

No. 09-3379

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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BEVERLY STAYART,

*Plaintiff - Appellant,*

v.

YAHOO! INC., OVERTURE SERVICES, INC. d/b/a ALTA VISTA and  
VARIOUS, INC., d/b/a FRIENDFINDER.COM

*Defendants - Appellees.*

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On Appeal from the United States district court  
for the Eastern District of Wisconsin, Milwaukee Division  
Case No. 2:09-CV-00116-RTR  
Hon. Rudolph T. Randa, Judge Presiding

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**JOINT BRIEF OF APPELLEES YAHOO! INC. AND VARIOUS, INC.**

---

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January 15, 2010  
Corrected filing: February 9, 2010

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. \_\_\_\_\_ No. 09-3379 \_\_\_\_\_

Short Caption: BEVERLY STAYART v. YAHOO!, INCORPORATED, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Yahoo!, Inc..

The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the partying this court:

Sonnenschein, Nath, & Rosenthal, LLP

If the party or amicus is a corporation: Identify all its parent corporations, if any; and list any publicly held company that owns 10% or more of the party's or amicus' stock:

Yahoo! Inc. has no parent company. Overture Services, Inc., a former subsidiary of Yahoo! Inc., was dissolved and merged into Yahoo! Inc. and no longer exists.

No publicly held company owns more than 10% of Yahoo!'s stock.

Attorney's Signature: s/Marc J. Zwillinger Date: January 13, 2010 (originally filed 10/14/2009)

Attorney's Printed Name: Marc J. Zwillinger

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

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\_\_\_\_\_  
Attorney's Signature: s/Christian S. Genetski Date: January 13, 2010

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Attorney's Printed Name: Christian S. Genetski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

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No publicly held company owns more than 10% of Yahoo!'s stock.

Attorney's Signature: s/Jacob A. Sommer

Date: January 13, 2010

Attorney's Printed Name: Jacob A. Sommer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

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Various Inc.

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Kravit, Hovel & Krawczyk, s.c.

Rothken Law Firm

If the party or amicus is a corporation:

Identify all its parent corporations, if any; and

Various Inc. is a wholly-owned subsidiary of Interactive Network Inc., which is a wholly owned subsidiary of FriendFinder Networks, Inc.

list any publicly held company that owns 10% or more of the party’s or amicus’ stock:

N/A

Attorney’s Signature: s/Michael Fischer

Date: October 7, 2009 (previously filed 10/22/2009)

Attorney’s Printed Name: Michael Fischer

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N/A

Attorney's Signature: s/Ira P. Rothken Date: October 20, 2009 (previously filed 10/22/2009)

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N/A

Attorney's Signature: s/John F. Hovel

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N/A

Attorney's Signature: s/Stephen E. Kravit

Date: January 13, 2010

Attorney's Printed Name: Stephen E. Kravit

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is not warranted in this case. Existing Seventh Circuit precedent regarding immunity under the Communications Decency Act (47 U.S.C. § 230) and the Lanham Act resolves the issues Appellant presents on appeal.

## JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

## STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that an individual who has never attempted to commercialize her name nor had any association with the products that she claims her name was used to endorse lacked standing to bring a claim under the Lanham Act.
2. Whether the district court correctly found that Appellant failed to state a claim for false endorsement under the Lanham Act because display under the facts alleged of Appellant's name in search engine results, source code of a website, or embedded in a string of a Uniform Resource Locator (URL) does not constitute "use" of that name "in connection with its own goods and services," and where Appellant failed to allege facts showing her name was distinctive or that consumers were likely to be confused about Appellant's association with the content of third-party websites.
3. Whether the district court correctly found that the Communications Decency Act precluded liability under the Lanham Act for a search engine's use of information provided by indexed websites to display search results and snippets.
4. Whether a social networking interactive services provider is entitled to immunity under the Communications Decency Act for alleged use of a person's name on third party websites that also happened to contain advertisements for its services and where Plaintiff's Complaint fails to allege sufficient facts that the services provider created or published the alleged source code or URL or third party website that included such name.

5. Whether the district court correctly refused to retain jurisdiction over state law claims for misappropriation of a person's name where no federal claim remained and Appellant's Complaint failed to allege specific facts that would support an amount in controversy of over \$75,000.

#### STATEMENT OF THE CASE

Appellees agree with Appellant's statement of the case.

#### STATEMENT OF FACTS

Appellant Beverly Stayart is a typical Internet user. According to her complaint, she uses the Internet for academic research. (JA at 4.) She makes comments in online discussion forums and has published her own writing online and other Internet users have read those comments and writing. (*Id.*) There are no allegations that Appellant has attempted to become particularly popular on the Internet, or has used whatever notoriety she may have achieved to profit. In fact, Appellant alleges that she "has never given . . . any third party, any permission, authority, or license to use or sell the right to use the name 'Bev Stayart' for the promotion of any goods or services on the Internet, or in any other media, either directly or indirectly." (JA at 5.)

On September 9, 2008, Appellant made the first of a series of web searches based on the search term "Bev Stayart" on [www.yahoo.com](http://www.yahoo.com). (JA at 12.) Seven search engine results were displayed. (JA at 13.) Six

of the results “correctly” referred to Appellant “and were recognizable to her.” (*Id.*) One of the search results appeared to be a website purporting to sell Cialis, a drug used to treat erectile dysfunction, and containing the term “bev stayart.” (JA at 13, 19.) Appellant clicked on the search engine result, which led her to a web page with her search term, “Bev Stayart,” centered at the top with a video screen which flashed “Watch Free Movie!” and sought to induce her to download software, which her virus protection software warned her not to do. (JA at 13–14.) Appellant describes this as “a fraudulent and illegitimate website.” (JA at 14.) Appellant never alleges that any of these websites belonged to or were controlled by either Appellee. Numerous times over the succeeding three months, Appellant repeated these almost precisely identical actions with almost precisely identical results. (JA at 14–27.)

Several months later, on December 5, 2008, Appellant typed into her browser the following address, <http://jewellery.makin.doorway.orge.pl/bev-stayart.html>.” (JA at 28.) A website appeared (the “Jewellery Website”) bearing the words, “Meet AdultFriendFinder members near Janesville [Wisconsin] – over 20 Million Members” and “containing five graphic images of fully or partially nude women.” (*Id.*)

Exhibit LL submitted as part of Appellant's complaint shows that the Jewellery Website is labeled "[u]nder construction." (JA, Ex. LL.) Appellant's allegations are consistent with the references to AdultFriendFinder being an advertisement placed by an unknown third party on a website "under construction." Appellant accessed the HTML source code for the <http://jewellery.makin.doorway.org.pl/bev-stayart.html> website and included it as part of the Complaint. (See JA, Ex. MM.) Exhibit MM contains the text "bev-stayart[1]" at its top, indicates that the website is "[u]nder construction," and contains a reference to there being a "banner," *i.e.*, a banner advertisement, with a link to [adultfriendfinder.com](http://adultfriendfinder.com). (*Id.*)

After viewing these websites, on February 5, 2009, Appellant filed this action against Yahoo! Inc., Overture Services, Inc. (collectively "Yahoo!"),<sup>1</sup> and Various, Inc. alleging violations of the Lanham Act, as well as Wisconsin state law tort claims. (See JA at 1-44.)

I. The Nature of Appellees' Businesses

A. Yahoo! Inc.

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<sup>1</sup> Overture Services, Inc., a former subsidiary of Yahoo! Inc., was dissolved and merged into Yahoo! Inc. and no longer exists.

Yahoo! is an interactive computer service, which provides, among other services, a search engine to over “500 million users worldwide[.]” (JA at 5.) Yahoo!’s search engine, through its proprietary algorithmic software, indexes web sites and pages across the entire Internet and displays search result listings in response to queries of hundreds of millions of Internet users worldwide. (JA at 5–43.) Yahoo!’s search engine allows users to input search terms for information they seek on the Internet and then retrieve listings of relevant websites. (JA at 6.)

#### B. Various

Various, Inc. (“Various”) is an Internet provider of online personal advertising and social networking websites. It oversees numerous online businesses, including the FriendFinder network, which includes 25 multicultural and multilingual dating and social networking sites with a combined membership of more than 260 million users. (JA at 10–11.) Through these websites, Various also provides adult-oriented social networking services to customers through its AdultFriendFinder.com web site. (JA at 11.) Various advertises these services through affiliates that place ads across the web. (*Id.*)

## II. Appellant’s Allegations

Appellant’s factual allegations fall into two categories. First, she alleges that she conducted searches on Yahoo! and Alta Vista using the terms “Bev Stayart,” and that some of the results generated by those searches displayed the search terms—her name—along with other text from third party websites containing references to prescription drugs. (JA at 16–17, 21.) Second, she alleges that after clicking on some hyperlinks contained in those search results, her browser was forwarded or redirected to sites *not identified in the search results* that displayed her name in conjunction with pornographic images. (JA at 15–18.) She alleges that the display of her name with the drugs in question within the search results caused her harm, though she acknowledges the prescription drug content originated from third-party websites and that she contributed her name as the search query. (*Id.*) She also alleges only that the appearance of her name with the pornographic images on the third-party sites caused her harm, and not that her name or the offending images appeared within the search results on Yahoo! or on websites owned or maintained by Various. (*Id.*)

### III. The Third-Party Content of Which Appellant Complains



Appellant alleges that when she typed “Bev Stayart” into the Yahoo! search engine on September 9, 2008, she received a search result titled “Pm 10kb Loading Cialis – Online Pharmacy[.]” (JA at 12.) The search result displayed the title of the page, an abstract containing words appearing on the page,<sup>2</sup> and the Uniform Resource Locator (“URL”) where the page was found. As indicated in the complaint, the URL for this link was [chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn/](http://chitosan-as-a-pharmaceutical-excipient.pills-n-health.cn/). (*Id.*) The words “bev stayart” appeared in the abstract.

