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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

)	
)	CASE NO.: V-015266-4
KATHLEEN R.)	
)	
Plaintiff,)	REPLY TO PLAINTIFF'S
)	OPPOSITION TO DEMURRER OF
v.)	DEFENDANT CITY OF LIVERMORE
)	
CITY OF LIVERMORE, et. al.)	
)	
Defendants.)	
)	
)	

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I. INTRODUCTION

In the Opposition to the Demurrer of the City of Livermore ("Opposition"), Plaintiff concedes that her Complaint for Injunctive Relief ("Complaint") should be dismissed, but requests that the Court allow her to amend the Complaint. (Opposition, pp. 4-5 and 10.) Allowing leave to amend in this case would be futile and a waste of time for both parties and the Court. This is not a case where anything can be accomplished by adding any facts or pleading in a different manner. This is a case where Plaintiff is asking for something the law does not provide.

II. ARGUMENT

A. Plaintiff Offers a Tortured Interpretation of Section 230 of the Federal Communications Decency Act.

Plaintiff argues that section 230 of the Communications Decency Act (47 U.S.C.A. section 230) does not apply in this case because: (1) the federal district court in Mainstream Loudoun v. Board of Trustees of the Loudoun County Library (E.D.Va 1998) 2 F.Supp.2d 783, refused to apply the section to a public library (Opposition, p. 2); (2) section 230 does not affect the enforcement of obscenity and child pornography statutes (*Id.* at p. 3); and (3) Congress could not have intended to provide what Plaintiff terms "public exhibitor" immunity (*Id.* at pp. 3-4). These arguments are based on an incomplete and confused reading of the law.

1. Plaintiff's Reliance on *Mainstream Loudoun* is Misplaced.

Plaintiff relies heavily on the court's opinion in *Mainstream Loudoun* to support her argument that section 230 is inapplicable. (Opposition, p. 2.) *Mainstream Loudoun* involves the constitutionality of a county library policy that requires site-blocking software be installed on the library's computers. (*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, supra*, 2 F.Supp. 783, 787.) In that case, the court correctly concludes that section 230 does not immunize public libraries from constitutional challenges to their Internet filtering policies. (*Id.* at p. 790.)

Plaintiff's blind reliance on this language to support her arguments is misplaced. As described below, the court in *Mainstream Loudoun* is not only dealing with a different type of [begin page 2] immunity, it is dealing with a different issue altogether. Without taking into account the

context of the court's opinion in *Mainstream Loudoun*, Plaintiff relies on dicta in the court's opinion to form an interpretation of the case that contradicts the plain meaning of section 230.

a. The Immunity at Issue in *Mainstream Loudoun* is Not the Same Type of Immunity at Issue Here.

As explained by the court in *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, the Congressional purpose in enacting section 230 was twofold. First, section 230 was enacted to ". . . maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." (*Id.* at p. 330; 47 U.S.C.A. § 230, subds. (b) (1) and (2).¹) Second, section 230 was enacted to ". . . encourage service providers to self-regulate the dissemination of offensive material over their services." (*Zeran v. America Online, Inc., supra*, 129 F.3d 327, 331; 47 U.S.C.A. § 230, subds. (b) (3) and (4).)

The twofold purpose in enacting section 230 is embodied in two distinct forms of immunity. First, subdivision (c) (1) of section 230 establishes what may be termed "content provider" immunity:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Second, subdivision (c) (2) of section 230 establishes what may be termed "filtering provider" immunity:

No provider or user of an interactive computer service shall be held liable on account of -
-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

The "content provider" immunity derived from subdivision (c) (1) of section 230 is the type of immunity at issue in *Zeran v. America Online, supra*, 129 F.3d 327 and *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44. Both of these cases involve the transmission of offensive statements over the Internet via the service provider America Online.

Unlike *Zeran* and *Blumenthal*, the type of immunity at issue in *Mainstream Loudoun* is the "filtering provider" immunity derived from subdivision (c) (2) of section 230. The type of immunity at issue in this case is "content provider" immunity, not the "filtering provider" immunity at issue in *Mainstream Loudoun*.

b. *Mainstream Loudoun* Involves a Fundamentally Different Issue.

As stated above, the court in *Mainstream Loudoun* correctly concludes that the "filtering provider" immunity of section 230 cannot be applied so as to immunize government regulation of Internet speech from constitutional review. (*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, supra*, 2 F.Supp. 783, 790 [" . . . § 230 was not enacted to insulate government regulation of Internet speech from judicial review."].) This conclusion is firmly rooted in the basic principle that ". . . [u]nder our system [of government] there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." (*St. Joseph Stock Yards Company v. United States* (1936) 298 U.S. 38, 52 56 S.Ct. 720, 726, 80 L.Ed. 1033.)

