that Ms. Barras wrote and provided all of the allegedly tortious statements.

Plaintiff also points to *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), a case concerning AOL's responsibility for publishing allegedly defamatory statements of gossip columnist Matt Drudge. Contrary to plaintiff's arguments, the court's only discussion of an agency relationship was to note "there is no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of [defendant] AOL, and plaintiffs seem to have all but abandoned that argument." *Id.* at 50. The Court found "no evidence" to support a finding of agency despite the court's acknowledgment that Drudge was a "columnist," and even though the evidence showed AOL had a contract with Drudge to publish his reports, paid him for his services, reserved the right to edit and remove the content he provided, and marketed his gossip column to potential subscribers. *Id.* at 51. Although the evidence of agency in *Blumenthal* was far stronger than it is here, the court concluded that AOL nevertheless qualified for Section 230

immunity. As the court explained:

Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book, store owner or library, to the liability standards applied to a distributor. *But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.*

*Id.* at 51-52 (emphasis added).

Plaintiff's parade of inapposite cases continues with *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142 (D. Ariz. 2005), which merely held that dismissal of the plaintiff's suit was inappropriate where the plaintiff had made numerous allegations in its complaint that the defendant website operators had *actually* provided original content for publication as well as solicited others to submit content for which they might be paid. *Id.* at 1149. The court held that dismissal was premature given the totality of the plaintiff's allegations, not just whether the defendants had solicited writers, as plaintiff suggests. *Id.* Unlike in *Hy Cite Corp.*, plaintiff here has not made any allegations—in her complaint or her opposition—to suggest that DCWatch was responsible for the creation or development of the content that is the basis of plaintiff's claims. As such, plaintiff's attempt to hold the DCWatch Defendants liable on an agency theory, in contravention of Section 230, must fail as a matter of law.

## **II. The First Amendment Also Requires Dismissal of Plaintiff's Claims Against the DCWatch Defendants.**

While Section 230 immunity is sufficient to dispose of plaintiff's claims against the DCWatch Defendants, the First Amendment also shields them from liability because the gist of Jonetta Rose Barras' comments about plaintiff Johnson, a public official, was

true, as demonstrated in their motion to dismiss.<sup>12</sup>

In her opposition, plaintiff seeks to avoid the defense of truth by explaining that her lawsuit does not actually rest on the theory that Ms. Barras' reporting about the historic facts was inaccurate: "whether Plaintiff initially submitted a resume with inaccuracies is irrelevant to this discussion." Plaintiffs' Opp. at 18. Rather, she asserts, her lawsuit rests on the alleged inaccuracy of Ms. Barras' statements of *opinion*: "What is relevant here is that Defendant Barras accused [Johnson] of intentionally misleading others and committing intentional, unethical, and possibly illegal misconduct." *Id.*<sup>13</sup>

Plaintiff's opposition does not specify which of Ms. Barras' statements plaintiff now relies upon as "the defamatory part of the statements at issue," *id.*, but what plaintiff has said is enough to show that her argument fails, because Ms. Barras' evaluations of plaintiff's motives or purposes are fully protected by the First Amendment, as explained in defendant Barras' Motion for Judgment on the Pleadings, at 12-14. Where "the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (Posner, J.), citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-21 (1990).

Thus, for example, Ms. Barras' statement that "[s]omeone inflated their resume to

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<sup>12</sup> See also Defendant Jonetta Rose Barras' Motion for Judgment on the Pleadings, at 7-10, which shows in even greater detail that the factual statements in the writings at issue were substantially true.

<sup>13</sup> This certainly appears to be a significant change of position on plaintiff's part. For example, Paragraph 75 of the complaint contains the single allegation that "Ms. Barras stated that 'Rosaly Johnson... actually misrepresented her employment and salary history.'" One wonders why this paragraph was included if, in plaintiff's view, it was "irrelevant" to her claims.

get a job,” Complaint ¶ 47, is analogous to a statement that a man left a poor woman for a rich one “to get money,” which was an allegedly defamatory claim in *Haynes*. But as Judge Posner explained in that case, “[a]s for Luther’s motives for leaving Ruby for Dorothy, they can never be known for sure (even by Luther) and anyone is entitled to speculate on a person’s motives from the known facts of his behavior. Luther Haynes left a poor woman for a less poor one, and [defendant] Lemann drew a natural though not inevitable inference.” *Haynes*, 8 F.3d at 1227. It is “a natural . . . inference” that a person who submitted an inflated resume with a job application did so to get the job. It is likewise an entirely natural statement of opinion that a person who acted in that manner acted unethically. And as for plaintiff’s focus on Ms. Barras accusing her of “possibly illegal misconduct,” the only statement alleged in the complaint that she can be referring to is: “[a]nyone found to have provided false information to receive his or her employment with the government can be terminated immediately and may be subject to criminal prosecution, according to DC personnel laws.” Complaint ¶ 71. That is certainly a true statement of fact. The Inspector General’s Report, filed with the DCWatch Defendants’ motion to dismiss, quotes the D.C. employment application form that plaintiff was required to sign as containing the following language:

I understand that a false statement on any part of my application may be grounds for not hiring me, or for firing after I begin work (D.C. Official Code § 1-616.51 et seq.) (2001). I understand that the making of a false statement on this form or materials submitted with this form is punishable by criminal penalties pursuant to D.C. Official Code § 22-2405 et seq. (2001).

DCWatch Mot. Dismiss, Exhibit A at 26. The complaint does not allege that Ms. Barras stated that Ms. Johnson had committed a crime. The complaint alleges that Ms. Barras stated that a person “found to have provided false information to receive his or her

employment with the government . . . may be subject to criminal prosecution.” If Ms. Johnson was disturbed by that statement, it is not Ms. Barras’ fault, and certainly not the DCWatch Defendants’ fault. The statement is not actionable because the First Amendment shields both true statements of fact and statements of opinion from creating liability.<sup>14</sup>

### CONCLUSION

For the reasons stated above and in the motion to dismiss, the DCWatch Defendants’ motion should be granted, and all claims against defendants Gary Imhoff, Dorothy A. Brizill and DCWatch should be dismissed with prejudice.

Respectfully submitted,

*/s/ Arthur B. Spitzer*

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<sup>14</sup> The DCWatch defendants also adopt by reference defendant Barras’ argument that all of plaintiff’s claims must be dismissed as a matter of law. *See* Defendant Jonetta Rose Barras’ Motion for Judgment on the Pleadings at 6-18. If the claims against defendant Barras are dismissed, the claims against the DCWatch Defendants must also be dismissed, as their alleged liability depends entirely on the actionability of her statements. There is no prejudice to plaintiff in permitting the DCWatch defendants to adopt Ms. Barras’ arguments in this reply, as plaintiff will have a full opportunity to respond to these arguments in her opposition to defendant Barras’ motion.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Reply in Support of the Motion to Dismiss All Claims Against Defendants Dorothy Brizill, Gary Imhoff and DCWatch was served upon counsel for all parties by e-mail through the Court's electronic case filing system, this 24th day of June, 2007.

*/s/ Arthur B. Spitzer*

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Arthur B. Spitzer