When clicking the title of the search result, which serves as a hypertext link to that third-party website, Appellant alleges she was redirected or “forwarded” to a number of websites displaying pornography.<sup>3</sup> (JA at 13–17.) Appellant does not allege that Yahoo! or Various owns, operates, or publishes any of these sites. None of these URLs appear in any of the Yahoo! search results Appellant identifies in

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<sup>2</sup> Plaintiff describes this text as a “snippet” (JA at 8), which is slightly deceiving – the abstract does not constitute a single segment of the page, but multiple samples of text that may appear in various places on the third-party website, each of which is separated from the others in the abstract by ellipses. (*see* JA at 13.)

<sup>3</sup> Those websites include: [www.mysharedvideo.com](http://www.mysharedvideo.com), [www.gothotvidtosee.com](http://www.gothotvidtosee.com), [www.videosfreefresh.com](http://www.videosfreefresh.com), [www.videofreeforonline.com](http://www.videofreeforonline.com), [www.myprivatetube.com](http://www.myprivatetube.com), and [www.freeprivatetube.com](http://www.freeprivatetube.com). (*Id.*)

her Complaint, nor in the exhibits displaying Yahoo! search results to which her complaint refers.

Appellant also alleges that, upon clicking the URL appearing in the “Pm 10kb Loading Cialis” search result on both the Yahoo! and Alta Vista search engines, the linked page displayed her name in conjunction with a number of prescription drugs. (JA at 16–17, 21–22.) Again, Appellant does not allege that Appellees own, operate, or publish the linked pages, or that either Appellee markets or distributes these drugs.<sup>4</sup> In short, in every instance the content to which Appellant objects was published by a third party not before the Court. Neither Yahoo! nor Various authored the content, and in most instances, Yahoo! did not directly link to it.

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<sup>4</sup> Plaintiff also alleges that text appearing in an Alta Vista search result did not accurately reflect a posting she made on the linked page. (JA at 24.) This allegation does not appear to provide a basis for any of Plaintiff’s claims, but in fact, the exact text of the first two portions of the abstract appears on the pages she attaches as Exhibit X. Although the third portion (“Buy evista cialis viagra levitra hydrocone pictures”) does not appear in the Exhibit, the Exhibit contains only a portion of the printed web page. (*See* JA, Ex. X (the two pages of this Exhibit are notated “Page 1 of 10” and “Page 7 of 10” in the top righthand corner, and display user comments numbered 28-32 without displaying the other comments).

## SUMMARY OF THE ARGUMENT

Appellant lacks standing to pursue her false endorsement claim under the Lanham Act because she has no commercial interest in her name. Under *Dovenmuehle v. Gildorn Mortgage Midwest Corp.*, 871 F.2d 697, 699-700 (7th Cir. 1989), to have standing under the Lanham Act a plaintiff must allege that she “has a reasonable interest to be protected against conduct violating the Act.” *Id.* at 700 (quoting *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981)). To do so, the plaintiff must allege an injury to a commercial interest. *Id.* Here, Appellant has failed to allege that she (1) has any present intention to operate a commercial activity under her name, (2) was engaged in competition, even indirectly, with the defendants, or (3) has been damaged or is likely to be damaged in any commercial activity as a result of Appellees’ alleged use of her name in commerce. In fact, Appellant’s complaint states the opposite: that she has never attempted to commercialize her name, much less in connection with the products at issue in her complaint.

Appellant unsuccessfully attempts to avoid the preclusive effect of this admission by seeking to transform her non-commercial activity into

a protectable interest akin to that recognized in high-profile non-profit organizations. Although Appellant has been involved in some political campaigns, her activities fall well short of those engaged in by the parties to whom courts have extended Lanham Act standing. Those groups are incorporated organizations that spend time and money promoting their marks, soliciting donations, and recruiting members. *See Comm. for Idaho's High Desert v. Yost*, 881 F. Supp. 1457, 1470–71 (D. Idaho 1995), *aff'd in part, rev'd in part on other grounds*, 92 F.3d 814 (9th Cir. 1996). In fact, Appellant cites no case providing an ordinary, politically active citizen with standing under the Lanham Act for use of their name, much less where the alleged endorsement concerns products in areas completely unrelated to their political activities. Appellant has also failed to allege she has suffered any commercial harm. *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993). To the contrary, Appellant's allegations make clear that her harms are emotional—repeatedly citing damage to her “good name”—and that no consumers have actually relied upon or been confused by use of her name by any party.

Even if Appellant has standing, she has failed to state a false endorsement claim under the Lanham Act. Neither Appellee actually used her name to endorse their own products. Appellant's complaint only alleges that her name appeared on third-party sites. Appellant alleges that use of her name in a website address constitutes commercial use, but that use is simply not sufficient to create the possibility of consumer confusion. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 409 (2d Cir. 2005). Similarly, the mere appearance of her name in Yahoo!'s search results does not constitute "use" by Yahoo!, because her name is in no way linked with endorsement of Yahoo!'s products. *Heartbrand Beef, Inc. v. Lobel's of N.Y., LLC*, 2009 WL 311087, at \*2 (S.D. Tex. 2008).

Nor is Appellant's name sufficiently distinctive to state a claim for false endorsement. False endorsement claims require that the plaintiff allege some sort of celebrity status. *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 43 (N.D. Ill. 1996); *Parks v. LaFace Records*, 329 F.3d 437, 445-46 (6th Cir. 2003). Appellant's complaint alleges at best that she is a successful person involved in admirable pursuits, but alleges no facts

showing that her name was sufficiently distinctive or well known to state a claim.

Finally, Appellant's allegations preclude a showing of a likelihood of confusion. Appellant's Complaint makes clear that she is not particularly well known, what notoriety she has is unrelated to either of the Appellees' products, and there is no evidence of actual confusion—all of which weigh against finding a likelihood of confusion. *Kournikova v. Gen. Media Commc'ns, Inc.*, 278 F. Supp. 2d 1111, 1119-1121 (C.D. Cal. 2003); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001). Appellant also makes clear that she has never licensed her name for any commercial endeavor, and that she has “in no way ever engaged” in activities related to any of the products she alleges have falsely appropriated her endorsement.

Likewise, the cases Appellant cites in support of her claim that use of her name caused “initial interest confusion” demonstrate that she has not alleged any facts that show “that the public believe[s] that [Appellant] sponsored or otherwise approved the use of [her name].” *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000) (quoting *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988)).

Instead, Appellant's Complaint contains numerous allegations that she had no relationship with the products at issue, and as such "[n]o one who accessed these links could reasonably conclude that Bev Stayart endorsed the products at issue." (Dkt. 41 at 13.)

The district court, having correctly dismissed Appellant's Lanham Act claims, also correctly refused to exercise jurisdiction over Appellant's state law claims. First, Appellant failed to plead any other basis for jurisdiction other than supplemental jurisdiction, which no longer exists once a federal court has dismissed the federal claims. *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (7th Cir. 1997). Second, Appellant failed to allege facts in her Complaint sufficient to cross the \$75,000 threshold for diversity jurisdiction.

Even if Appellant's claims survive jurisdictional challenges and state a claim under the Lanham Act, the Communications Decency Act ("CDA") 47 U.S.C. § 230, bars her claims. The CDA provides immunity for interactive computer services ("ICS") that merely republish material found on third party sites. In order to avoid subjecting ICSs to frivolous suits, this court should resolve CDA immunity on a motion to dismiss. Yahoo!, a search engine, is an ICS, *Murawski v. Pataki*, 514 F. Supp. 2d

577 (S.D.N.Y. 2007), and Appellant's attempts to transform it into a content provider are unavailing because Yahoo!'s algorithm gathered and displayed material contained entirely on third-party sites. Various is also entitled to immunity, because Appellant does not allege that it owns or operates (and thus provides content on) any of the websites at issue.

Nor is Appellant's attempt to characterize her false endorsement claims under the Lanham Act as intellectual property claims sufficient to defeat CDA immunity. False endorsement claims, while contained in the same act as trademark claims, are not "intellectual property" claims—especially where a plaintiff's complaint makes clear that they are nothing more than defamation claims camouflaged as intellectual property claims.

Finally, should this Court exercise jurisdiction over Appellant's state law claims, it should also dismiss those claims because an ordinary citizen does not have a sufficient property right in her name to state a claim under Wisconsin's misappropriation and defamation laws. Wis. Stat. Ann. § 995.50 (West 2009); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 132 (Wis. 1979).



## ARGUMENT

### I. Standards On A Motion to Dismiss

While a complaint “does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court need not accept as true “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009). Notice pleading “marks a more notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Id.* at 1950.

