

CERTIFICATE OF INTERESTED PERSONS

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 WHERE THE COMPLAINT ALLEGES A CAUSE OF ACTION BASED
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PREFACE

The following abbreviations will be used:

The Appellant/Plaintiff, JANE DOE, on behalf of her minor child, JOHN DOE, shall collectively be referred to as "Plaintiff."

The Minor plaintiff, JOHN DOE, shall be referred to as "Doe."

The Appellees/Defendants, AMERICA ON LINE, shall be referred to as "Defendant."

The Co-Defendant, RICHARD RUSSELL, shall be referred to as "Russell."

All references to the Record on Appeal shall be designated "(R.)"

All references to the transcript of the hearing held on June 13, 1997 shall be designated "(T.)"

All references to the Appendix shall be designated as "(A.)"

STATEMENT OF THE CASE & FACTS

Nature of the Case

The Plaintiff appeals to the Florida Supreme Court, the Opinion of the Fourth District Court of Appeal affirming the Order of the trial court dismissing claims against Defendant with prejudice. The Order for Dismissal was rendered on June 26, 1997, following a hearing on June 13, 1997. Plaintiff filed and served a Notice of Appeal on July 23, 1997 from the Order of Dismissal. The Fourth District Court of Appeal affirmed on October 14, 1998 and certified three questions as being of great public importance to this Court.

The Course of Proceedings

Plaintiff's Complaint was filed on January 23, 1997 in the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County. (R. 1-11). On April 4, 1997, Defendant served and filed Defendant's Motion to Dismiss Plaintiff's Complaint With Prejudice under Fla.R.Civ.P. 1.140(b)(6). Memoranda of Law in support and in opposition to Defendant's Motion to Dismiss were filed with the trial court. On June 13, 1997, the Honorable Judge Carlisle heard argument and granted Defendant's Motion to Dismiss with Prejudice. Said Order of Dismissal was rendered on June 26, 1997. (R. 250-258; (A-4). An appeal to the Fourth District Court of Appeal was noticed on July 23, 1997. The Fourth District Court of Appeal affirmed and certified three questions of great public importance to this Court on October 14, 1998 (A.5)

Disposition of the Trial Court

The trial court granted Defendant's Motion to Dismiss Plaintiff's Complaint on the

grounds that Section 230 of the Communications Decency Act [hereinafter “CDA”] (A-1), which confers immunity from liability for content carried by a provider of an interactive computer service in its capacity “as the publisher or speaker” of any information provided by another, acts as a bar to Doe’s action against Defendant. (R. 259-269) (A-4.1-9). The court stated that the CDA applied retroactively to events which arise before the enactment of the CDA on the basis that Congress intended the CDA to apply retroactively by indicating in Section 230(d)(3), that “no cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section.” (R. 269) (A-4. 7). The trial court indicated that this language in Section 230(d)(3) showed Congress’ intent to bar litigation from the day of the CDA’s enactment and forward, regardless of whether the events giving rise to the lawsuit accrued prior to the enactment of the CDA. (T. 47-48). The trial court refused to grant Plaintiff leave to amend her Complaint despite Plaintiff’s request to do so. (T. 47).

Disposition In The Fourth District Court of Appeal

The Fourth District Court of Appeal affirmed the Trial Court’s Dismissal with Prejudice without leave to Amend (A.5) relying on Zeran v. America Online, Inc. 129 F.3d 327 (4th Cir.1997) cert denied 118 s.ct. 2341(1998). The Fourth District held that the CDA should be given retroactive effect despite the fact that the facts alleged in the Plaintiff’s Complaint pre-dated its enactment because “Here DOE does not allege any action taken reliance on the law existing prior to Section 230’s enactment”(A.5.3) The Court further held that the CDA Section 230 entirely pre-empted all possible causes of action under Florida Statutory or Common Law and precluded same and that therefore

the Trial Court did not err in failing to grant DOE leave to Amend (A.5). The District Court further held that the Trial Court properly considered the preemption defense at the Motion to Dismiss stage and did not improperly consider matters outside the four corners of the Complaint in granting the Motion to Dismiss. (A. 5).

The Fourth District Court of Appeals then certified the following questions to this Court as being of great public importance:

1. WHETHER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT APPLIES TO COMPLAINTS FILED AFTER ITS EFFECTIVE DATE WHERE THE COMPLAINT ALLEGES A CAUSE OF ACTION BASED UPON ACTS OCCURRING PRIOR TO ITS EFFECTIVE DATE?
2. IF THE ANSWER IS IN THE AFFIRMATIVE, WHETHER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT PREEMPTS FLORIDA LAW?
3. WHETHER A COMPUTER SERVICE PROVIDER WITH NOTICE OF A DEFAMATORY THIRD PARTY POSTING IS ENTITLED TO IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT?

Statement of Facts

The facts sub judice are not in dispute, since they are based on the averments in Plaintiff's Complaint against Defendant. (R. 1-11) (A-3). For emphasis, Plaintiff outlines the following undisputed facts. During early 1994, Russell committed sexual battery upon Doe, a minor of eleven years. Russell lured Doe and two other minor males to engage and perform sexual acts with one another and with Russell. Russell photographed and videotaped these sexual acts. (A-3. ¶¶23-24).

During 1994, Russell was a subscribing member of Defendant. Russell utilized Defendant's "Chat Rooms" to advertise, solicit and otherwise market the videotapes

and photographs depicting Doe. (A-3. ¶26). Chat rooms are defined as “forums in which two or more subscribers may conduct real-time, computer-to-computer conversations. . .” (R. 259-269). The content of the speaker’s transmissions are available for view by other members of Defendant’s on line service who are also in attendance in the chat room.

Russell successfully engaged other members of Defendant’s service to purchase the video and photographs which depict obscene and unlawful images of minor Doe. (A-3. ¶¶ 26).

