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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

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11 BARBRA STREISAND, an individual,,)
12 Plaintiff,)
13 vs.)
14 KENNETH ADELMAN, an individual;)
15 PICTOPIA.COM, a California corporation;)
16 LAYER42.NET, a California corporation; and)
DOE 1 through DOE 20, inclusive.,)
17 Defendants.)

Case No. SC077257
**NOTICE OF MOTION AND MOTION OF
DEFENDANT PICTOPIA.COM TO
STRIKE COMPLAINT PURSUANT TO
CIV. PROC. CODE § 425.16 AND
JOINDER IN KENNETH ADELMAN'S
MOTION TO STRIKE**
Date: July 14, 2003
Time: 1:30 p.m.
Dept.: H (Hon. Allan J. Goodman)
Complaint filed: May 20, 2003

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 14, 2003 at 1:30 p.m., in Department H of the
3 above-entitled Court, located at 1633 Purdue Ave., Los Angeles, California 90025, defendant
4 Pictopia.com will and hereby does move to strike plaintiff Barbra Streisand's Complaint pursuant
5 to Code of Civil Procedure section 425.16 on the grounds that (1) each of the causes of action
6 against Pictopia.com arises from an act in furtherance of Pictopia.com's or defendant Kenneth
7 Adelman's right of free speech; and (2) Streisand cannot demonstrate a probability of prevailing
8 on any of the causes of action. In addition, each of the causes of action against Pictopia.com is
9 barred by section 230 of the federal Communications Decency Act. Pictopia.com also joins in
10 defendant Kenneth Adelman's concurrently-filed motion to strike. Pictopia.com requests that the
11 Court award it its attorneys' fees and costs under Code of Civil Procedure sections 425.16(c) and
12 3344.

13 This motion is based on this notice, the accompanying memorandum of points and
14 authorities, Kenneth Adelman's motion to strike and memorandum of points and authorities, the
15 declarations of Laura A. Seigle, Kenneth Adelman, and Mark Liebman and exhibits thereto, the
16 arguments and other evidence as may be presented at or prior to the hearing on this motion, the
17 record and files in this action, and such matters of which the Court may take notice.

18 Dated: June 23, 2003

IRELL & MANELLA LLP
Richard B. Kendall
Laura A. Seigle
Christopher M. Newman

21
22 By: 

23 Richard B. Kendall
24 Attorneys for Defendants
25 Kenneth Adelman and Pictopia.com
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1 **INTRODUCTION**

2 Defendant Pictopia.com is a Internet company that allows Internet users to order reprints of
3 photographs via the Pictopia.com website. Pictopia.com has an arrangement with defendant
4 Kenneth Adelman to provide reprints of the aerial photographs of the California coastline taken by
5 Adelman and posted on Adelman's website, www.californiacoastline.com. Adelman took these
6 photographs as part of a project to document the entire California coastline and develop a
7 photographic database for environmental and conservation purposes. Adelman's project and
8 photographs are described in more detail in his concurrently-filed motion to strike.

9 Plaintiff Barbra Streisand has asserted five causes of action against Adelman based on one
10 of the coastline photographs (Image 3850) that happens to depict her ocean-front estate along with
11 other houses in her neighborhood. Ex. A.¹ Streisand alleges that by taking the photograph and
12 posting it on his website, Adelman has violated her right to privacy. Streisand also asserts that the
13 caption on Image 3850 – "Streisand Estate, Malibu" – violates her privacy by identifying the estate
14 as hers. Although almost every factual allegation in the Complaint names only Adelman as
15 engaging in supposedly wrongful conduct, Streisand asserts that Pictopia.com is also liable on
16 every cause of action as an agent and co-conspirator based on its role in providing reprints of the
17 photographs.

18 All of the causes of actions against Pictopia.com should be stricken under California Code
19 of Civil Procedure section 425.16. Section 425.16 entitles a defendant to bring a special motion to
20 strike causes of action "against a person arising from any act of that person in furtherance of the
21 person's right of petition or free speech . . . in connection with a public issue." Civ. Proc. Code §
22 425.16(b)(1). In his concurrently-filed motion to strike, Adelman explains that because Streisand
23 cannot prove that she will prevail on her claims, they should be stricken under section 425.16 as
24 an improper attempt to chill the valid exercise of the constitutional right of freedom of speech.
25 The same reasoning applies to Pictopia.com, and Pictopia.com hereby joins in Adelman's motion.

26 In addition, Pictopia.com enjoys another ground for striking the Complaint under section
27 425.16 – all of the causes of action against Pictopia are preempted by section 230 of the federal

28 ¹ All exhibits are attached to the concurrently-filed declarations.

1 Communications Decency Act. Section 230 protects providers of interactive computer services
2 from liability under state law for claims based on information provided by others. All of
3 Streisand's claims are based on the photograph (taken by Adelman) and the photograph's caption
4 (provided by a user of Adelman's website). Because Pictopia did not create the photograph or the
5 caption and is merely an intermediary of the photograph to the public, it is immune from
6 Streisand's claims.

