IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EUCLID DISCOVERIES LLC, J. ROBERT WERNER and RICHARD Y. WINGARD, Plaintiffs, v. MARK NELSON, SACHIN GARG and JOHN DOES 1-150, all of whose true names are unknown, Defendants.	Case No. 1:11-cv-11393-DJC **DEFENDANT SACHIN GARG'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Fed. R. Civ. P. 12(c), Defendant Sachin Garg respectfully moves for judgment on the pleadings dismissing all counts of Plaintiffs' Complaint against him, on the following bases: (i) lack of subject-matter jurisdiction due to the presence of John Doe defendants; (ii) lack of personal jurisdiction; (iii) failure to state a claim for which relief may be granted because Plaintiffs' claims are barred by the applicable statute of limitations; (iv) failure to state a claim because the statements of which Plaintiffs complain are non-defamatory as a matter of law; and (v) failure to state a claim for which relief may be granted because Garg has absolute immunity as a matter of federal law for claims of defamation based on statements made by others and the Complaint fails to allege a single defamatory statement by Garg.

In support of this Motion, Defendant Garg relies on the accompanying Memorandum in Support, as well as the Memorandum in Support of co-Defendant Mark Nelson's contemporaneous Motion for Judgment on the Pleadings, as incorporated by reference herein.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(e), Defendant Garg respectfully submits that oral argument may assist the Court in resolving this motion, and therefore requests oral argument.

Respectfully submitted,

SACHIN GARG,
By his attorney,

/s/ Mitchell J. Matorin
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Dated: January 12, 2012

Local Rule 7.1 Certification

I certify that I have conferred with counsel for Plaintiffs in a good faith attempt to resolve or narrow the issues presented in this motion.

/s/ Mitchell J. Matorin

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 12, 2012.

/s/ Mitchell J. Matorin

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EUCLID DISCOVERIES LLC, J. ROBERT WERNER and RICHARD Y. WINGARD, Plaintiffs, v. MARK NELSON, SACHIN GARG and JOHN DOES 1-150, all of whose true names are unknown, Defendants.	Case No. 1:11-cv-11393-DJC **MEMORANDUM IN SUPPORT OF DEFENDANT SACHIN GARG'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Respectfully submitted,

SACHIN GARG,

By his attorney,

/s/ Mitchell J. Matorin
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Dated: January 12, 2012

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Pursuant to Fed. R. Civ. P. 12(c), Defendant Sachin Garg ("Garg") respectfully moves for judgment on the pleadings, for lack of personal jurisdiction and failure to state a claim upon which relief may be granted. Defendant Garg is a citizen of India residing in New Delhi and the Complaint fails to allege any conduct by Garg sufficient either to invoke the Massachusetts long-arm statute or to satisfy Due Process.

Even if there were a basis for exercising personal jurisdiction, the Complaint fails to state a claim for relief against Defendant Garg because as a matter of law he is immune from all liability for allegedly defamatory statements made by anyone other than himself under Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("CDA" or "Section 230"), and neither the Complaint nor Plaintiffs' More Definite Statement ("MDS") alleges a single statement made by Defendant Garg himself.[1] Accordingly, Defendant Garg is entitled to judgment on the pleadings in his favor.

In the interest of brevity, Defendant Garg incorporates by reference and further moves for judgment of dismissal on the pleadings for the reasons set forth in Sections I, III, IV, and V of the contemporaneous Motion for Judgment on the Pleadings filed by Defendant Mark Nelson.[2]

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[1] Although, as discussed below, established precedent makes clear that Section 230 bars the Complaint against Garg in its entirety as a matter of law and the Complaint provides no basis for arguing otherwise, Defendant Garg has not served a motion under Fed. R. Civ. P. 11(c)(2) at this time.

[2] With respect to Section IV of Nelson's motion (failure to state a claim based on the applicable statute of limitations), Garg notes that the same analysis dictates the application of India's statute of limitations for libel as to Plaintiffs' claims against him. Like Texas, India has a one-year statute of limitations from the date of publication. *See* India Limitation Act of 1963, Art. 75, available at http://indiacode.nic.in/ (last visited January 12, 2012); *Sria Chand v. Shri Jai Bhagwan Sharma*, No. 2006/2002 (New Delhi High Court Jan. 13, 2009), available at http://delhicourts.nic.in/Jan09/Sri%20Chand%20Vs.%20Jai%20Bhagwan.pdf (last visited January 12, 2012), paragraph 7. (A copy of this decision is attached for the Court's convenience.)

Background

For purposes of this Motion, Defendant Garg accepts as true the following allegations of the Complaint.

Plaintiff Euclid Discoveries LLC ("Euclid") is a Delaware corporation with a principal place of business in Concord, MA. Plaintiff J. Robert Werner ("Werner") is a citizen of the Commonwealth of Kentucky, residing in Louisville, KY. Plaintiff Richard Y. Wingard ("Wingard") is a citizen of the Commonwealth of Massachusetts, residing in Carlisle, MA. Defendant Mark Nelson ("Nelson") is a citizen of the State of Texas residing in Plano, TX. (Complaint § I, ¶¶ 1-5.)