For the purpose of this appeal, Plaintiff’s averments that Defendant expressly prohibited the actions taken by its member Russell against Plaintiff are undisputed. Plaintiff alleged in the Complaint that Defendant has promulgated “Terms of Service” and “Rules of the Road” which govern the behavior of its members while on line. There is no dispute that Russell’s activities violated Defendant’s rules and no dispute that Russell’s activities constituted grounds for terminating Russell’s America On Line membership. (A-3. ¶¶ 10-14).

Also uncontested is Plaintiff’s allegation that Defendant had knowledge of Russell’s unlawful actions as well as other pedophile activity. Plaintiff’s Complaint alleges that as early as 1991, Defendant was on notice that its online service was utilized worldwide by pedophiles as an open forum to discuss, trade and market child pornography. (A-3. ¶18). Defendant had, in effect, become a “marketplace for the sale and distribution of child pornography.” (A-3. ¶ 19). Plaintiff’s Complaint further alleges that although complaints were communicated to Defendant regarding unlawful

pedophile behavior, Russell was allowed to continue utilizing Defendant's services to the detriment of minor Doe. (A-3. ¶ 22).

Plaintiff's Complaint alleges two counts of negligence per se against Defendant for violation of the Criminal law as set forth in Sections 847.0111 and 847.0135, Florida Statutes. Specifically, Plaintiff alleges that Defendant violated Section 847.0111 by ". . . knowingly allowing and permitting Russell to sell, distribute, transmit or offering] to sell, distribute or transmit photographs and videotape containing the images of the minor Plaintiff. . ." (A-3. ¶ 29).

Furthermore, Plaintiff alleged that Defendant violated Section 847.0135(2), Florida Statutes, (a criminal statute more commonly known as the Computer Pornography and Child Exploitation Prevention Act of 1986), by "knowingly allowing Russell to enter into or transmit by means of computer the distribution of an advertisement for the purposes of offering a visual depiction of sexual conduct involving the minor Plaintiff, Doe." (A-3. ¶31). Plaintiff specifically alleges that "AOL, INC., further violated this section by knowingly allowing Russell to sell or arrange to sell child pornography. . . .By its actions or inactions, AOL. INC., has aided in the sale and distribution of child pornography, including obscene and unlawful images of the minor Plaintiff, Doe." [Emphasis Added]; (A-3. ¶32-33).

Plaintiff also alleges general negligence against Defendant. (A-3. ¶ 40-44). Plaintiff contends that "AOL, INC., had a duty to exercise reasonable care in the operation of its AOL Service to ensure that its AOL Service was not being used for the purposes of the sale and/or distribution of child pornography." (A-3. ¶41).

POINTS ON APPEAL BEFORE THE FOURTH DISTRICT COURT OF APPEAL

- I. THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S COMPLAINT SHOULD BE REVERSED AS THE COURT TREATED THE DEFENDANT'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT AND CONSIDERED MATTERS OUTSIDE OF THE FOUR CORNERS OF THE COMPLAINT.**
- II. WHERE THE TRIAL COURT FAILED TO GRANT PLAINTIFF LEAVE TO AMEND HER COMPLAINT, THE COURT COMMITTED REVERSIBLE ERROR.**
- III. THE TRIAL COURT ERRED IN HOLDING THAT SECTION 230 OF THE CDA APPLIES RETROACTIVELY TO EVENTS GIVING RISE TO CLAIMS BEFORE ITS ENACTMENT.**
- IV. DEFENDANT IS NOT ENTITLED TO STATUTORY IMMUNITY UNDER THE CDA SINCE THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT ARE OUTSIDE THE SCOPE OF THE CDA.**

SUMMARY OF ARGUMENT

The first certified question should be answered in the negative, because the Communications Decency Act does not apply retroactively to acts which pre-date its enactment. Retroactive application of a statute is not proper unless the statute is procedural in nature or Congress has expressed a clear intent to give that statute retroactive effect. Here, there is no express intent on the part of Congress to give the Communications Decency Act retroactive effect. Such an application by the Courts is unfounded where the Communications Decency Act is void of a clear statement as to its retroactive effect and there exists no support in the legislative history for retroactivity. The Communications Decency Act is a federal statute enacted in 1996, two years after the events occurred which give rise to the Plaintiff's Complaint. Thus, the Plaintiff herein had a vested right in pursuing a claim against the Defendant which existed under the substantive law at the time of the tort. By finding that the Communications Decency Act bars Plaintiff's claim, the trial court has stripped Plaintiff of a vested right. To the extent that the Communications Decency Act is construed to apply retroactively, it is unconstitutional. Recent precedent from the United States Supreme Court establishes that there is a strong statutory presumption against retroactive application of statutes, which substantively changes the party's positions.

The second certified question should also be answered in the negative. Although Section 230, by its terms, preempts state laws that are inconsistent, the laws under which the Plaintiff brings her action are consistent with Section 230. Furthermore, Section 230 should not be construed to preempt all causes of actions that

Plaintiff has available to her which could be pleaded in an amendment to her Complaint.

The third certified question should likewise be answered in the negative, because the facts herein involve criminal conduct and not defamation and Section 230 of the Communications Decency Act was never intended to provide immunity to computer service providers who are on notice that their service is being used for purposes of engaging in criminal conduct. Furthermore, Section 230 of the Communications Decency Act, under which the Defendant claims immunity, applies to “Good Samaritan” use of blocking and screening measures taken to protect the Internet community from obscene and illegal computer images. The Plaintiff’s theories of liability are not based upon the Defendant’s utilization of “Good Samaritan” measures, but rather are based upon negligence and criminal statutory violations on the part of the Defendant in allowing its members to use its service for the sale and distribution of child pornography. To the extent that the Plaintiff alleges that the Defendant had knowledge of these activities, the Defendant cannot shield itself from liability under a “Good Samaritan” defense.