7 BACKGROUND FACTS

8 As set out in greater detail in defendant Kenneth Adelman's concurrently-filed motion to
9 strike, in 2002 Adelman began the California Coastal Records Project. His plan was to develop a
10 pictorial record of the entire California coastline in order create a database of photographs that
11 could be used over the years to analyze damage caused by illegal coastal activity. Ex. C.
12 Adelman took the photographs and posted them on his website – www.californiacoastline.org.
13 Complaint, ¶ 6. The result of Adelman's endeavor is a website consisting of over 12,200
14 photographs that depict virtually all 840 miles of the California coastline.

15 Some of the photographs have captions describing what is depicted. To facilitate public
16 participation in his project and obtain the benefit of the public's knowledge about the sites along
17 the coastline, Adelman has made the captioning aspect of his website interactive. Any user of the
18 website may add a caption to a photograph by using the "Suggest Caption" function. Ex. G.
19 When a user clicks on a photograph, a box appears on the screen permitting the user to suggest a
20 caption. The user can then type in a caption in the box. The website requests the user to identify
21 the location of the photograph as part of the caption. *Id.*

22 Website users may obtain a professional quality reprint of a particular photograph
23 appearing on the website through defendant Pictopia.com. To purchase a photograph, a user
24 clicks on the "Purchase Photograph" button under the photograph. Ex. S. A page entitled
25 "Photograph License and Reprint Purchase Terms and Conditions" appears. *Id.* At the bottom of
26 that page is a button labeled "I do agree with these terms (Continue to Order Taking page)."² *Id.*

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28 ² After the user's first use of the Purchase Photograph button, the website will no longer
bring up the Photograph License and Reprint Purchase Terms and Conditions screen.

1 When the user clicks on that button, the next page appears confirming that the user wants to
2 purchase that particular photograph and asking the user to click on a button labeled "Order an
3 Enlargement of this image." *Id.* That button leads to the Pictopia.com website where the user
4 chooses the size of reprint desired, enters shipping and credit card information, and completes the
5 order. *Id.*; Liebman Decl., ¶ 2.

6 When the Pictopia.com website receives an order, its computer server accesses Adelman's
7 computer server to retrieve the file containing the photograph that is the subject of the order. The
8 Pictopia.com computer server does not retrieve any data about the caption of the photograph. All
9 the Pictopia.com computer receives is the image number (e.g., Image 3850) and corresponding file
10 name on Adelman's server. After retrieving the desired file containing the photograph, the
11 Pictopia.com computer automatically prints a reprint of the photograph in the size ordered by the
12 user. The photograph's caption does not appear on the reprint. The Pictopia.com computer and
13 printer cannot change the photograph by, for example, enlarging a portion of it or focusing on a
14 particular part of the image. This entire process is automated and does not involve a single person
15 from the moment that the user submits his or her order until the reprint emerges from the printer.
16 When the photograph is finished printing, a Pictopia.com employee checks the photograph to
17 make sure that it does not contain obscene material, trims the photograph, places it in an envelope
18 with a thank you letter, labels the envelope, and puts the envelope in the mail. During this entire
19 process, no Pictopia.com employee sees the photograph's caption. Liebman Decl., ¶¶ 3-6.

20 ARGUMENT

21 **I. Streisand's Causes Of Action Against Pictopia.com Must Be Stricken For The Same** 22 **Reasons As Her Causes Of Action Against Adelman**

23 Streisand's Complaint asserts every one of her five causes of action against Pictopia.com as
24 well as Adelman. However, Streisand makes only one specific factual allegation about
25 Pictopia.com – that "The photographs of Plaintiff's property . . . can also be purchased at various
26 prices depending on the picture size through Adelman's 'special relationship' with defendant
27 Pictopia.com." Complaint, ¶¶ 6, 25. Thus, all of Streisand's causes of action against Pictopia.com
28 depend on a supposed "agent and co-conspirator" relationship between Adelman and Pictopia.com

1 and the assertion that "each defendant was in some manner responsible for the acts and damages
2 alleged." *Id.* at ¶ 15. Because the causes of action against Pictopia.com are dependent on
3 Adelman being liable, if the causes of action against Adelman are stricken, the causes of action
4 against Pictopia.com must also be stricken.

5 Accordingly, for all of the reasons set forth in Adelman's motion to strike, with which
6 Pictopia.com joins, the causes of action against Pictopia.com should be stricken.

7 **II. Section 230 Of The Communications Decency Act Bars The Entire Complaint**
8 **Against Pictopia.com**

9 A separate and independent ground for striking the Complaint against Pictopia.com is the
10 protection afforded Internet service providers and users under section 230 of the Communications
11 Decency Act.

12 Section 230 provides that "[n]o provider or user of an interactive computer service shall be
13 treated as the publisher or speaker of any information provided by another information content
14 provider." 47 U.S.C. § 230(c)(1). It further provides that "[n]o cause of action may be brought
15 and no liability may be imposed under any State or local law that is inconsistent with this section."
16 *Id.* at § 230(e)(3). Thus, this section "creates a federal immunity to any cause of action that would
17 make service providers liable for information originating with a third-party user of the service."
18 *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692 (2001). In enacting this statute,
19 "Congress made a policy choice . . . not to deter harmful online speech through the separate route
20 of imposing tort liability on companies that serve as intermediaries for other parties' potentially
21 injurious messages." *Id.* at 697 (quotation omitted).