A party can also “plead itself out of court by pleading facts that establish an impenetrable defense to its claims. . . . If the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief.” *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008) (internal

citations omitted); *Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir. 1994).

II. Appellant Lacks Standing To Bring A Claim Under the Lanham Act.

The district court correctly applied prudential standing doctrines in finding that Appellant lacked standing to bring her Lanham Act claim against both Yahoo! and Various because she lacks any commercial interests in the allegedly misappropriated identity.

Section 43(a)(1)(A) of the Lanham Act provides that:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of *his or her goods, services, or commercial activities* by another person, or

...

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”<sup>5</sup>

Appellant states that she is only pursuing false endorsement claims pursuant to subsection (A). (Appellant’s Br. at 45.) As the district court noted, “[f]alse endorsement occurs when a person’s identity is connected with a product or service in such a way that consumers are likely to be misled about that person’s sponsorship or approval of the product or service.” (Dkt. 41 at 8 (citing *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925-26 (6th Cir. 2003).)

A. Lanham Act Standing Is Limited To Those Who Allege An Injury To A Commercial Activity.

The Lanham Act provides standing to “any person who believes that he or she is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1)(B). As the district court recognized, “[w]hile this language implies a broad reach, the focus of the Lanham Act is on ‘*anti-competitive conduct in a commercial context*.’ Conferring standing to the full extent implied by the text of § 43(a) would give standing to parties, such as consumers, having no competitive or commercial interests affected by the conduct at issue.” (Docket 41 at 8–9 (quoting

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<sup>5</sup> 15 U.S.C. § 1125(a)(1)(A)–(a)(1)(B) (emphasis added).

*Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 229 (3d Cir. 1998).) The district court applied this prudential standing doctrine to limit standing to plaintiffs that “at the least allege an existing intent to commercialize an interest in identity.” *Condit v. Star Editorial, Inc.*, 259 F. Supp. 2d 1046, 1052 (E.D. Cal. 2003); *Hutchinson v. Pfeil*, 211 F.3d 515, 521 (10th Cir. 2000) (“[M]ere potential of commercial interest . . . is insufficient to confer standing’ for [a] false association claim[.]” (citation omitted)); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (same).

As this Court stated in *Dovenmuehle*, 871 F.2d at 699-700, standing under section 43(a) of the Lanham Act requires at least an allegation that “the party ‘has a reasonable interest to be protected against’ conduct violating the Act.” *Id.* at 700 (quoting *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981)). A Lanham Act plaintiff must allege an injury or likely injury related to a commercial activity. *Id.*; *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971) (noting that section 43(a) standing is limited to members “of a purely commercial class[.]”).

B. Appellant Has Failed To Allege An Intent To Commercialize Her Name.

*Dovenmuehle* set forth the factors for determining whether a plaintiff has alleged a commercial interest sufficient to confer standing under the Lanham act. The plaintiffs there brought suit after selling their family business, alleging that the defendants' use of the trade name "Dovenmuehle, Inc." violated § 43(a) of the Lanham Act. While under the plain language of the Lanham Act, the plaintiffs may have had standing as "any person who believes that he or she is likely to be damaged," *Dovenmuehle*, 871 F.2d at 699, this Court denied standing, finding that "[n]one of the plaintiffs are engaged in competition, even indirectly, with the defendants. Nor do they claim any present intention to operate a commercial activity under the name 'Dovenmuehle.'" *Id.* at 700.

*Dovenmuehle* is dispositive. As in that case, Appellant has failed to allege that she is engaged in competition, even indirectly, with either Appellee, nor even that she independently has any present intention to operate a commercial activity under her name. *Id.* To the contrary, Appellant alleges only that:

- She posts academic articles on a third-party site. (JA at 4.)
- She uses the Internet in support of animal protection activities and genealogy research. (*Id.*)

- She has participated in campaigns to save certain animal species. (JA at 3.)

Appellant first attempts generate “commercial intent” by arguing that “Beverly Stayart” has become a popular keyword phrase through the actions of other parties that have allegedly used her name to drive traffic to their websites. To support her novel theory of commercialization by proxy, Appellant cites to an appendix to her complaint that shows five websites have received traffic from Internet searchers using the search term “Beverly Stayart” and to *National Cable Television Ass’n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1577-78 (Fed. Cir. 1991). (Appellant’s Br. at 26–27.) *National Cable*, however, extends Lanham Act standing to the use of an abbreviation of a name that the plaintiff had commercialized on its own. 937 F.2d at 1577–78. *National Cable* would only apply here if Appellant had commercialized “Beverly Stayart” and here sought to prevent use of a nickname, such as Bev Stayart, that she was commonly known by, but did not commercialize.

Appellant also attempts to distinguish *Dovenmuehle* on the basis that the plaintiffs in *Dovenmuehle* had sold the rights to their family’s trade name and thus no longer had a “reasonable interest to be protected,” while Bev Stayart has “never sold the right to use her

unique personal name.” (Appellant’s Br. at 22.) Appellant’s own distinction merely emphasizes the soundness of the district court’s decision. Appellant has indeed never sold the right to use her name, or made *any attempt* to commercialize her name.

Finally, Appellant seeks to equate her limited, individual participation in advocating certain causes—causes unrelated to the products she claims her name was used to endorse—with large-scale non-profit organizations that have successfully established protectable interests in their trademarks. Her attempt fails. Although advocacy may in some instances amount to commercial activity, Appellant never even alleges that she used her to promote causes through boycotting or any particular political advocacy. Appellant argues, in her brief, that her activities related to “boycotting” and “educat[ing] the general public” about certain issues amount to commercial activity. But Appellant’s Complaint merely alleges that she “actively participated” in several environmental campaigns, engaged in “humanitarian endeavors,” contributes to a genealogical discussion forum in which her “posts . . . have generated almost 17,000 ‘hits’ during the past three years[,]” and wrote two poems that appeared on two Danish websites.

(JA at 4.) She does not allege that she was the public face of such campaigns, or that her identity was used to garner support for them. Rather, the Complaint contains nothing more than conclusory allegations that Appellant's name has value because of unspecified "humanitarian endeavors." (*Id.*)

If such allegations could support a false endorsement claim, nearly every person who signed a petition for *any* advocacy or political group would have an enforceable interest under the Lanham Act—no matter how obscure his or her role might be. Such a result would eviscerate the "commercial interest" standing requirement and extend the Lanham Act to parties it was never intended to cover, specifically, an individual who discovers a reference to themselves on the Internet that they find incongruent with their own self image.

The cases Appellant cites underscore that "advocates" with standing to sue under the Lanham Act are more like commercial entities than individuals. For instance, Appellant relies on *Committee for Idaho's High Desert v. Yost*, 881 F. Supp. 1457 (D. Idaho 1995) to argue that a "non-profit organization engaged in dissemination of information about environmental causes" could have standing to sue



under the Lanham Act. (Appellant's Br. at 25.) Unlike Appellant, CIHD engaged in a number of commercial activities in an effort to make itself the public face of the positions it espoused.

[CIHD] . . . provides certain goods to its members in return for membership fees, such as newsletters, and printed "alerts." Plaintiff also sells goods to its members and the public, particularly when sponsoring or otherwise participating in "Desert Conferences" with other environmental organizations held in Idaho or in other nearby states. These goods include bandannas, T-shirts, and bumper stickers.

*Id.* at 1465. Second, CIHD, had been operating for twenty-plus years *solely* as an advocacy group focused on Idaho's desert. *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F. 2d 814, 817 (9th Cir. 1996). Like a commercial entity, it incorporated, advertised, sought out members, and charged membership fees. *Yost*, 881 F. Supp. at 1465. Moreover, the defendant in *Yost* was not a completely unrelated entity with which CIHD had never associated itself, but instead a *direct* political "competitor" that was engaged in a political campaign to oppose CIHD's environmental advocacy. *Id.* While, CIHD was specifically *identified* with the very issue with which the defendant associated its name. Appellant here insists that she never had any association with the

goods or services at issue, admits she has never attempted to commercialize her name, and has failed to plead any details of the extent of her advocacy. In fact, Appellant simply has failed to plead any details sufficient to establish that her efforts are akin to those undertaken by the plaintiff in *Yost*. (JA at 4, 5); *see also United We Stand Am., Inc. v. United We Stand Am. N.Y., Inc.*, 128 F. 3d 86, 89-90 (1997) (enforcing a trademark where a presidential candidate’s campaign committee spent considerable sums promoting the mark, raising money, and trying to “commercialize” the mark); *Brach Van Houton Holding, Inc. v. Save Brach’s Coalition for Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994) (providing protection for a candy company that used the “Brach’s” mark to market and sell candy, in an action against an advocacy group that was speaking out against Brach’s management).

In fact, Appellant cites *no case* allowing an *individual participant* in an advocacy campaign—or a political campaign—to transform that participation into a protectable interest under the Lanham Act. *See Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity*, 654 F.Supp. 1095, 1101 (D. N.H. 1987) (fraternal organization); *Am.*

*Diabetes Ass'n, Inc. v. Nat'l Diabetes Ass'n*, 533 F.Supp. 16, 20 (E.D. Pa.1981) (association for medical research), *aff'd*, 681 F.2d 804 (3d Cir. 1982); *United States Jaycees v. Philadelphia Jaycees*, 490 F.Supp. 688, 691 (E.D. Pa. 1980) (public service organization), *rev'd on other grounds*, 639 F.2d 134 (3d Cir. 1981); *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F.Supp. 61, 64, 65 (N.D. Cal. 1972) (same), *aff'd*, 513 F.2d 1226 (9th Cir. 1975).