The Courts below erred in finding that the Communications Decency Act provides immunity for the Defendant to the extent that they are being treated as a publisher of third party content. The Plaintiff has alleged negligence, negligence per se and statutory violations against the Defendant for aiding the third party perpetrator in distributing and selling child pornography. Under these theories of liability, Plaintiff is not required to establish publication to sustain a valid cause of action. Furthermore,

Plaintiff does not seek to treat the Defendant as a publisher of the third party content, but rather as a distributor of information and/or an active conduit of and participant in criminal conduct within its system.

ARGUMENT

FIRST CERTIFIED QUESTION PRESENTED

WHETHER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT APPLIES TO COMPLAINTS FILED AFTER ITS EFFECTIVE DATE WHERE THE COMPLAINT ALLEGES A CAUSE OF ACTION BASED UPON ACTS OCCURRING PRIOR TO ITS EFFECTIVE DATE

The first certified question should be answered in the negative. Historically, the U.S. Supreme Court has remained suspicious of attempts to apply statutes to situations which predate a statute's enactment. "The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." [Emphasis Added.] Lynce v Mathis, 519 U.S. 443; 117 S.Ct. 891 (1997).

The facts giving rise to this litigation occurred in 1994, some two years before the CDA was signed into law and became effective on February 8, 1996. (A-1). This lawsuit was filed January, 23, 1997. The controlling precedent in determining whether a statute may be applied retroactively to facts which predated its enactment is the United States Supreme Court decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994) and its progeny. ¹

¹See, Hunter v. United States, 101 F.3d 1565, 1569 (11th Cir.1996) (en banc), cert. denied, 117 S.Ct. 1695 in Nagel v. Bailey(1997).

The presumption against retroactive application of new laws "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Lynce, citing: Landgraf, 511 U.S. at 265 (1994). The court in Lynce points to the United States Constitution in support of the strong presumption against retroactive application of new laws including the Ex Post Facto Clause, Due Process Clause, and the Fifth Amendment Takings Clause. ²

In Landgraf, the Supreme Court held that Section 102 of the Civil Rights Act of 1991, which created a right to recover compensatory and punitive damages and provided for a jury trial, did not apply to cases pending on appeal when the law was enacted. In so holding, the Court found:

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.[Emphasis Added] (citations omitted) Landgraf, 511 U.S. at 265.

The Court followed the long-standing principle of statutory construction that statutes are presumed to apply only prospectively, and remained suspicious of retroactive application. Specifically the court stated:

² "The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Article I, S 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on 'Bills of Attainder' in Art. I.. Sections 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct." See, e.g., United States v. Brown, 381 U.S. 437, 456-462 [85 S.Ct. 1707, 1718-1722, 14 L.Ed.2d 484] (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation...." Landgraf v. USI Film Products, 511 U.S. at 266.

These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized considerations. [Emphasis Added]. Landgraf at 266.

In order to contain the legislature's "unmatched powers," the Court imposed a requirement that Congress make its intention clear before a statute will be applied retroactively to conduct predating the effective date of enactment. This requirement "helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." Landgraf, at 267.

Thus, the first inquiry under the Landgraf analysis in determining whether the newly enacted CDA's statutory provisions are applicable to cases which arose before its enactment and were pending at the time of its implementation is "to determine whether Congress has expressly proscribed the statute's proper reach." Landgraf, at 280. In the case at bar, Congress has simply not spoken on the issue. Nowhere in the CDA does Congress express a clear intent to apply the statute retroactively. The trial court erroneously relied on the language in subsection (d)(3) of Section 230 of the CDA which provides:

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State Law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section. 47 U.S.C. Section 230(d)(3).

There is nothing in the language of Section 230(d)(3) that clearly evidences an intent to apply the Act retroactively. Had Congress intended the Act to apply retroactively, they would have said so. This subsection merely states that no suit may

be based on state laws that are inconsistent with Section 230. It is clearly not a retroactive application provision.

For its part, Defendant relies on the decision in Zeran v. AOL, 129 F. 3d 327 (4th Cir. 1997) for the proposition that the language in Section 230 of the CDA satisfies the first prong of the Landgraf analysis. In Zeran, the court, in reviewing the very provision that is in dispute in this case, held that while Congress had expressed its intent with respect to retroactivity more directly in other circumstances, subsection (d)(3) constitutes an adequately clear statement of Congress' intent to apply [Section] 230 of the CDA to claims that are filed after the enactment of the CDA. The mere use of the word "adequately" in defining Congress' statement of intent flies in the face of Landgraf. The analysis in Landgraf specifically requires a finding that Congress "has expressly prescribed the statute's proper reach." Landgraf, at 1505.

An "adequately clear" statement is not enough. In fact, in United States Fidelity and Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U.S. 306 (1908), the United States Supreme Court required "clear, strong and imperative language" from Congress favoring retroactivity before a statute will be given retrospective application. Fidelity, at 314. This rule is cited by the Landgraf court, further establishing the guidelines by which the language used by Congress in a specific act will be analyzed. Landgraf at 1507.

The Supreme Court's holding in Landgraf has been followed by numerous courts, including the Fourth District Court of Appeal in Levine v. Federal Deposit Insurance Corporation, 651 So.2d 134 (Fla. 4th DCA 1995). There, the Court noted

that the U.S. Supreme Court has provided the analytical framework for determining whether a federal statute can be applied retroactively. Under the Landgraf analysis, it must first be determined whether Congress has provided for the statute's scope in legislative history and, if so, to abide by that directive. If there is no express congressional directive, it must then be determined whether the statute would have "truly retroactive effect," and, if so, the presumption against retroactive application is the appropriate default rule. Levine, at 137.

Consistently, Florida state court decisions have held that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary.³ This very court held in Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994), that a substantive statute is presumed to operate prospectively rather than retrospectively unless the legislature clearly expresses its intent that the statute is to operate retrospectively (emphasis supplied). This is especially true when retrospective operation of law would impair or destroy existing rights. Thus, whether the CDA applies retroactively turns on whether the statute is a "substantive statute" that destroys existing rights that the Plaintiff had at the time it was enacted.