Unlike *Mainstream Loudoun*, the instant case does not involve government regulation of Internet speech, nor does it involve the constitutionality of such regulation. This case involves a challenge to the City's policy of *not* regulating Internet speech based on state statutory grounds. The City's nonregulation of the Internet fits squarely within the "content provider" immunity of section 230 and directly furthers the Congressional intent behind that immunity: to ". . . maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." (*Zeran v. America Online, Inc., supra*, 129 F.3d 327, 330; 47 U.S.C.A. § 230 subds. (b) (1) and (2).) Congress's intent behind the immunities contained in section 230 was not to provide a shield against constitutional review, but to provide a shield against challenges based on state law such as is the case here.

c. *Mainstream Loudoun* Cannot be Read to Suggest that Libraries Do Not Fall Under the Scope of Section 230 or That the Section's Immunities Do Not Apply to State Law Causes of Action.

Plaintiff relies on dicta in *Mainstream Loudoun* to argue that section 230 was not enacted to protect government entities from judicial review or to bar actions for declaratory and injunctive relief. (Opposition, p. 2; *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, supra*, 783 F.Supp. 783, 790 [". . . [e]ven if § 230 were construed to apply to public libraries , defendants cite no authority to suggest that the 'tort-based' immunity to 'civil liability' described by § 230 would bar the instant action, which is for declaratory and injunctive relief."]

Plaintiff's hasty interpretation of this language, outside of the context of the facts and [begin page 6] issues involved in *Mainstream Loudoun*, contradicts the plain meaning of section 230.

As described in the City's initial Memorandum of Points and Authorities in Support of its Demurrer ("Initial Memorandum"), libraries expressly fall within the scope of section 230. (Initial Memorandum, pp. 5-6.) The definition of the term "interactive computer service" contained in subdivision (e) (2) of section 230 includes ". . . any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. (Emphasis added)."

Also, as described in the City's Initial Memorandum, subdivision (d) (3) of section 230 extends the scope of the section's preemption to both "liability" and "causes of action" regardless of whether the relief requested is for damages or for injunctive and declaratory relief. (Initial Memorandum, p.5; 47 U.S.C.A. § 230, subd. (d) (3) ["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."]; *Zeran v. America Online, Inc.*, *supra*, 129 F.3d 327, 330 ["By its plain language, § 230 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." (Emphasis added.)] Injunctive relief is simply a remedy and not a cause of action, and a cause of action must exist before injunctive relief may be granted. (*Id.*) Or, stated another way, injunctive relief cannot be granted in a vacuum. If Congress wanted to limit section 230's scope to damage actions, it would not have included the words "[n]o cause of action may be brought . . ." in subdivision (d) (3).

2. Plaintiff Appears to be Confused Over the Distinction Between Civil and Criminal Liability.

Plaintiff contends that section 230 does not apply here because subdivision (d) (1) of the section provides that it should not be construed to impair the enforcement of criminal laws.² (Opposition, p. 3.) Plaintiff goes on to state that "[t]he gravamen of this suit is that the defendant library is knowingly soliciting, aiding the transmission of, and providing obscene and harmful images, transmitted from both within the state and from without the state, to minors." (*Id.*)

If Plaintiff is contending that library employees are violating federal or state criminal laws the appropriate course of action would be for her to file a complaint with the United States Attorney's Office or with the Alameda County District Attorney's Office. The Complaint she brought against the City alleges civil causes of action and requests a civil remedy.

Furthermore, to the extent the Plaintiff is contending that the City has negligently allowed or is allowing third-party criminal activity to occur at its library, she is also alleging a civil cause of action against the City. (See discussion in Initial Memorandum at pp. 13-15.)

3. Plaintiff's "Public Exhibitor" Hypotheticals Confirm That She is Confused Over the Distinction Between Criminal and Civil Liability.

Plaintiff offers two hypothetical fact situations to support her argument that Congress never intended section 230 to provide what she calls "public exhibitor" immunity. (Opposition at pp. 3-4.) Both hypotheticals involve men engaging in criminal activity with children. (*Id.*) Nothing in section 230 would preclude the criminal prosecution of the men under either federal or state law. (47 U.S.C.A. § 230, subd. (d) (1) ["Nothing in this section shall be construed to impair the enforcement of . . . any . . . Federal criminal statute."].)³ Once again, Plaintiff has failed to recognize that the causes of action she is advancing are *civil* in nature.

B. The First Cause of Action for Waste of Public Funds Cannot Be Cured By Way of Amendment.

Plaintiff concedes that she has not alleged sufficient facts to state a cause of action under Code of Civil Procedure section 526a for waste of public funds. (Opposition, pp. 4-5.) At the same time, Plaintiff has asked this court for leave to amend in order that she attempt to properly allege standing under the section. (*Id.* at p.10.)