Defendant Garg is a citizen of India, residing in New Delhi, India. Garg is the registered owner of the Internet domain www.c10n.info (the "Domain"), currently the Internet address of a weblog titled "The Data Compression News Blog" ("the Blog") that provides news and commentary on the computer data compression industry and technology. (Complaint § I, ¶6, § III, ¶¶ 2-3.) The Domain was registered online through, and is hosted by, the GoDaddy Internet domain registrar (located in Scottsdale, AZ). (Complaint § III, ¶ 3.) Defendant Nelson is one of several individuals who have, at various times, written posts that have appeared on the Blog, and one of many individuals who have, at various times, written and responded to comments on the Blog as part of the online discussion about data compression. (*See* Complaint § III, ¶¶ 3-4.)

Neither the Complaint nor the MDS alleges that Garg himself has ever made a single allegedly defamatory statement in any article or comment on the Blog; in fact, neither alleges that Garg has ever written anything at all on the Blog. Rather, they allege only that through his ownership of the Domain, Garg has "provided a platform" for the publication of allegedly defamatory statements by others. (*See* Complaint § III, ¶ 12; MDS ¶¶ 16-46.)

Argument

I. The Complaint Must Be Dismissed as to Garg for Lack of Personal Jurisdiction

A. Legal Standard

For general personal jurisdiction to exist, the defendant must have "continuous and systematic" contacts with the forum state. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998). There are no allegations in the Complaint even theoretically supporting the exercise of general personal jurisdiction, so the relevant inquiry is whether specific jurisdiction exists.

Specific personal jurisdiction exists when there is a "demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities. *Id.* This requires both satisfaction of the Massachusetts long-arm statute and that the exercise of personal jurisdiction is consistent with constitutional due process. The defendant must have "minimum contacts" such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Daynard v. Ness, Motely, Loadholt, Richardson & Poole, P.A.* , 290 F.3d 42, 52 (1st Cir. 2002) (citing *Int'l Shoe Co. v. Washington* , 326 U.S. 310, 316 (1945).

The plaintiff bears the burden of establishing personal jurisdiction. *Mass. Sch. of Law*, 142 F.3d at 34. Federal Rule of Civil Procedure 4(e) gives federal district courts personal jurisdiction over non-resident defendants only "to the extent authorized under the law of the forum state in which the district court sits." The Massachusetts long-arm statute, M.G.L. c. 223A § 3, imposes restraints beyond those derived from the Constitution, and personal jurisdiction exists *only* if one of the provisions of the long-arm statute applies *and* the exercise of jurisdiction is consistent with the Due Process Clause:[3]

[3] The distinct steps of the analysis are sometimes blurred in decisions suggesting that the court may proceed directly to the Due Process analysis without first analyzing the Massachusetts long-

> Jurisdiction is conferred only when some basis for jurisdiction enumerated in the statute has been established. ***If*** the literal requirements of the statute are satisfied, it ***also*** must be established that the exercise of jurisdiction under State law [is] consistent with basic due process requirements mandated by the United States Constitution

Tatro v. Manor Care, Inc., 416 Mass. 763, 767 (1994) (internal quotations omitted) (emphasis added). *See also, Good Hope Indus., Inc. v. Ryder Scott Co*., 378 Mass. 1, 6, 389 N.E.2d 76, 80 (1979)("Although presented with jurisdictional facts sufficient to survive due process scrutiny, a judge would be ***required to decline*** to exercise jurisdiction if the plaintiff was unable to satisfy ***at least one of the statutory prerequisites***.")(emphasis added); *Foster-Miller, Inc. v. Babcock &*