Likewise, in the Fifth and Eleventh Circuits, the courts have remained reluctant to apply legislation retroactively. In Harless v. Boyle-Midway Division, American Home Products, 594 F.2d 1051 (5th Cir.1979), the Fifth Circuit Court of Appeal found that a

³ Arrow Air, Inc. v. Walsh, 645 So.2d 422 (Fla. 1994); Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc., 683 So.2d 609 (Fla. 1996)
Citing: State Farm Mutual Automobile Insurance Company v. LaForet, 658 So.2d 55 (Fla.1995); City of Lakeland v. Catanella, 129 So.2d 133 (Fla. 1961).

Florida statute which prohibited intentional inhalation of chemicals for the purposes of obtaining a condition of intoxication would not be retroactive to acts which predated its enactment. The decision was premised on the lack of direct evidence which demonstrated a legislative intent to apply the statute retroactively.

Similarly, in Arledge v. Holnam, Inc., 957 F.Supp. 822 (M.D. Louisiana 1996), the court held that a statute permitting punitive damages did not apply to conduct that occurred before its effective date regardless of when the damage arose or when the damage was discovered.

Due to the sparsity of legislation regulating the Internet and the diverging politics that surround the regulation of the Internet, Congress may have left many issues deliberately ambiguous. In fact, legislative history on the CDA is not extensive and reflects the lack of guidance by Congress on the retroactivity issue. The CDA is part of the Telecommunications Act of 1996, (A-2), which includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and House of Representatives. See, Reno v. ACLU, 521 U.S. 844; 117 S.Ct. 2329 (1997). By contrast, the CDA (Title V of the Act) contains provisions that were “either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation.” Reno, at 2338.

Again, in the present case, there is no “clear, strong, and imperative” language in Section 230 itself or in the legislative history that clearly indicates that Congress intended this Act to apply retroactively.

Where there is no clear Congressional intent to apply a statute retroactively, the next prong of the Landgraf analysis is to determine whether the new statute has a truly retroactive effect. The essential hypothetical question in this analysis is whether the statute would serve to: (1) impair rights a party possessed when he or she acted; or (2) increase a party's liability for past conduct; or (3) impose new duties with respect to transactions already completed. Landgraf 511 U.S. at 280; Hunter, 101 F.3d at 1570.

The second and third indices of statutory retroactive effect outlined above have no application to this case. The single issue for consideration by this court is whether the application of Section 230 of the CDA to this case would impair rights that Plaintiff possessed at the time of Defendant's negligence. Landgraf, at 280.

Florida courts have been applying the vested rights analysis to cases involving questions of statutory construction since the early 1900s. In Re Seven Barrels of Wine 83 So. Fla. 627 (1920). This court in Seven Barrels stated, dispositively, that:

The rule that statutes are not to be construed retrospectively, unless such construction was plainly intended by the Legislature, applies with particular force to those statutes the retroactive operation of which would impair or destroy vested rights. 83 So.Rptr. at 632 (1920). (Citations omitted.)

This rule was reiterated in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). This court, in reviewing the application of 1980 Amendments to the Tort Immunity Statute to the Plaintiff's cause of action, noted that prior to the amendments, Plaintiffs had a right to seek recovery from both defendants. Because the Amendments plainly abolished the Plaintiffs rights to recover, this court found the statute unconstitutional. Rupp, at 666.

This prong of the Landgraf analysis has been addressed by several federal

courts as well. For example, in Maitland v. University of Minnesota, 43 F.3d 357 (8th Cir. 1994), the court applied the Landgraf analysis to determine whether the plaintiff had a vested right prior to the enactment of a statute.⁴ There, the court was persuaded by the Appellant's argument that had the appellant known that the law would change and that he might be barred by subsequent legislation from bringing a lawsuit, he would have brought the lawsuit sooner. Maitland, at 363. The court refused to apply the statute in question retroactively since to do so would bar appellant's cause of action and thus give the statute in question a "true retroactive effect" contrary to the holding in Landgraf. The court's reluctance in Maitland to bar a plaintiff's cause of action is instructive to the present facts.

Here, Plaintiff had a viable cause of action in 1994, when the events giving rise to the claim against Defendant occurred. Instead of quickly rushing to the courthouse with a complaint, Plaintiff, in order to lessen the trauma of a civil proceeding to the minor child, chose to wait until the criminal prosecution and subsequent sentencing of Russell, the third-party tortfeasor, was resolved. Upon completion of the criminal prosecution of co-defendant Russell, Plaintiff then went forward with this lawsuit. (T. 29). By the time the Complaint was filed, the CDA had been recently enacted. Similar to the plaintiff in Maitland, had Plaintiff herein known that the law should suddenly change and effectively bar her cause of action against Defendant, Plaintiff would have taken a more aggressive approach and filed her suit earlier. This type of retroactive

⁴The Plaintiff in Maitland brought suit against his employer under a section in the Civil Rights Act of 1991.

effect is the precise type of negative outcome the Supreme Court in Landgraf was protecting against.

Similarly, in Strauss v. Springer, 817 F.Supp. 1203 (E.D. Pa. 1992), the court held that a Plaintiff's cause of action accrues on the day that the incident takes place, and not when his Complaint is filed. In Strauss, the Plaintiff brought a lawsuit against the City of Philadelphia after he was shot by police officers. His Complaint was filed after an ordinance had been enacted reinstating governmental immunity. The court ruled that the Plaintiff's action accrued and vested when he was injured and the legislature "cannot extinguish a cause of action that has already accrued." Strauss, at 1210. The court held that the ordinance could not be applied retroactively to the Plaintiff's negligence cause of action.

The only exception to the general presumption against retroactivity is where the statute is jurisdictional or procedural in nature, which Section 230 of the CDA is not.

The Landgraf Court noted:

Application of a new jurisdictional rule takes away no substantive right but simply changes the tribunal that is to hear the case.[citation omitted]. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the [citations omitted]. Landgraf, 511 U.S. at 273.