It is unsurprising that Appellant has failed to locate cases providing ordinary citizens with standing. Adopting Appellant's position would lead to a massive influx of litigation under the Lanham Act that would render the prudential standing doctrine meaningless.

C. Appellant Lacks Standing Because She Has Failed To Allege That She Has Suffered Commercial Harm.

In *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, this Court rejected a false endorsement Lanham Act claim because plaintiff:

failed to offer any evidence that it was entitled to any relief. In order to recover damages for a purported Lanham Act violation, the plaintiff "must demonstrate that it has been damaged by actual consumer reliance on the misleading statements."

*Heath*, 9 F.3d at 575 (citing *Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1205 (7th Cir. 1990) (quoting *Schutt Mfg. Co. v. Riddell, Inc.*, 673 F.2d 202, 206 (7th Cir. 1982).)

It is obvious from the face of the Complaint that the only way anyone would ever encounter the web pages that offended Appellant would be not only to do an Internet search for “Bev Stayart,” but also to click through every web page that the search pulled up, all the way to the bottom of the list. Appellees submit that the only person likely to do that is Appellant herself. Given that Appellant’s Complaint only alleges limited participation on the Internet, it is unlikely that a significant number of people beyond Appellant herself, Appellees’ counsel, and persons interested in this case, would ever be aware of these links. In fact, Appellants complaint fails to allege that anyone other than Appellant ever saw or was misled by the search results in question. (JA at 32.)

Second, to satisfy *Heath’s* commercial harm requirement, a plaintiff must allege actual consumer reliance on allegedly misleading statements by Defendant. *Id.* at 575. No such reliance has been alleged, nor could it be alleged, in the present case; there is no cause for

consumers to seek out and exhaustively research “Bev Stayart.” The only plausible conclusion based on the allegations is that no such actual consumer reliance could have occurred. Accordingly, Appellant’s claim should be rejected under the *L.S. Heath & Son* standard without leave to amend.

The inability to allege facts demonstrating any *commercial* harm is unsurprising, as Appellant’s complaint betrays that her actual perceived injury is personal and emotional. As the district court observed, this “emotional non-commercial concern is underscored by Stayart’s correspondence with Yahoo! that is attached to her complaint.” (Docket 41 at 10; *see* JA, Ex. CC (“[M]y privacy and reputation have been seriously violated and defamed.”); JA, Ex. DD, EE (“This material is both pornographic and demeaning to her. The site is using her name without her permission to defame and denigrate her good name.”); JA, Ex. Z (“I believe that Yahoo[ ]as invaded my privacy by the publishing, and/or facilitating the publishing, of false and defamatory pornographic photos purporting to be me.”).

III. Appellant’s Complaint Fails to State a Claim Under the Lanham Act

To state a false endorsement claim, Appellant must allege facts that, if true, would establish that her name was: (1) used in commerce, (2) it is distinctive, and (3) a likelihood of confusion exists. 15 U.S.C. § 1125(a)(1); *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 43 (N.D. Ill. 1996).

A. Appellant Does Not Allege Use In Commerce

In order to constitute “use in commerce” under the Lanham Act, a false endorsement must have a “substantial economic effect” on interstate commerce. *Johnson v. Jones*, 149 F.3d 494, 502 (6th Cir. 1998); *Condit v. Star Editorial, Inc.*, 259 F. Supp. 2d 1046, 1050 (E.D. Cal. 2003) (“competitive” harm is needed). The district court correctly held that Appellant’s complaint is without any well pleaded factual allegations of any “economic” effect, let alone a “substantial” one, caused by the alleged false endorsement. *Iqbal*, 129 S. Ct. at 1953. The “use in commerce” element further requires that plaintiff allege that defendants use plaintiff’s name to *endorse* the defendants goods or services. *L.S. Heath & Son, Inc*, 9 F.3d at 575.

1. *Appellant Has Not Alleged That Various Used Her Name In Commerce*

Here, Appellant alleges commercial “use” of the term “Bev Stayart” to endorse Various’s goods and services based on (1) the term’s inclusion as part of a long URL, (2) its inclusion in source code on a website, and (3) display of the term in search results. None of these allegations meets the “use in commerce” requirement of the Lanham Act or constitutes endorsement of Various’s services. The Second Circuit in *1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400 (2d Cir. 2005),<sup>6</sup> discussed the “use in commerce” requirement of the Lanham Act, finding that a competitor’s use of a trademarked term in a URL does not constitute “use in commerce” of the mark under the Lanham Act, even where the only difference was limited to the addition of “www.” and “.com”. *Id.* As the *1-800 Contacts* court stated:

The district court found that the differences between 1-800’s trademarks and the website address utilized by WhenU were insignificant because they were limited to the addition of the “www.” and “.com” and the omission of the hyphen and a space. We conclude that, to the contrary, the differences between the marks are quite significant because they transform 1-800’s trademark . . . .

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<sup>6</sup> While *1-800-Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 2005), is a trademark infringement case it is predicated upon the “use in commerce” requirement of the Lanham Act as a whole— the same act plaintiff here relies upon in her Seventh Claim For Relief.

*Id.* (internal citations omitted). If adding “www.” and “.com” can transform a trademark to such an extent that use of the transformed term does not constitute “use in commerce” of the mark, then there is little doubt that adding “jewellery.makin.doorway.orge.pl/” and “.html” to an untrademarked name cannot constitute a “use in commerce” of the term Bev Stayart.

The only other “use” Appellant alleges is the inclusion of “bev-stayart[1]” in the source code of the Jewellery Website. In *1-800 Contacts*, defendants had included plaintiff’s trademark in a directory of terms, the use of which in a search engine would trigger pop-up ads. *Id.* at 408. The Court determined that including a business competitor’s trademark in such a directory did not constitute a “use in commerce”:

Although the directory resides in the C-user’s [computer user’s] computer, it is inaccessible to both the C-user and the general public. . . . A company’s internal utilization of a trademark in a way that does not communicate it to the public is analogous to a individual’s private thoughts about a trademark. Such conduct simply does not violate the Lanham Act, which is concerned with the use of trademarks in connection with the sale of goods or services in a manner likely to lead to consumer confusion as to the source of such goods or services.

*Id.* at 409.



The decision in *1-800 Contacts* is relevant to the allegation that Various “used in commerce” the term “Bev Stayart” by including the term “bev-stayart[1]” in source code for a web page. Like the use in *1-800 Contacts*, the source code at issue here is inaccessible to anyone but the rare computer user who would go to the extreme length of checking the source code of the web pages they browse. Although the use allegedly had some effect on the search results of a computer user, it is not a use that communicates the term to the public, and is analogous to a company’s “internal utilization of” and “private thoughts about” the term. This “use” is not a “use in commerce” under the Lanham Act – and it would not be, even if the term “bev-stayart[1]” were a trademark and not simply a string of characters resembling Appellant’s name. Because Appellant has not alleged any “use in commerce” as required by the Lanham Act, her claim against Various should be dismissed.

2. *Appellant Has Not Alleged That Yahoo! Used Her Name In Commerce*

Appellant argues that Yahoo! used her name in commerce because her name appeared in search results and that appearance somehow constitutes her endorsement of Yahoo!’s service. This argument cannot

withstand scrutiny. *Heartbrand Beef, Inc. v. Lobel's of New York, LLC*, 2009 WL 311087 (S.D. Tex. 2009). Appellant's complaint alleges that Yahoo!'s "wrongful" use of her name consisted of her names appearance in a number of search results. (JA at 13-20.) There are no allegations that Yahoo!'s search results stated that Appellant preferred to use Yahoo!'s products, or was of the opinion that Yahoo!'s products were particularly effective. In fact, the search results alleged do not contain any statements Appellant purportedly made regarding Yahoo!'s products or services. If appearance in search results constituted an "endorsement" of those results, nearly every human being, corporation, and entity—including this Court and its individual judges<sup>7</sup>—would have a claim for false endorsement against Yahoo!. Extending Appellant's claim this far obliterates the "endorsement" requirement of a false endorsement claim and would render all Internet search engines susceptible to millions of frivolous suits.

B. Appellant Fails to Allege That Her Name Is Unique And Distinctive.

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<sup>7</sup> See e.g. <http://search.yahoo.com/search?p=seventh+circuit+court+of+ appeals&toggl=1&cop=mss&ei=UTF-8&fr=yfp-t-701>

A false endorsement claim requires allegations of the “unauthorized use of celebrity’s identity,” such as the “misuse” of “visual likeness, vocal imitation, or other uniquely distinguishing characteristic . . . .” *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 43 (N.D. Ill. 1996). Appellant argues celebrity status is not required, citing *Pesina* and *Doe v. FriendFinderNetwork, Inc.*, 540 F. Supp. 2d 288, 306 (D. N.H. 2008). (Appellant’s Br. at 19). *Pesina*, however, held that “Mr. Pesina must demonstrate that he was a ‘celebrity’ when the defendants used his persona, name, and likeness; otherwise, his identity does not constitute an economic interest protectable under the Lanham Act.” *Pesina*, 948 F. Supp. at 43. The court even noted that Mr. Pesina’s own expert had conceded that plaintiff’s “identity . . . lacked commercial value.” *Id.* *FriendFinderNetwork*, meanwhile, represents a minority view, and appears to be in conflict with the in-Circuit decision in *Pesina*. It also appears to be at odds with other decisions, including the Sixth Circuit’s decision in *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).