22 "This form of immunity requires that (1) the defendant be a provider or user of an
23 interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker
24 of information; and (3) the information at issue be provided by another information content
25 provider." *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828-32 (2002) (provider of auction website
26 not liable for fraudulent item descriptions and seller ratings posted on site by users).

27 An "interactive computer service" is "any information service, system, or access software
28 provider that provides or enables computer access by multiple users to a computer server." 47

1 U.S.C. § 230(f)(2). Examples of such services are websites such as eBay that "enable[] users to
2 conduct sales transactions" (*Gentry*, 99 Cal. App. 4th at 830 n.7), services like AOL that provide
3 and distribute a variety of information (*id.* at 830), and libraries providing Internet access to the
4 public. *Kathleen R.*, 87 Cal. App. 4th at 692.

5 The statute provides immunity to a "distributor" as well as "a publisher or speaker of
6 information" provided by another. *Id.* at 695 n.3. Thus, immunity applies whether the service
7 provider is merely a conduit for the information (for instance, a library providing Internet access,
8 including access to pornography, *id.* at 695) or plays "an active even aggressive role in making
9 available content prepared by others." *Gentry*, 99 Cal. App. 4th at 830 (describing case where
10 AOL "contracted for [allegedly defamatory] reports, retained certain editorial rights as to its
11 content, and aggressively promoted the report").

12 Information is provided by "another information content provider" when the defendant "is
13 not responsible, in whole or in part, for the creation or development of any of the harmful matter
14 accessible through its computers." *Kathleen R.*, 87 Cal. App. 4th at 692 (library not liable for
15 providing Internet access to pornography because library did not create the pornography). For
16 instance in *Gentry*, the court concluded that eBay could not be liable under state law for failing to
17 provide a certificate of authenticity to purchasers of autographed collectibles through its website
18 because the causes of action sought to "hold eBay responsible for misinformation or
19 misrepresentations originating with other defendants or third parties." *Gentry*, 99 Cal. App. 4th at
20 820. Such causes of action are preempted by section 230. *Id.* eBay similarly was held not liable
21 under section 230 in a case where the plaintiff charged eBay with selling contraband musical
22 recordings. *Stoner v. eBay Inc.*, 56 U.S.P.Q. 2d 1852 at *2 (Cal. Super. Ct. 2000). Even though
23 the plaintiff attempted "to characterize eBay as an active participant in the sale of products
24 auctioned over its services," the plaintiff's case at bottom sought to hold eBay liable for
25 "information that originates with the third party sellers who use the computer service."³ *Id.*

26 _____
27 ³ These cases, and the instant case, are different from the circumstances in *Carafano v.*
28 *Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002). In that case, the court concluded
that Matchmaker.com was an information content provider because users created their profiles that
were posted on the Matchmaker website by answering specific multiple choice and essay
questions written by Matchmaker and that these questions themselves contributed to the content of

1 Streisand's five state law causes of action against Pictopia.com easily fall within the type of
2 state law tort claims preempted by section 230. First, Pictopia.com is as much a provider of
3 interactive computer services as eBay. Just as eBay does, Pictopia.com allows multiple users to
4 access its computer server to sell and purchase products that do not originate with and are not
5 created by Pictopia.com, in this case, reprints of Adelman's photographs. Liebman Decl., ¶¶ 2, 3.
6 Second, Streisand's causes of action treat Pictopia.com as a publisher or distributor of the
7 allegedly wrongful information. In every one of her causes of action, Streisand alleges that she is
8 harmed by the captioning and distribution of the photograph of her estate throughout the world via
9 the Internet, including through the sale of reprints via Pictopia.com. Complaint, ¶¶ 22, 25, 33, 43,
10 53, 64, 68.

11 Pictopia.com is immune from liability under these causes of action because it is no more
12 than an intermediary of information provided by others. Pictopia.com does not create the
13 photographs that it reprints, and it does not even have access to the captions of the photographs
14 that appear on Adelman's website. Liebman Decl., ¶ 3. It merely retrieves the digital data for a
15 photograph from Adelman's computer server, prints that photograph, and mails it to the purchaser.
16 Like eBay, Pictopia.com does nothing more than facilitate a sale of a product. *Id.* at ¶¶ 3-6. Even
17 if that product is unlawful, contains harmful information, or is sold by means of wrongful
18 information (all of which it is not), Pictopia.com is not liable because the supposedly unlawful
19 information originates from another party.

20 Accordingly, all of the causes of action are barred by section 230.

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28 the third-party user's profile. *Id.* at 1066-67. Adelman's website makes no such contribution to
the captions suggested by users.


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CONCLUSION

For the reasons given above, the Pictopia.com respectfully request that the Court strike the Complaint pursuant to section 425.16 and award Pictopia.com its attorneys' fees and costs under sections 425.16(c) and 3344.

Dated: June 23, 2003

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