In the opinion below, the District Court of Appeal held that the presumption against retroactive application is of no assistance to the Plaintiff herein because she has not alleged any action taken in reliance on the law that existed prior to Section 230's enactment. One is left wondering how Plaintiff could allege in her Complaint that she is relying on laws that might be affected by future enactments of Congress. Plaintiff

has, as stated above, relied on the state of the law as it existed at the time of the actions giving rise to her Complaint by not bringing her suit immediately. To require that Plaintiff allege reliance in her Complaint would be tantamount to requiring her to possess a crystal ball as to future Acts of Congress or the State Legislature. Plaintiff is not aware of any such requirement under the Rules of Civil Procedure or prior case law.

Thus, this court should apply the “traditional presumption” against retroactive application of the CDA, find, as the Court in Landgraf instructed, that the subject statute does not govern in cases that arose before the statute became effective and answer the first certified question in the negative.

SECOND CERTIFIED QUESTION

WHETHER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT PREEMPTS FLORIDA LAW

The second certified question should also be answered in the negative. Although Section 230, by its terms, preempts state laws that are inconsistent, the laws under which Plaintiff brings her claims are not inconsistent with Section 230. The CDA’s stated purpose is to encourage enforcement of laws to deter and punish trafficking in obscenity, stalking and harassment by means of computer. The criminal laws under which Plaintiff brings her action are clearly consistent with the CDA’s stated purpose.

Plaintiff submits that the more pressing question is whether Section 230 of the

Communications Decency Act preempts all causes of action that Plaintiff might bring against the Defendant. Plaintiff has sought an opportunity to amend her Complaint to allege other causes of action that would not be affected by the CDA (even assuming that her initial causes of action are barred). The Defendant argued below and the District Court of Appeal held that leave to amend would be futile because Plaintiff's complaint cannot be amended to overcome Section 230 immunity (A.5). The scope of the immunity is discussed further in response to the third certified question, but Plaintiff submits that the CDA has no application, for example, to a third party beneficiary breach of contract cause of action. AOL's contract with members such as Russell specifically addresses third party rights as affected by the actions of AOL's members, including criminal conduct. Certainly, a third party beneficiary breach of contract action would not be preempted by Section 230. Plaintiff submits that Section 230 was never intended to preempt all causes of action that might be available to Plaintiffs such as DOE and should not be construed as such by this Court.

The United States District Court for the Eastern District of Virginia in Zeran v. America OnLine, Inc. 958 F.Supp 1124 (E.D. Va.1997)[Zeran I] explained that its holding did not amount to blanket immunity for AOL. Rather, the court indicated that "within the universe of negligence claims there might well exist a set of facts where information was initially placed online by a third party which might very well be deemed to be information provided by Defendant itself." Zeran I at 1133.

Plaintiff submits that the case at bar is such a set of facts. In Zeran I, footnote 20 is instructive. The court states:

FN20. This preemption conclusion is, of course, limited to the state law claim for negligent distribution asserted here. This opinion neither addresses nor embraces the broader position advanced by AOL's counsel in oral argument to the effect that the CDA precludes AOL's liability for any information appearing on its system unless that information was provided by Defendant itself. By AOL's lights, it is immune from state common law liability for any material on its network as long as that material was put online by a third party. And this is so, AOL's counsel contended, even if Defendant knew of the defamatory nature of the material and made a decision not to remove it from the network based on a malicious desire to cause harm to the party defamed. These facts were not presented here, nor do they appear to have been contemplated by Congress. In any event, there is no occasion here to consider whether, under some set of facts, information initially placed online by a third party might be deemed to be information provided by the service provider itself, thereby rendering [section] 230 (c) inapplicable.[Emphasis Added].

Despite the above language in Zeran, the Defendant herein continues to argue that it is entitled to blanket tort immunity. Specifically, AOL's counsel argued in the case sub judice, that in enacting the CDA, Congress acknowledged that harmful online content was a serious problem and addressed that problem by not imposing liability on services such as America On Line, but rather, by enforcing criminal laws against the perpetrators of that harmful content. (T. 14-15). A careful reading of Section 230 of the CDA reveals that although Congress recognized that a problem exists, Congress did not intend to give a blanket immunity to AOL and other on line service providers.

THIRD CERTIFIED QUESTION PRESENTED

WHETHER A COMPUTER SERVICE PROVIDER WITH NOTICE OF A DEFAMATORY THIRD PARTY POSTING IS ENTITLED TO IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

The third certified question would be more properly phrased in terms of notice of

criminal conduct rather than defamatory content and should be likewise answered in the negative. The facts herein involve criminal conduct (in the form of distribution and sale of child pornography) and not defamation. The question then, should be: Whether a computer service provider on notice that its service is being utilized for purposes of criminal conduct, is entitled to immunity under Section 230 of the Communications Decency Act. Another question should be: Whether AOL is entitled to immunity under Section 230 of the Communications Decency Act where they aid in the criminal conduct taking place in their system, an act which is itself criminal under the State Laws which form a basis of Plaintiff's Complaint.

Defendant relied on the Zeran decision in support of its arguments below. Likewise, the trial court and District Court of Appeal below relied on Zeran in support of its opinions. What the Defendant and the courts below overlook is the clear distinction between defamation and criminal conduct. Both the trial court and the District Court below treated this case as a defamation case, which it is not.

Plaintiff's Complaint alleges that the defendant had actual and/or constructive knowledge of the proliferation of child pornography within its service. In fact, Plaintiff alleges that Defendant had become "a marketplace for the sale and distribution of child pornography" (A-3. ¶19). The activities of Russell violated Defendant's "Terms of Service" and "Rules of the Road" which govern the behavior of AOL members while on line (A-3. ¶ 10). Furthermore, Defendant had knowledge of Russell's behavior as early as 1991 and Defendant was on notice that its service was utilized by pedophiles as an open forum to discuss, trade and market child pornography. (A-3. ¶18).