In *Parks*, Rosa Parks, the civil rights activist who gained prominence during the Montgomery bus boycott in 1955, brought an action against a record producer for using her name as the title of a

song. *Id.* at 431. She contended that the use of her name constituted false advertising under section 43(a) and intruded on her common law right of publicity under Michigan law. *Id.*

After explaining that she could bring a Section 43(a) claim even though her name had not been trademarked, the court held that Ms. Parks “clearly has a property interest in her name” and that “[i]t is beyond question that” she “is a celebrity.” *Id.* at 447. The court explained:

The right of publicity protects the identity of a celebrity from exploitive commercial use. *See Carson v. Here's Johnny Portable Toilets, Inc.* 698 F.2d 831, 835 (6th Cir. 1983). “The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.” As such, the common law right of publicity forms a species of property right.

*Parks*, 329 F.3d at 459; *see Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000).

Although the Lanham Act’s literal terms do not require a plaintiff be a celebrity or have distinctive status, the nature of a false endorsement claim suggests that such status is required. It is not

plausible that one can commercially exploit an unrecognizable name that has no commercial value.

The complaint makes clear that, while Appellant may have been a successful person involved in certain admirable pursuits like many Internet users, she was in no sense a “celebrity” or someone with a “distinctive” name for purposes of protection under the Lanham Act. (JA at 3-4.) Appellant contends that her name has commercial value “because of her humanitarian endeavors, positive and wholesome image, and the popularity of her scholarly posts on the Internet.” (JA at 4.) Notwithstanding these allegations of her prominence, however, Appellant admits that the initial Yahoo! searches she performed using the keywords “Bev Stayart” resulted in a display of only *seven* search engine results. (JA at 12-13.) Accordingly, the term “Bev Stayart” has no commercial value and Appellant’s “identity does not constitute an economic interest protectable under the Lanham Act.” *Pesina*, 948 F. Supp. at 43; *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992).

- C. Appellant Has Not Sufficiently Pleaded A Likelihood of Confusion.

With respect to the consumer “confusion” requirement of § 43(a), “[t]he test ... is whether ‘the evidence indicates a likelihood of confusion, deception or mistake on the part of the consuming public.’” *Schutt Mfg. Co. v. Riddell, Inc.*, 673 F.2d 202, 206 (7th Cir. 1982) (quoting *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 572 F.2d 574, 576 (7th Cir. 1978)). A number of factors are relevant to determining if there is a likelihood of confusion:

- Recognition among the segment of the society for whom defendant’s product is intended (the more well-known the defendant, the greater the protection),
- The relatedness of plaintiff’s fame or success to defendant’s product (the closer the relationship between the cause for the plaintiff’s notoriety and the defendant’s product the greater the likelihood of confusion),
- Evidence of actual confusion, and
- Defendant’s intent in selecting the plaintiff.

*Kournikova v. General Media Communications, Inc.*, 278 F. Supp. 2d 1111 (2003), *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007-08 (9th Cir.2001) (restating the factors set forth in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)).

None of these factors weigh in Appellant’s favor. She is not well-known. She only posts academic articles on a third-party site that are

interesting to a narrow group of people, (JA at 4); she has posted her own poetry on two Danish web sites (*Id.*); she uses “the Internet in support of animal protection activities and genealogy research” (JA at 4); and she has some unknown level of participation in advocacy campaigns. (JA at 3.)

As to the second factor, Appellant’s alleged activities on the Internet bear no relation to defendants’ products. As Appellant herself states “Plaintiff in no way has ever engaged in a promiscuous lifestyle, or other overt sexual activities, which she and a large portion of her community and social circle consider perverse and abhorrent.” (JA at 4.)

Finally, Appellant fails to allege any actual confusion by consumers other than herself, and given her lack of notoriety, her complaint offers no plausible facts on which to base an inference that Appellees would intentionally select Appellant as a means of promoting their products. As such, not a single factor weighs in her favor.

Appellant attempts to remedy these defects by arguing that trademark owners may state a claim against use of their mark in markets in which they do not participate directly. (Appellant’s Br. at

20). These cases Appellant cites reveal that her claims are not actionable under the Lanham Act. In *Polaroid Corp. v. Polaroid, Inc.*, 319 F.2d 830, 834-35 (7th Cir. 1983), for instance, plaintiffs promoted their well-known mark heavily across a broad range of products. Even though defendant did not compete with plaintiff's products directly, the court found that the exceedingly well-known nature of the mark entitled it to broad protection. *Id.* Appellant, however, has pleaded *no facts* that would allow a court to conclude that her name is so widely known that it should accorded protection in areas in which she admits she has *never* had any association or involvement. *Id.*

Appellant also argues that use of her name itself creates a likelihood of confusion, citing *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F. 2d 1100, 1111 (6th Cir. 1991). *Homeowners Group* did not involve the use of a name in a context not associated with the owner of the name. Instead, the plaintiff and defendant both participated in the home-buying market and had overlap in customer base. *Id.* at 1103-04. In determining whether the plaintiff's claim had merit, the court stated that "[t]he ultimate question remains whether relevant consumers are likely to believe that the products or services



offered by the parties are affiliated in some way.” *Id.* at 1107. To that end, the fact that the two parties were *in competition* with each other was relevant to finding that a likelihood of confusion existed—and copying a name to an unrelated good or service did not suffice.

Finally, Appellant cites *Boston Professional Hockey Ass’n v. Reliable Knitting Works, Inc.*, 178 U.S.P.Q. 274, 1973 WL 19860 (E.D. Wis. 1973) for the proposition that “even though the products or services of the litigants are so unrelated that it is clear that the defendant’s goods or services do not come from the plaintiff, the misleading impression may be created that the defendant’s business is related to, or otherwise connected with the plaintiff.” (Appellant’s Br. at 32). *Boston Professional*, however, involved the manufacture of unlicensed Boston Bruins apparel. 178 U.S.P.Q. at 276. While the Bruins franchise is not an apparel company—it had licensed the right to make Bruins apparel to another company. *Id.* Appellant’s complaint, on the other hand, states that she did not participate in any way in the prescription drug or adult services market.

Appellant faults the district court’s conclusion that no person could actually be misled by the alleged statements by arguing that

falsity is the “*raison d’etre* for a false endorsement claim.” (Appellant’s Br. at 31.) As the district court recognized, the statement must not only be false, but a reasonable person must be capable of believing it is true. For instance, *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899 (7th Cir. 2007), which Appellant cites in support of this point, upheld a requirement that the consumers who viewed the allegedly false endorsement actually have been deceived for liability to attach. *Id.* at 908. In so holding, *Muzikowski* affirmed dismissal despite plaintiff’s submission of affidavits from eighteen friends claiming confusion. *Id.* Appellant’s complaint fails to allege any facts tending to establish that the false statements are sufficiently believable to support a claim under the Lanham Act.

As the district court correctly recognized, Appellant’s complaint *only* alleges that she is known in certain (small) academic and activist circles. (Docket 41 at 13.) The complaint affirmatively alleges, as the district court noted, that “Stayart’s identity is completely unrelated to the services offered by the AdultFriendFinder site” or prescription drugs. (Docket 41 at 14.) Appellant does not allege actual confusion by individuals or consumers or harm other than her own hurt feelings

because she saw her name next to products she does not approve of. Appellant's assertion that some unnamed and unidentified individuals could have thought that Appellant endorsed these products is exactly the type of allegation that *Twombly* rejects. Appellants' own hypothetical worries and hurt feelings are not actionable under the Lanham Act.<sup>8</sup>

D. Appellant's Claim Of "Initial Interest Confusion" Against Various Also Fails.

Appellant cites *Syndicate Sales, Inc. v. Hampshire Paper Corp.*, 192 F. 3d 633 (7th Cir. 1999) to support her claim that Various' actions created initial interest confusion and established a likelihood of confusion. (Appellant's Br. at 34.) Initial interest confusion requires allegations that an individual has been lured to a product by a similarity to a known mark, and "actual confusion, not a mere risk of confusion" has occurred. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 465 (7th Cir. 2000). Importantly, *Syndicate Sales* involved a competitor's use of a mark, such that individuals looking for a

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<sup>8</sup> As with all of Appellant's allegations, the nature of this harm reveals that Appellant has attempted to allege nothing more than simple defamation claims, which are barred by the CDA. *See, infra*, Section V.E.

particular type of service that the plaintiff offered would instead find defendant's offering of that same service.