In this case, allowing the Plaintiff to amend her Complaint is futile because standing is only part of her problem. In order to allege a cause of action under section 526a, the taxpayer must plead facts sufficient to show that the expenditure of public funds is in fact *illegal*. (*County of Los Angeles v. Superior Court* (1967) 253 Cal.App.2d 670, 678; *National Organization for Reform of Marijuana Laws v. Gain* (1979) 100 Cal.App.3d 586, 598; *Fort Emory Cove Boatowners Association v. Cowett* (1990) 221 Cal.App.3d 508, 515.)

The Complaint does not allege (see Complaint, pp. 3-4), nor could it be amended to allege, that spending public funds to provide unfettered Internet access is illegal. The allegations in the Complaint clearly establish that the Plaintiff is unhappy with the City's Internet Policy and thinks it is a waste of public funds to provide unfettered access, but under section 526a that is not sufficient to state a legal cause of action. For obvious reasons, section 526a does not provide relief to those taxpayers who are simply unhappy with the policy choices of the City and think implementation of those policies is a waste of money. If a taxpayer is not satisfied with the policies choices of the City, his or her remedy is at the ballot box. In order to invoke section 526a there must be some illegality.

C. Plaintiff Cannot State a Public Nuisance Cause of Action.

1. Plaintiff Cannot Allege a Special Injury Different in Kind From That Suffered by the General Public.

In the Opposition, Plaintiff correctly points out that whether or not she has standing to bring a public nuisance action depends upon whether she has alleged a "special injury." (Opposition, p.5; Civil Code § 3493 ["A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."].)⁴ Plaintiff claims that she has satisfied the special injury requirement of Civil Code section 3493 because she has alleged that her son ". . . suffered actual psychological injury by being repeatedly exposed to material deemed obscene material and material 'harmful to minors.'" (Opposition, p. 5.) This is not sufficient to state a legal cause of action.

Simply alleging an injury does not meet the requirements of Civil Code section 3493. The special injury must be of a character different *in kind* and not merely in degree from that suffered by the general public.⁵ (*Koll-Irvine Center Property Owners Association v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040-1041 ["Koll-Irvine argues its allegations of mental anguish, risk of higher insurance premiums, diminished property values and reduced usefulness of its premises constitute unique damages due to its proximity to the Fuel Farm. But these damages apply to all the homes and businesses in the area of the airport."]; *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 21 ["In general, the annoyance and inconvenience suffered by Plaintiff (interruption of television and radio communication, interruption of sleep and general annoyance), which is the basis for the emotional distress claim, is the same kind as that

suffered by other residents in the general vicinity of Plaintiff's property; the only difference is the degree to which a particular resident experiences the aircraft annoyance."]; *Brown v. Petrolane, Inc.* (1980) 102 Cal.App.3d 720, 726 [Fear of a liquefied petroleum gas storage facility near plaintiffs' homes, which were located in an area of recurring seismic activity, was a fear that differed between individuals within the community, if at all, in degree rather than kind.]; *Venuto v. Owens-Corning Fiberglass Corporation* (1971) 22 Cal.App.3d 116, 124 -125 ["In essence the complaint alleges nothing more than that the health of the general public and that of plaintiffs, as members of the public, is being injured because of defendant's activity [manufacturing fiberglass], but that the health of each plaintiff is being injured to a greater degree [because of their allergies and respiratory disorders]. Plaintiffs' alleged damage is, therefore, not different in kind but only in degree from that shared by the general public."].)

Plaintiff's Complaint makes clear that the alleged injuries suffered by her son are not different in kind from those allegedly suffered by the general public. (See Complaint, p. 4, & 25 ["Moreover, any person who is in the vicinity of the computer and glances at it when obscene images are being displayed will be exposed to obscene material even if they did not intend to view it."].) As was stated in the City's Initial Memorandum, the Library is open to the public and Internet access is available to all patrons. (Initial Memorandum, p. 12.) The alleged injuries suffered by Plaintiff's son may be different in degree by those allegedly suffered by other library patron, but they are not different in kind.

2. A Public Nuisance Action is Precluded by Civil Code Section 3482, Because Unrestricted Internet Access is Specifically Contemplated in the Library's Internet Policy.

The City does not dispute that, under Civil Code section 3482 (which bars an action for nuisance against a public entity where the alleged wrongful acts are expressly authorized by statute), the statute must contemplate the doing of the very act which occasions the injury. (Opposition, p. 7.) Plaintiff fails to acknowledge, however, that the alleged wrongful act here (unrestricted Internet access) is specifically contemplated in the Library's Internet Policy. Not only does the Policy expressly contemplate unrestricted Internet access, it also contemplates that minors will be using the Library's computers:

Parents and guardians are encouraged to work closely with their children. Parents are expected to monitor and supervise children's use of the Internet in selecting material that is consistent with personal and family values. The Livermore Public Library does not provide this monitoring or supervision.