In essence, Defendant has enabled Russell to violate Federal Law to the detriment of the Plaintiff. Defendant has done so by providing the forum which Russell utilized to harm Plaintiff repeatedly. Defendant profited from Russell's illegal behavior and ignored Russell's blanket violations of law and their own membership rules and guidelines. Defendant encouraged the activities of Russell and other pedophiles by allowing them to continue their membership, in full force, despite Defendant's knowledge of these illegal activities and the numerous complaints by other members. Defendant cannot be permitted to turn a blind eye to the overwhelming proliferation of child pornography on their service, profit from it, and then claim immunity under the CDA when a foreseeable plaintiff brings a claim. AOL's acts of aiding and abetting Russell and others in their criminal conduct is itself a criminal act under the Statutes cited by the Plaintiff.

To some extent, Plaintiff argued below that it does not seek to hold Defendant liable as a speaker or publisher but rather seeks liability on a "distributor" theory of liability. This argument, in direct response to the holding of the trial court herein (relying on the Zeran decision), was then applied to this Plaintiff as if this were a defamation case. The trial court and District Court's of Appeal reliance on Section 230 (c)(1) of the CDA is misplaced. That section provides as follows:

(1) Treatment of Publisher or Speaker
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content providers." 47 U.S.C. 230

The trial court found, in dismissing Plaintiff's Complaint, that Plaintiff sought to

treat the Defendant as the publisher or speaker of the content of Russell's communications. The trial court erred in so holding since the theory of liability in the Complaint was not prefaced on the content of Russell's communication. The Plaintiff herein does not seek to treat America On Line as a publisher or speaker of the content of information posted by Russell. Rather, the Plaintiff alleges that the Defendant acted as a distributor of Russell's information and, in fact, aided Russell in the distribution of child pornography. Moreover, Plaintiff submits that the Defendant is subject to civil liability for its failure to prohibit the use of its service for criminal purposes.

The courts have traditionally drawn a distinction between publisher liability and distributor liability, first in the context of the traditional information provider such as a bookstore or library⁵, and then with the ever increasing development of technology, in the context of on line service providers.

The standard of liability for on line service providers begins with the decision in Cubby, Inc. v. CompuServe, 776 F.Supp. 135 (S.D.N.Y. 1991). In Cubby, the on line service provider, CompuServe, was found not to be liable for defamatory statements posted on its service, absent a showing that it either knew or had reason to know of the defamation. The Cubby court states that "Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements." Cubby at 140.

The Cubby court bases their decision upon the scienter requirement as

⁵Smith v. California, 361 U.S. 147 (1959).

established in Smith v. California, 361 U.S. 147 (1959). Citing Smith, the Cubby court states “knowledge of the contents is deeply rooted in the First Amendment, made applicable to the states through the 14th Amendment.” Cubby at 139. In Smith, the U.S. Supreme Court found that a bookstore could be liable for the content of its books when the bookstore had knowledge, actual or constructive, of the contents of the book. Thus, Cubby and Smith announced that the standard for distributors of content is that a distributor must have knowledge of the damaging contents of a publication before liability can be imposed for distributing that publication.

In 1995, the Superior Court of New York, in its decision in Stratton-Oakmont v. Prodigy Service Co., Inc., 1995 WL 323710 (Sup.Ct. N.Y. May 24, 1995) ⁶, took the standard of liability for on line service providers to a new level. The court moved away from the Smith and Cubby line of cases which required knowledge as a prerequisite to imposing liability upon a distributor of information and held that a distributor should be held strictly liable, akin to a publisher, to the extent that the distributor was prescreening and conducting editorial control of the content on its service. In Stratton-Oakmont, the court found the distributor strictly liable for false information published within its computer bulletin boards not because it had knowledge of the content but because they had exercised editorial control over the content. Such is not the case here.

When Congress enacted Section 230 of the CDA, it specifically addressed the

⁶23 Media L.Rep 1794; 63USLW 2765

strict liability standard set forth in the Stratton-Oakmont decision.⁷ They did not, however, mention or specifically overrule Cubby or Smith.

Thus, in enacting the “Good Samaritan Blocking and Screening” portion of Section 230, Congress left intact the Cubby and Smith standard which imposes distributor liability with actual or constructive notice. Allowing distributor liability where the distributor of content has knowledge of the damaging material is entirely consistent with the CDA. If Congress had intended the CDA to give immunity to distributors, it would have said so. Furthermore, the legislative history would have referenced an intent on the part of Congress to overrule Cubby and Smith and it does not do so. Presumably, members of Congress were as aware of Cubby and Smith as they were of Stratton-Oakmont, and the fact that they did not mention Cubby and Smith in their Conference Report, indicates their intention to leave the decisions in those cases intact. The language of Section 230 (c) specifically limits itself to publisher or speaker immunity and does not provide immunity to distributors. This again, evidences an intent on the part of Congress to not provide immunity to distributors, as contemplated by the Cubby and Smith decisions.

The use of “good faith” language suggests that the knowledge requirement is still viable under the CDA. Failing to act while retaining full knowledge of defaming or otherwise damaging material cannot be understood to be a “good faith effort.” If

⁷The Conference Report to the CDA states as follows:
“One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” H.R. Conf. Rep. No. 104-458, at 194 (1996)

Congress had intended to give the Defendant blanket immunity, there would be no need to include the wording “good faith.”

The theory of liability which the Plaintiff alleges against the Defendant is not rooted in the contents of the message that Russell sent over the Defendant service but rather is rooted in the conduct of Russell and the Defendant’s failure to prohibit such conduct and does not require a showing that the message was published. Moreover, the Plaintiff’s Complaint does not seek to hold the Defendant liable as a publisher or speaker of information, but rather as a distributor of information and/or an active conduit of and participant in criminal conduct and accordingly, the trial court and District Court of Appeal below erroneously find immunity under Section 230(c) .

PENDENT ISSUES

There are several Pendent Issues that were raised at the Fourth District Court of Appeal level but were not made a part of the certified questions presented to this Court.