Similarly, the other cases Appellant cites underscore the requirement that a plaintiff allege use as well as some connection (most often competition) between plaintiff and defendant to support a finding of confusion. *See e.g. Promatek Indus., Inc. v. Equitrac Corp.*, 300 F.3d 808, 810-11 (7th Cir. 2002) (competitor used direct competitor's name in metatags), *Int'l Profit Assocs., Inc. v. Paisola*, 461 F. Supp. 2d 672 (N.D. Ill. 2006) (website used a trademark for commentary on the trademark's owner; but only basis for removal of false statements was defamation claim); *Indiaweekly.com, LLC v. Nehaflix.com, Inc.*, 596 F. Supp. 2d 497, 500 (D. Conn. 2009) (competitor used direct competitor's name on its website to attract customers).

Appellant cannot state a claim because she has not demonstrated "that the public believe[s] that 'the mark's owner sponsored or otherwise approved the use" of her name. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000). As the district court noted in considering initial interest confusion on the Internet, the court must consider "the relatedness of the goods offered and the level of care

exercised by the consumer.” *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 945 (9th Cir. 2002). Considering those factors, the district court found that Appellant’s own allegation that “*explicitly disavows* any association with pornographic materials, sexual dysfunction drugs or sexually-oriented dating services” pleads her out of court. (Docket 41 at 13.) Accepting her pleading as true, “[n]o one who accessed these links could reasonably conclude that Bev Stayart endorsed the products at issue[,]” (*id.*), because “in the absence of [some relation between plaintiff and the product at issue] some initial interest confusion will not likely facilitate free riding on the goodwill of another mark or otherwise harm the use claiming infringement.” (*Id.* at 14.) (*quoting Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270 (3d Cir. 2001).) Where confusion has “little or no meaningful effect in the marketplace, it is of little or no consequence” in establishing initial interest confusion. *Checkpoint Sys., Inc.*, 269 F.3d at 297. Thus, as the district court correctly observed, “[t]he type of person looking for information about Bev Stayart would not be fooled into using an online adult-oriented dating website.” (Docket 41 at 14.)

IV. The District Court Correctly Declined to Exercise Jurisdiction Over Appellant’s Remaining State Law Claims

Appellant only plead supplemental jurisdiction in support of jurisdiction over her state law claims. 28 U.S.C. § 1367. Appellant does not appear to challenge the district court's adherence to actions in following the general rule that when any federal claims drop out before trial the federal district court should relinquish jurisdiction over the supplemental claims. *Van Harken*, 103 F.3d at 1354 (7th Cir. 1997).

Appellant argues instead that the district court erred denying leave to amend her complaint to allege more than \$75,000 in damages in order to establish diversity jurisdiction. An appellate court reviews a district court's denial of leave to replead for an abuse of discretion. *Garcia v. City of Chicago*, 24 F.3d 966, 970 (7th Cir. 1994). Repleading would be futile if the complaint still would not survive a motion to dismiss. *Id.*; *Perkins v. Silverstein*, 939 F.2d 463, 472 (7th Cir. 1991). Here, the district court found that Appellant would have had no basis on which to make a good faith allegation that her damages are more than \$75,000.

Appellant argues that her damages would meet this threshold because she may be able to seek punitive damages, attorney's fees, and compensatory damages under Wisconsin law. Appellant's statements

and allegations, however, are purely speculative and conclusory. Further, her complaint fails to allege any compensatory damage amount, save an amount sufficient to bear some relation to a punitive damages award of more than \$75,000. *BMW of N. Am. v. Gore*, 517 U.S. 559, 580-81 (1996). As such, the district court properly exercised its discretion not to allow Appellant to amend her complaint.

V. The Communications Decency Act Bars Appellant's Claims Against Both Appellees

Regardless of whether she has standing, has stated a claim, or satisfies the jurisdictional amount, all of Appellant's causes of action are nonetheless barred under Section 230(c)(1) of the Communications Decency Act ("CDA").

A. The Communications Decency Act

Section 230(c)(1) of the CDA provides that "[n]o 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). An interactive computer service ("ICS") is defined 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.” 47 U.S.C. § 230(f)(2). An “[i]nformation content provider,” by contrast, is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3).

Congress passed the immunity provision in 1996 “for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.” *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). “In light of these concerns, reviewing courts have treated § 230(c) immunity as quite robust[.]” *Id.* at 1123. The Fourth Circuit found that, because the plain language of Section 230(c)(1) “creates a federal immunity to *any cause of action* that would make service providers liable for *information originating with a third-party user of the service*,” an Internet service was immune from liability for both publishing third-party content and delaying in removal of the content. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997) (emphasis added). As the court stated:

Congress made a policy choice ... not to deter harmful online speech through the separate route



of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. ... The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

*Id.* at 331. Numerous circuits, including this one have also recognized Section 230's broad protection.<sup>9</sup> *See Chicago Lawyers' Committee for Civil Rights Under the Law v. Craigslist.org.*, 519 F.3d 666, 672 (7th Cir. 2006); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, (10th Cir. 2000); *Universal Commc'n. Sys., Inc. v. Lycos, Inc.* 478 F.3d 413 (1st Cir. 2007). As discussed below, each Appellees' services are exactly the kind Congress enacted the CDA to protect, and

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<sup>9</sup> Moreover, in passing the "Dot Kids Implementation and Efficiency Act," Congress explicitly endorsed this body of law. *See* 47 U.S.C. § 941 (2002) (extending protections of Section 230 to certain entities); H.R. Rep. No. 107-449, at 13 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1441, 1749 ("The courts have *correctly interpreted* section 230(c)" and "[t]he Committee intends these interpretations of Section 230(c) to be equally applicable to those entities covered by" the Dot Kids Act).

Appellant's claims fall directly within the CDA's immunity provisions.

*See Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007)

(search engine Ask.com is an ICS); *Kruska v. Perverted Justice Found.*

*Inc.*, 2008 WL 2705377, at \*4 (D. Ariz. 2008) (dismissing § 43(a)

Lanham Act claim because of domain registrar's CDA immunity);

*Carafano*, 339 F.3d at 1125 (finding CDA immunity for website against

claims of misappropriation of right of publicity and invasion of privacy).

B. CDA Immunity May Be Decided on a Motion to Dismiss.

Appellant argues that CDA immunity is an affirmative defense, and that she need not "try to plead around" it. (Appellant's Br. at 37-38.) Courts, however, have consistently resolved CDA immunity on a motion to dismiss. "Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, No. 08-2097, 2009 WL 5126224, at \*2 (4th Cir. Dec. 29, 2009).

Immunity is "immunity from suit rather than a mere defense to liability" and "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* (quoting *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)); *see also Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1201

at n.6 (N.D. Cal. 2009) (Rule 12(b)(6) dismissal on the basis of CDA immunity); *see also Universal Commc'n Sys.*, 478 F.3d at 413 (1st Cir. 2007) (same); *Green v. Am. Online*, 318 F.3d 465, 470-71 (3d Cir. 2003) (same); *Barnes v. Yahoo! Inc.*, 570 F. 3d 1096, 1097 (9th Cir 2009) (same). In *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003), this Court established that claims barred by the CDA may be adjudicated on the pleadings pursuant to Fed. R. Civ. P. 12(c), and may be adjudicated at the same time as a 12(b)(6) motions when expedient.

For the reasons stated below, this Court should affirm the district court's conclusion that the CDA bars Appellant's claims.

C. The CDA Bars Appellants' Claims Against Yahoo!

1. *Yahoo! is an ICS*

Appellant argues only that Yahoo! authored the "snippets" of text that appear in its search engine results, making it an "information content provider" not entitled to immunity. (Appellant's Br. at 37.) Appellant's own allegations, however, establish that Yahoo! is an ICS,<sup>10</sup> and courts have recognized that the definition of ICS includes search

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<sup>10</sup> JA at 5 ("Among other services, Yahoo provides a commercial search engine"); *id.* at 6 ("Yahoo ... provide[s] Internet functions and services to all fifty states within the United States . . . .").

engines like Yahoo!. *See Murawski*, 514 F. Supp. 2d at 591 (holding that search engine Ask.com is an ICS).

2. *Yahoo! Cannot Be Held Liable for Information Appearing Solely on Third Party Sites*

Much of the content Appellant complains of is not only provided exclusively by parties other than Yahoo!, but is displayed exclusively on sites not under Yahoo!'s control.<sup>11</sup>

- “[S]he then clicked the search engine result.... When she did so, her name ‘Bev Stayart’ appeared on the website ... www.mysharedvideo.com.” (JA at 13.)
- “When she clicked this link, the same darkened movie screen with her name ‘Bev Stayart’ centered at the top appeared. This time, the website on which the movie played was www.gothotvidtosee.com.” (JA at 14; *see also* JA at 15-16).

Thus, for these sites Appellant does not even allege that Yahoo! displays the objectionable content on its site, much less that it created the content. As such, Yahoo! is entitled to CDA immunity with regard to all of these sites.

3. *The District Court Correctly Held That Yahoo! Did Not Create The Content Extracted From Websites That Appears In Its Search Results.*

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<sup>11</sup> Yahoo! does not even include links to these sites, as Plaintiff's allegations acknowledge they were accessed only after the initial site to which Yahoo! linked redirected the Plaintiff to yet another site. (*See, e.g.*, Compl. ¶ 70.)