(See Initial Memorandum, pp. 3-4.)

D. In Spite of Plaintiff's Refusal to Acknowledge the California Tort Claims Act, the Act Precludes Plaintiff's "Premises Liability" Cause of Action.

Responding to Plaintiff's causes of action for declaratory relief and "premise liability" in its Initial Memorandum, the City discusses in detail the requirements of the California Tort Claims Act (the "Tort Claims Act") (Gov. Code, § 810 *et seq.*). (Initial Memorandum, pp. 8, 13-15.)

Despite this discussion, however, Plaintiff does not even attempt to delve into the Tort Claims Act in order to justify her "Apremises liability" theory. (See Opposition, pp. 7-8.) Instead, Plaintiff simply offers more hypotheticals which have no bearing to this case. (*Id.* at p. 8.) Whether she likes it or not, Plaintiff is limited to the facts alleged in her Complaint and the law as set forth in the Tort Claims Act.

In its Initial Memorandum, the City liberally construed the Plaintiff's allegations in order to somehow find some basis for them in the Tort Claims Act. (Initial Memorandum, p. 14.) If Plaintiff knew of some other argument under the Act, she should have mentioned it in her Opposition. The fact remains that, at best, the Plaintiff is arguing that providing unfettered Internet access to minors is a dangerous condition of public property because it increases the possibility that minors will be exposed to obscene and harmful material posted on the Internet by third-parties. (See *id.*) The fact also remains that, under the Tort Claims Act, in order for liability to be imposed in such a case, the third-party conduct must be coupled with a physical defect of the property. (See *id.*) Such a defect does not exist here.

III. CONCLUSION

The City realizes that, even if the Court grants the Demurrer, it must allow leave to amend if there is a reasonable possibility that the defects in the Complaint can be cured by amendment. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118.) However, where as in this case, there is no reasonable possibility that the defects can be cured by amendment because of the substantive law involved, sustaining a demurrer without leave to amend is clearly merited and is not an abuse of discretion. (*Vater v. County of Glenn* (1958) 49 Cal.2d 815, 821; *Sackett v. Wyatt* (1973) 32 Cal.App.3d 592, 603.)

In this case, Plaintiff's claims are precluded by the both the plain language of section 230 and all applicable state statutes. The issue the Plaintiff has identified is one of policy, not a legal one. Internet access policies only raise legal issues if they mandate affirmative government restrictions on Internet speech. This is not the case here. Allowing leave to amend would be futile and allowing this case to go any further would be a waste of time for both parties and the Court.

Date:

Respectfully submitted

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Footnotes

1 47 U.S.C.A. section 230, subdivision (b) provides as follows:
It is the policy of the United States - -

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove the disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

2 It should be noted that the exemption the Plaintiff relies on (subdivision (d) (1)) applies only to federal criminal statutes. (47 U.S.C.A. § 230, subd. (d) (1) ["Nothing in this section shall be construed to impair the enforcement of section 223 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute."] Certainly this narrow exemption does not apply to the state civil causes of action at issue here.

3 Even though this subsection only speaks to federal criminal statutes, enforcement of state criminal statutes (including Penal Code section 313.1, as cited by the Plaintiff in her hypothetical) is in no way prevented by section 230. (See 47 U.S.C.A. § 230, subd. (d) (3) ["Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."].)

4 Plaintiff cites *People ex rel. Busch v. Projection Room Theatre* (1976) 17 Cal.3d 42 to support her standing argument. (Opposition, p. 5.) The public nuisance action in the Busch case was ". . . brought by public officials acting on behalf of the public generally and proceeding under provisions (see Code Civ. Proc., § 731) which expressly confer standing upon them." (Id. at p. 51.) This case is inapplicable here, where the issue is whether a private person has standing to bring a public nuisance action.

5 Plaintiff cites *Buchanan v. Los Angeles County Flood Control District* (1976) 56 Cal.App.3d 757 and *Beck Development Company v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160 to support her claim of special injury. (Opposition, pp. 5-6.) Both of these cases involved physical interference with the enjoyment of the plaintiffs' land. In *Buchanan* it was erosion of the plaintiff's land through improper activity of a flood control district. (56 Cal.App.3d at 768.) In *Beck* it was contamination under the plaintiffs property. (44 Cal.App.4th at 1214.) Therefore, both of these cases also involved private nuisances. Where the nuisance is a private as well as public, as in these cases, there is no requirement that the plaintiff suffer damage different in kind from that of the general public. (*Venuto v. Owens-Corning Fiberglass*, supra, 22 Cal.App.3d 116, 124.) These cases are inapplicable here, where there is no interference with the Plaintiff's property and therefore no private nuisance. Here, the Plaintiff must still suffer damages different in kind from that of the general public.