The Fourth District erred in affirming the Trial Court on these issues:

THE TRIAL COURT’S DISMISSAL OF THE PLAINTIFF’S COMPLAINT SHOULD BE REVERSED AS THE COURT TREATED THE DEFENDANT’S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT AND CONSIDERED MATTERS OUTSIDE OF THE FOUR CORNERS OF THE COMPLAINT

The restrictions which govern a trial court in considering a Motion to Dismiss for failure to state a cause of action are black letter law. The purpose of a Motion to Dismiss for failure to state a cause of action is to determine if the Plaintiff has alleged a

good cause of action and the court must make this determination by considering only those allegations "within the four corners of the Complaint." Pizzi v. Central Bank and Trust Company, 250 So.2d 895 (Fla. 1971).⁸

A trial court will be reversed for granting a Motion to Dismiss for failure to state a cause of action when it impermissibly considers any matters outside the "four corners of the Complaint," even if those matters are the Defendant's defenses to the action." Pizzi, at 897.⁹ The trial court may not consider any facts raised outside of the allegations of the Complaint. Hembree v. Reaves, 266 So.2d 362 (Fla. 1st DCA 1972); Mellish Enterprises, Inc. v. Weatherford International, Inc., 678 So.2d 913 (Fla. 4th DCA 1996) [The trial court erred when it considered matters outside the four corners of the complaint. at 913.]. Additionally, the trial court must consider the allegations in the Plaintiff's Complaint as true.¹⁰ It has also been held that all reasonable inferences are to be allowed in favor of the Plaintiff's case. Orlando Sports Stadium, Inc., v. State Ex Rel. Powell 262 So.2d 881 (Fla. 1972), and the trial court may not speculate on the Plaintiff's ultimate ability to prove its case. Cook, at 408; Kest, at 235.

In Hillman Const. Corp. v. Wainer, 636 So.2d 576 (Fla. 4th DCA 1994), this court

⁸Citing: Kest v. Nathanson, 216 So.2d 233, 235. (Fla. 4th DCA 1968); Cyn-co Inc., v. Lancto, 667 So.2d 78 (Fla. 2d DCA 1996) ["the court is not permitted to speculate as to whether the allegations ultimately will be proven" at 79]; Cook v. Sheriff of Collier County, 573 So.2d 406, 408. (Fla. 2d DCA 1991); Concerned Citizens of Putnam County for Responsive Government, Inc., v. St. Johns River Water Management District, 622 So.2d 520, 524 (Fla. 5th DCA 1993) ["The court must confine itself strictly to the allegations within the four corners of the complaint."]

⁹The Pizzi court stated, "While the bank may have affirmative defenses. . .these may not be considered at this time." Pizzi at 897. There, the court was considering defenses raised in a motion to dismiss.

¹⁰Hembree, 266 So.2d at 362; Cook, 573 So.2d at 408; Kest, 216 So.2d at 235.

summarized the law as follows:

We must always be aware of exactly what we are about. Here we assess not the ultimate merits of the contractor's claim but merely whether he can plead it. The test for pleading is whether the contractor could theoretically offer evidence that would support the cause of action...[c]omplaints should not be dismissed for failure to state a cause of action unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim.(citations omitted). Hillman at 578.

Here, the trial court dismissed Plaintiff's Complaint and held that the Plaintiff's claims were preempted by Section 230 of the Communications Decency Act. This is clear error. The issue of preemption is a defense which was improperly considered in what should only have been the trial court's analysis of the sufficiency of the Plaintiff's pleading under Florida Rule of Civil Procedure 1.140(b)(6). Pizzi at 897.¹¹ The Fourth District Court of Appeals has held that preemption is an affirmative defense which should be raised in an Answer, not in a Motion to Dismiss. Martin v. Eastern Airlines, Inc., 630 So.2d 1206, 1208-1209 (Fla. 4th DCA 1994), citing: Temples v. Florida Industrial Construction Co., 310 So.2d 326, 327 (Fla. 2d DCA 1975); Staples v. Battisti, 191 So.2d 583, 585 (Fla. 3d DCA 1966) ["These are affirmative defenses that should be pleaded in the answer to the Complaint and may not be asserted as grounds for a motion to dismiss the complaint, even though availability may appear on the face of the complaint."]

¹¹In Pizzi, the court held that although the Defendant may have affirmative defenses which would absolve the Defendant of liability, such defenses were not properly before the court on a Motion to Dismiss. Pizzi, at 897. See also Stucchio v. Huffstetler, 690 So.2d 753,753-754 (Fla. 5th DCA 1997); Wausau Insurance Company v. Haynes, 683 So.2d 1123, 1124-1125 (Fla. 4th DCA 1996).

The trial court's Order herein does not attempt to analyze whether the Plaintiff's Complaint alleges sufficient facts to state a cause of action against the Defendant. It merely applies the Defendant's defense of preemption based upon numerous references to facts outside the four corners of the Complaint as if it were considering a Motion for Summary Judgment rather than a Motion to Dismiss. This, again, is clear error. A review of the trial court's order reveals that it considered defenses, facts, exhibits, and other evidence outside the four corners of the Complaint. Portions of the court's order considering such factors read as follows [facts or matters not contained in Plaintiff's Complaint are underlined.]:

Defendant operates an interactive computer service over which millions of subscribers transmit and receive information through computer modem connections to AOL's computer network. Defendant subscriber may communicate with one another over AOL's service in a variety of ways, including electronic mail (private electronic communications addressed to specific recipients), message boards (topical forums where subscribers post messages that may be read by all other subscribers), and 'chat rooms.' Chat rooms are forums in which two or more subscribers may conduct real-time, computer-to-computer conversations, with the statements of each speaker briefly appearing on the computer screens of other participating subscribers.

Defendant Russell is presently serving lengthy federal and state prison sentences arising out of events relating to those alleged in the Complaint. He pled guilty and was convicted on federal criminal charges of sexual exploitation of children and transportation of sexually explicit material involving a minor and state criminal charges of attempted capital sexual battery.