Appellant argues that Yahoo! is not acting as an ICS because its search results include abstracts that include the words “bev stayart” amidst other allegedly objectionable content. (*See, e.g.*, JA at 19.) Appellant’s complaint alleges that “[t]he search result list provided by Yahoo and Overture includes the web page title, as well as *a summary of the web page text*, with the search terms in bold, in the form of a ‘snippet’ or ‘snippets.’ The title page, along with the snippet summary, gives the user an idea of whether the particular web page will be relevant.” (JA at 8.) As Appellant’s complaint, her exhibits attached thereto, and prior case law make clear, the content displayed in Yahoo!’s “snippets” is *provided by the linked website* not Yahoo!. (JA at 7.) The district court thus held that:

Yahoo! search results include abstracts, or snippets, that contain multiple samples of text appearing in various places on the third-party websites. Yahoo! does not create this content, it only displays the content in response to a C-user’s search results. It follows that Yahoo! did not create the content Stayart complains about.

(Dkt. 41 at 16-17.) Therefore, Appellant’s complaint alleges only that in the course of providing its interactive computer service, Yahoo!

displayed content provided by third-party information content providers (the sites generated by Appellant's search query). (JA at 8-9.)

In *Murawski*, the court similarly found immunity where a plaintiff complained that the search engine Ask.com displayed search results that included content from a third-party website associating his name with the Communist Party. *Murawski*, 514 F. Supp. 2d at 590-91.

After concluding that the search engine was an ICS, the court held:

It is equally clear that the text displayed from [the linked site] when plaintiff ran a search for his name on Ask.com was 'information provided by another information content provider,' specifically the [linked] website. *Accordingly, Ask.com cannot be held liable for any statements made on [the linked site], including information that appears as a result of a search query of plaintiff's name.*

*Id.* at 591 (emphasis added) (citation omitted). As in *Murawski*, Appellant searched for her name, noticed search results she found objectionable, and visited sites containing other objectionable content. Just as in *Murawski*, all of that content was "provided by another information content provider," and the search engine linking to it is immunized under the CDA.

The district court also correctly held that “the only way Yahoo! could exert any control over the results of a search engine query would be to change its underlying, proprietary algorithm.” (Dkt. 41 at 17); *see also Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008). As Appellant alleged in her complaint, “[a] search engine, such as those established by Yahoo! and Overture supposedly checks the search terms entered into it against its databases, and applies a formula or algorithm to produce search result page(s) that may relate to the customer’s search terms.” (JA at 6.)

Accordingly, Appellant’s claim falls into the class of claims barred by Section 230(c)(1). In addressing the plaintiff’s claim in *Craigslist* that defendant Craigslist “caused” allegedly discriminating posts to appear online by maintaining its online forum, this Court stated that “an [ICS] ‘causes’ postings only in the sense of providing a place where people can post.” *Craigslist*, 519 F.3d at 671-72. Thus, “given § 230(c)(1), [plaintiff] cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.” *Craigslist*, 519 F.3d at 671-72. Numerous other cases have similarly found the “source” of the allegedly defamatory content

determinative. “Immunity depends on the source of the information in the allegedly tortious statement, not the source of the statement itself.” *Doe v. Friendfinder*. “[A]n online information system must not be treated as the publisher or speaker of any information provided by someone else.” *Chicago Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist.org.*, 519 F.3d 666, 671 (7th Cir. 2006). Yahoo! only “caused” the publication of the content Appellant deems harmful by displaying search results through which Appellant found the third-party sites. As in *Craigslist*, Section 230(c)(1) does not permit Appellant to sue the messenger because its display of search results may reveal a third party’s association of Appellant with objectionable material.

Appellant attempts to distinguish these cases by arguing that Yahoo!’s “selection” of particular portions of web page text renders it a “developer” of information. Courts have held that, to the contrary, a service provider’s privilege as a publisher under the CDA protects more than the mere repetition of data obtained from another source, but extends to the provider’s “inherent decisions about how to treat postings generally.” *Universal*, 478 F.3d at 422. Yahoo!’s algorithm selects the



portions of the webpage, or its source code, to be displayed without any input from a human being at Yahoo!. Even to the extent the automatic display of third party content by an algorithm could be considered “editing,” a service provider’s immunity as a publisher extends to its “exercise of a publisher’s traditional editorial functions” with respect to third-party information “such as deciding whether to publish, withdraw, postpone or alter [it].” *Zeran*, 129 F.3d at 330; *accord Universal*, 478 F.3d at 422. “[A] service provider’s exercise of its editorial prerogatives as to information from another content provider does not transform the service provider into the content provider under § 230.” *Friendfinder*, 540 F. Supp. 2d at 297.

Appellant’s claims that Yahoo! was “not forced to display” metatags or particular web page text are thus not relevant to the CDA analysis. (Appellant’s Br. at 39). Appellants are correct that different search algorithms will display different search results. (Appellant’s Br. at 40 (citing *Intermatic Inc. v. Toppen*, 947 F. Supp. 1227, 1231-32 (N.D. Ill. 1996).) The CDA protects this choice of algorithm, however, because no matter what algorithm Yahoo! chooses, the information displayed comes from a third party source and the CDA protects even

the “exercise of ... editorial prerogatives as to information from another content provider.” *Friendfinder*, 540 F. Supp. 2d at 297. Yahoo!’s immunity remains intact and Appellant’s claims cannot stand.

Appellant argues that the district court erred in granting Yahoo!’s motion to dismiss on CDA grounds when it also held that Appellants’ claims with regard to “AdultFriendFinder banner ad associated with the <http://jewellery-makin-doorway.org.pl/bev-stayart.html> URL” should not be dismissed because Various’ role in the creation of the banner ad content is unclear.” (Dkt. 41 at 18-19). There are, as discussed above, no allegations in the complaint that Yahoo! itself, rather than third parties, created the language in the snippets—or any of its search result language.

#### D. The CDA Bars Appellants’ Claims Against Various

After concluding that Appellant’s complaint should be dismissed, the district court concluded in *dicta* that Various was not entitled to CDA immunity at the pleading stage. (*Id.* at 18-19.) Appellant argues that, “[t]he actions of information content providers are not immune from liability pursuant to the CDA. Since Stayart has stated in her complaint that Various was responsible for the content of the dating

service web site she found, Various' alleged conduct precludes its claim of immunity." (Appellant's Br. at 45-46). But there are insufficient allegations in the Complaint under *Twombly* and its progeny that Various created or published the content at issue (i.e. the Jewelry site and URL) and allowing leave to amend would be futile. Thus Various is immune under the CDA.

Defeating CDA immunity is not as simple as Appellant suggests, and, as an interactive computer service, Various is entitled to such immunity if this Court does not dismiss the Complaint on the grounds adopted below.

As set forth above, § 230 defines an "interactive computer service" ("ICS") as "any information service, system or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). It is clear from Appellant's complaint, which describes Various as a company which "markets and sells online adult-oriented social networking services," (JA at 11), that Various's is an ICS. Specifically, the complaint describes Various as a company that (a) "owns approximately 25 'web communities' . . . where 'over 100 million registered members' meet each other through

computer ‘personals;’” (b) hosts “‘the world’s largest adult social personals with over 20,000,000 members;’” (c) earns revenue by selling monthly memberships that enable users to access personal profiles and photographs furnished by other members, as well as to communicate with other members through chat and webcam technologies. (JA at 10-11.) Appellant herself asserts that Various serves over 250,000 members in Wisconsin alone. (JA at 11.) Because it offers services that enable multiple users to access a computer server to furnish information and to communicate with one another, Various provides an interactive computer service under the CDA. *See Friendfinder Network*, 540 F. Supp. 2d at 301-02 (treating Various as an ICS entitled to immunity under the CDA); *Carafano*, 339 F.3d at 1123-24 (concluding that an online dating service was an ICS and extending CDA immunity).

As an ICS, pursuant to 47 U.S.C. § 230(c)(1), Various, like Yahoo!, may not “be treated as the publisher or speaker of any information provided by another information content provider.” Subsection (e)(3) of 47 U.S.C. § 230(e)(2) further provides “[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.” The district court noted, however, that “a website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.” (Dkt. 41 at 18-19 (*quoting Roomates.com*, 521 F.3d at 1162-63.)

Although this distinction could be relevant if Appellant’s allegations related to content created by Various that appeared on a site operated by Various, the Complaint makes no such assertions. Instead, Appellant’s allegations with respect to Various stem exclusively from the appearance of her name in the Jewellery Website URL. The Complaint does not allege that Various owns or operates the Jewellery Website, created or published the URL, or is responsible for information posted on that site – including the term bev-stayart in the site’s URL . Significantly, Appellant does assert that Various “owns approximately 25 ‘web communities’” and lists several by name: [www.friendfinder.com](http://www.friendfinder.com), [www.seniorfriendfinder.com](http://www.seniorfriendfinder.com), [www.jewishfriendfinder.com](http://www.jewishfriendfinder.com),

www.germanfriendfinder.com, and www.italianfriendfinder.com as well as www.adultfriendfinder.com. (JA at 10.) But Appellant does not include the Jewellery Website. Nor does she allege that Various caused the advertisement or the underlying code for the same to be placed on the site, or that Various had any control over the use of the term “bev stayart” in the site’s URL.

Absent such allegations, Various cannot be considered an ICS with respect to the purportedly offending use of Appellant’s name. At most, Appellant’s claims relate to Various only in that a third party – the owner of the Jewellery Website, which included the term “bev stayart” in a URL – published an advertisement that permitted visitors to the site to follow a link that would take them to the www.adultfriendfinder.com site, which Various operates as an ICS. Accordingly, without allegations showing Various is an Internet Content Provider related to the alleged wrongful manifestations on or related to the site(s) at issue and since amendment is futile the CDA bars Appellant’s claims.

- E. Appellant’s Characterization Of Her Complaint As An “Intellectual Property” Claim Does Not Preclude Application Of The CDA.

Although the CDA provides that it has no effect on intellectual property law, 47 U.S.C. § 230(c)(2)(e), courts have declined to apply this exception to false endorsement claims under the Lanham Act, as well as to state law privacy and right of publicity claims. *See Kruska*, 2008 WL 2705377 at \*3 (plaintiff's "claim that Section 43(a) of the Lanham Act defeats the immunity provision in the CDA has no support in statute or case law"); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) ("[p]ermitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.")

Late in the game, Appellant is attempting to recast her complaint as one implicating intellectual property, thereby precluding application of the CDA. 47 U.S.C. § 230(e)(2). But Appellant's consistent claim, whether styled as a Lanham Act claim or a state law defamation claim, is that content of these other websites damages her "good name," harm that is the very basis of a *defamation* claim. *Storms v. Action Wis. Inc.*, 750 N.W.2d 739, 748 (Wis. 2008).

A “false endorsement” claim is distinguishable from a trademark infringement claim, and is not an “intellectual property” claim solely because it is grounded in the same federal statute as trademark infringement claims. Appellant cannot seek to avail herself of the distinction between a false endorsement and trademark infringement claim in arguing for standing, and then seek to avoid the implications of this distinction to sidestep the CDA’s application. (*See, e.g.*, Appellant’s Br. at 42-43 (citing *Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 472 (3d Cir. 1994)). *Fisons* was a claim under 15 U.S.C. § 1115 for *trademark infringement*, not for false endorsement or false advertising—a claim alleged nowhere in Appellant’s complaint and specifically disavowed in pressing her Lanham Act arguments. Appellant argues that Stayart’s identity constitutes a mark, but that argument is absent from her complaint or her discussion of her Lanham Act claims below or on appeal.

Courts have seen a distinction between classic federal intellectual property cases like trademark, and other claims under the Lanham Act (as well as similar state claims for false endorsement). *See Perfect 10, Inc.*, 488 F.3d at 1118 (finding characterization of claims under state



law not determinative); *Kruska*, 2008 WL 2705377 at \*3 (declining to find that claims under Section 43(a) of the Lanham Act defeat CDA immunity). As the *Perfect 10* court stated:

[T]here are many types of claims in both state and federal law which may-or may not-be characterized as “intellectual property” claims. \*\*\* In the absence of a definition from Congress, we construe the term “intellectual property” to mean “federal intellectual property.”

*Id.* at 1118-1119.

Though they arise under the Lanham Act, Appellants’ claims are not “intellectual property” claims for purposes of the CDA, but as Appellant’s complaint makes clear, are the federal equivalent of state law defamation claims that courts have routinely found the CDA bars. The complaint begins with a lengthy discussion of “Bev Stayart’s Name and Image.” (JA 3-5.) Her communications with Yahoo!, which she attaches to her complaint, repeatedly reference defamation: “[M]y privacy and reputation have been seriously violated and defamed.” (*Id.* at Ex. CC.) “This material is both pornographic and demeaning to her. The site is using her name without her permission to defame and denigrate her good name.” (*Id.* at Ex. DD, EE.) “This is an attempt to slander me with pornographic photos purporting to be me.” (*Id.* at Ex.

Y.) “I believe that Yahoo! has invaded my privacy by the publishing, and/or facilitating the publishing, of false and defamatory pornographic photos purporting to be me.” (*Id.* at Ex. Z.)

Appellant’s artful attempt to recast her Lanham Act and right of publicity claims as federal trademark infringement claims is also exposed in her responses to Appellees’ motions to dismiss below. In Appellant’s response to Various’ motion below, she emphasized that the greatest harm she has suffered is not commercial, but to her “self-esteem.” (Dkt. 21 at 28). When arguing that her § 43(a) false endorsement claim concerns “intellectual property,” as on appeal, Appellant opted to characterize her name as a “trademark” and cited trademark infringement and even trade secret theft cases, although she explicitly disavowed that her claim sounded in trademark when it suited her 12(b)(6) arguments under the Lanham Act.<sup>12</sup> Allowing such sham pleading to circumvent CDA protection will only invite future plaintiffs to follow the same course, and will eviscerate the service provider exceptions provided by Congress.

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<sup>12</sup> Dkt. 21 at 19 (“This is a false designation of origin case, *not* a trademark infringement case.”).

Appellant's claims arise from her allegations that her reputation is sullied, not from allegations that her commercial endorsement was not properly compensated. Indeed, she has failed to identify *any* commercial value to that endorsement, particularly in the context in which the third party websites use the words "bev stayart." Her allegations in fact yield the opposite conclusion: The "bev stayart" name, by Appellant's own admission, has zero recognition or value in the markets promoted by the websites cited in her complaint as she has no connection to them. Accordingly, both her state and federal claims sound in defamation, and not in intellectual property, and thus the CDA bars them.<sup>13</sup>

VI. Even If The District Court Erred In Refusing To Exercise Jurisdiction Over Appellants' State Law Claims, Those Claims Fail As A Matter Of Law.

If this Court reaches the merits of Appellant's state law claims, it should dismiss those claims with prejudice. Appellant attempts to state a claim under Wis. Stats. § 995.50(2)(b), which bars

“[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if

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<sup>13</sup> See *Kruska* 2008 WL 2705377, at \*3.

the person is a minor, of his or her parent or guardian.”

Wis. Stats. § 995.50(3) goes on to state that

“[t]he right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy . . . with due regard for maintaining freedom of communication, privately and through the public media.”

Indeed, the Wisconsin Supreme Court only recognized a common law claim for invasion of privacy after the passage of the statute and by explicit reference to the then recently enacted privacy statute, which was later re-numbered § 995.50. *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 132 (Wis. 1979). The statute was enacted after the events underlying *Hirsch* had occurred, *see id.*, so the statute was not applicable to the case, but the clear intention of the *Hirsch* court in interpreting the law going forward was to make no distinction between a statutory and a common law claim. In fact, in discussing the common law claim, it often described its elements with the same language used in the statute. *See id.* As the *Hirsch* court stated, the purpose of the claims is to protect “the property rights in the publicity value of aspects of a person’s identity,” that is, “to protect the property rights in one’s

identity or name from commercial exploitation by others.” *Id.* at 130, 136.

In simultaneously setting out the parameters of the statute and the newly-recognized tort, the *Hirsch* court distinguished “the tort of appropriation [from] other torts involving invasion of privacy” in that only the former hangs on the question of whether a person has “a property right in his name or identity.” *Id.* at 134, 137. Only where there is such a right, “the possessor of that property right may place [limitations] upon the commercial and public use of the name.” *Id.* at 137. In applying the question of whether the plaintiff in that case, a former professional football player, had a property right in his name that could support a claim for invasion of privacy, the Wisconsin Supreme Court quoted a law review article entitled, Judith Endjean, Comment, The Tort of Misappropriation of Name or Likeness Under Wisconsin’s New Privacy Law, 1978 WIS. L. REV. 1029, 1046, which refers to the newly-enacted invasion of privacy statute, now codified at § 995.50. As that article states: “The rule is fairly well established that well known athletes have a property right in their identities and are allowed to recover for wrongful appropriation.” *Id.*

The foregoing makes clear that under Wisconsin law the presence of a property right in one's name is a prerequisite to a claim for invasion of privacy by means of appropriation of that right. As discussed above, Appellant has no celebrity status, her name has no distinctiveness, and she has no grounds for believing that the term "bev stayart" without any additional context refers to her. Appellant thus could not have a "property right" sufficient to support an appropriation claimant under the Wisconsin common law and § 995.50. *See Hirsch*, 280 N.W.2d at 132. Accordingly, Appellant's invasion of privacy claims should fail.

Moreover, a comparison of the Restatement (Second) of Torts § 652A, B, C and D (1977) with § 985.50(2)(a), (b) and (c) reveals that the statute, and *ipso facto* the Wisconsin common law, are modeled after the Restatement, with certain irrelevant modifications. *Id.*, § 652C. Accordingly, the Restatement's limitation that "[i]n order that there may be liability ... the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness" applies here.

Again, Appellant's complaint demonstrates that Appellees did not use the term "bev stayart" at all – having only, at most, placed advertising on a website that made such use – and therefore did not "appropriate" anything. Appellees did not enjoy any benefit from reputation, prestige, social or commercial standing, public interest or other values of Appellant's name. As the Complaint makes evident, Appellant's name, in the vast context of the Internet, did not possess these virtues to the extent needed to state a claim; and Appellees' alleged use of the term "bev-stayart" was so *de minimis* that no such benefit could possibly have accrued to Appellees.

## CONCLUSION

For the reasons set forth above, this Court should AFFIRM the district court's order dismissing Appellant's claims without leave to amend.

Respectfully submitted,

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