Defendant is an "interactive computer service" as defined in Section 230(e)(2), and the communications allegedly made by Russell in Defendant chat rooms are "information provided by another information

content provider" within the meaning of Section 230(c)1.

The Conclusion that Section 230 bars Doe's claims against Defendant is reinforced by the statute's policy statement and legislative history. The preamble of Section 230 indicates that problems of harmful speech on computer networks, including speech related to "trafficking in obscenity," should be addressed by "vigorous enforcement of Federal criminal laws" against the originators of such material, not through "Federal or State regulation" of the online services that are used as intermediaries for such speech. See 47 U.S. C. Statutes 230(a),(b). (The fact that Russell is now serving a federal prison sentence suggests that in this instance the legal system has operated as Congress intended.) The statute's legislative history further evidences a recognition of the impossibility of requiring providers of online services "to edit out information that is going to be coming to them from all manner of sources." 141 Cong. Rec. H4871(daily ed.Aug.4, 1995)(statement of Rep. Goodlatte).

Furthermore, holding Defendant liable for harm caused by third-party messages on the theory that it "knew or should have known" of the messages and their harmful nature would defeat one of the other purposes of the Section 230, namely to remove disincentives for providers of online services by voluntarily to screen or block objectional content from their services. 47 U.S.C. Section 230(b)(4). As the federal court held in *Zeran*, subjecting such a provider to liability under a "knew or should have known standard" would discourage it from making efforts to screen or block -- such as employing persons to monitor subscribers' use of the service -- because doing so could provide the basis for finding that it "knew or should have known" of any harmful content that slips through the editing process. *Zeran*, 958 F. Supp. at 1135.

The trial court considered facts and other matters not contained within the Plaintiff's Complaint and treated the Defendant's Motion to Dismiss as a Motion for Summary Judgment and, therefore, the order granting Defendant's Motion to Dismiss should be reversed.

WHERE THE TRIAL COURT FAILED TO GRANT PLAINTIFF LEAVE TO AMEND HER COMPLAINT, THE COURT COMMITTED REVERSIBLE ERROR

Leave to amend a Complaint should be freely granted where justice so requires, unless it can be clearly shown that the privilege to amend has been abused, or the amendment would be futile because the Complaint is completely untenable. Brumer v. HCA Health Services of Florida, Inc., 662 So.2d 1385, 1386 (Fla. 4th DCA 1985). There, the court found that “where a summary judgment is in essence a substitute for a motion to dismiss for failure to state a cause of action, leave to amend should be freely granted unless it is clear that no viable cause of action can be stated.” Brumer at 1386; Fla.R.Civ.P. 1.190(a).¹²

The clear public policy of the State of Florida is to allow such amendments so that cases may be decided on their merits.¹³ The court should resolve all doubts regarding the sufficiency of Plaintiff’s Complaint in favor of permitting an amendment. Craig, 650 So.2d 179, 180 (Fla. 2d DCA 1995); Hatcher v. Chandler, 589 So.2d 428 (Fla. 1st DCA 1991).

In the instant case, the trial court dismissed the Plaintiff’s original Complaint with prejudice without allowing even one attempt to amend. (T.47). The courts have

¹² See *also*, Omasta v. Bedingfield, 689 So.2d 409 (Fla. 5th DCA 1997); Winselmann v. Reynolds, 690 So.2d 1325 (Fla. 3d DCA 1997); Colandrea v. King, 661 So.2d 1250 (Fla. 2d DCA 1995), Craig v. Eastpasco Medical Center Inc., 650 So.2d 179 (Fla. 2d DCA 1995).

¹³ Colandrea, at 1251

repeatedly held that this is an abuse of discretion.¹⁴ Leave to Amend should be granted unless it appears that the privilege has been abused even when the trial court is of the opinion that the amendment will not result in the stating of a cause of action. Petterson v. Concrete Construction Inc., 202 So. 2d 191 (Fla. 4th DCA 1967), quashed on other grounds, 216 So.2d 21.

It should be noted that to the best of Plaintiff's knowledge, this is the first case in Florida where a Plaintiff attempts to assert claims such as these against an on-line service provider such as the Defendant. The defense of preemption by the CDA (albeit improperly considered at this stage of the proceeding and improperly applied as set forth in issues on Appeal I,III, and IV) is also of first impression in Florida. Additionally, the case relied on most strongly by the Defendant, Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) was decided after the drafting and filing of the original Complaint (A-3) on January 23, 1997. (R.1-11). To not allow Plaintiff even one attempt to amend to assert additional facts which would distinguish the Plaintiff's causes of action herein from those of Zeran, or to assert additional causes of action which would not be subject to the defenses raised, was clearly an abuse of discretion in violation of Florida's public policy to decide cases on their merits.

¹⁴Lewis v. Howanitz, 378 So.2d 310 (Fla. 3d DCA 1979); Town of Micanopy v. Connell, 304 So.2d 478 (Fla. 1st DCA 1974); Posey v. Magill, 530 So.2d 985 (Fla. 1st DCA 1988); City of Homestead v. Dade County, 425 So.2d 593 (Fla. 3d DCA 1982); Dingess v. Florida Aircraft Sales and Leasing Inc., 442 So.2d 431 (Fla. 5th DCA 1983).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court to reverse the trial court's Order granting Defendant's Motion to Dismiss and to remand to the trial court for further proceedings and any other relief that this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via US Mail this ____ day of January, 1999 to L. MARTIN REEDER, JR., ESQUIRE, Steel, Hector & Davis, 1900 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 (650-7232), PATRICK J. CAROME, ESQUIRE, Wilmer, Cutler & Pickering, 2445 M Street, Washington, D.C., 20037 (202/663-6000), and to RICHARD LEE RUSSELL, #40359-004, FCC Coleman Med. Unit A-1, Post Office Box 819, Coleman, FL 33521-0819.

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