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arm statute. *See, e.g., Adelson v. Hananel*, 652 F.3d 75, 80 (1st Cir. 2011); *Acronis, Inc. v. Lucid8, LLC*, 2011 WL 5117669 (D. Mass. Oct. 26, 2011)(Casper, J.). To the extent that this common short-hand suggests that the long-arm authorizes personal jurisdiction if it comports with Due Process *regardless* of whether the conduct satisfies one of the statutory jurisdictional provisions, the formulation misstates the Massachusetts Supreme Judicial Court's consistent construction of the statute. Defendants submit that proceeding directly to the Due Process analysis without first establishing that the conduct satisfies one of the prongs of the long-arm statute is inconsistent with Massachusetts law. That each of the long-arm statute's prongs extends to the limits of Due Process *if the prong is satisfied* does not eliminate the long-arm as an independent analytical step. *See, e.g., Tatro*, 416 Mass. at 553-54 ("We doubt that the Legislature intended to foreclose a resident of Massachusetts, injured in another State, from seeking relief in the courts of the Commonwealth ***when the literal requirements of the long-arm statute have been satisfied***.")(emphasis added). Where, as here, there is a threshold question as to whether the long-arm statute has been satisfied, that question must be analyzed and if the conduct does not fall within the statutory provisions, that is dispositive of the matter and Due Process becomes immaterial. *See, e.g., Gray v. O'Brien*, 777 F.2d 864, 867 (1st Cir. 1985) ("Since we find that Gray did not establish facts which would support the valid exercise of personal jurisdiction under the state long-arm statute, it is unnecessary to reach the question of whether the exercise of jurisdiction under Massachusetts law is consistent with basic constitutional due process requirements."); *Bearse v. Main Street Invest.*, 170 F. Supp. 2d 107, 113 (D. Mass. 2001) ("Because I find that the Massachusetts statute is not satisfied, I need not, and should not, address the constitutional issues regarding personal jurisdiction over Norman. 'Where a plaintiff is clearly unable to establish jurisdiction as a matter of state law, it is the better practice to end the inquiry without addressing constitutional concerns.'")(internal citations omitted); *Roberts v. Legendary Marine Sales*, 447 Mass. 860, 865 (2006) ("Having concluded that the long-arm statute does not provide a basis for conferring personal jurisdiction over the defendant, we need not inquire into the constitutional constraints on the exercise of jurisdiction under the statute.")

Wilcox Canada, 46 F.3d 138, 144-45 (1st Cir. 1995); *Hahn v. Vermont Law School*, 698 F.2d 48, 50 (1st Cir. 1983); *Nova Biomedical Corp. v. Moller*, 629 F.2d 190, 192 (1st Cir. 1980).

The First Circuit has established three frameworks for evaluating a motion to dismiss for lack of personal jurisdiction. The *prima facie* method is appropriate here.[4] The plaintiff may not rest upon the pleadings, but must produce evidence sufficient to "demonstrate the existence of every fact required to satisfy both the forum's long-arm statute and the Due Process Clause of the Constitution." *United Elec. Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 987 F.2d 39, 43-44 (1st Cir.1993) (quotations and citation omitted); *Boit*, 967 F.2d at 675. The court may not "credit conclusory allegations or draw farfetched inferences." *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 203 (1st Cir.1994).

B. The Massachusetts Long-Arm Statute Does Not Authorize Personal Jurisdiction

The Massachusetts long-arm statute provides in part as follows:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
>
> (a) transacting any business in this commonwealth;
>
> (b) contracting to supply services or things in this commonwealth;
>
> (c) causing tortious injury by an act or omission in this commonwealth;

[4] The "preponderance of the evidence" method applies when it would be "unfair to force an out-of-state defendant to incur the expense and burden of a trial on the merits in the local forum without first requiring more of the plaintiff than a *prima facie* showing of facts establishing jurisdiction." *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 676 (1st Cir. 1992). Although this concern over unfairness clearly applies to Defendant Garg, the preponderance of the evidence framework requires a hearing and should be used cautiously. *Id.* at 677. Because personal jurisdiction is manifestly unavailable even under the *prima facie* test, Defendant Garg does not presently seek a hearing under the preponderance of the evidence method. However, in the event that the Court is not satisfied that personal jurisdiction is lacking under the *prima facie* method, Garg respectfully requests that the Court hold a hearing to determine jurisdiction under the preponderance of the evidence standard.

> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in, this commonwealth ….

M.G.L. c. 223A § 3. The Complaint contains no allegation that Defendant Garg transacted any business in Massachusetts or contracted to supply services or things in Massachusetts.[5] The only question, then, is whether section (c) or (d) might confer jurisdiction. They do not.

To satisfy section (c) of the statute, Plaintiffs must allege and establish that Garg committed some act "in this commonwealth." The Complaint, however, does not allege a single act by Garg in Massachusetts. Accordingly, jurisdiction may not be exercised under section § 3(c).

To satisfy section 3(d) of the statute, Plaintiffs must allege and establish that Defendant Garg "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in, this commonwealth." There is no allegation in the Complaint that Defendant Garg *ever* did or solicited business or engaged in any course of conduct in Massachusetts, let alone that he did so "regularly." Nor is there any allegation that Defendant Garg derives *any* revenue from Massachusetts, let alone "substantial revenue." Indeed, the Blog is non-commercial in nature.

Accordingly, the Massachusetts long-arm statute does not provide any basis for the exercise of personal jurisdiction over Garg. The Court need go no further to determine that the Complaint must be dismissed. *See supra,* n. 3.

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[5] The mere existence of a passive or moderately interactive non-commercial website visible in the forum is insufficient to establish personal jurisdiction. *See McBee v. Delica Co.*, 417 F.3d 107, 124 (1st Cir. 2005); *SportsChannel New England Ltd. Ptn'ship v. Fancaster, Inc.*, 2010 WL 3895177 (D. Mass. 2010).

C. Due Process Does Not Support Personal Jurisdiction

Even if the long-arm statute did authorize personal jurisdiction, Due Process would preclude its exercise. In the First Circuit, courts use a tripartite test to determine whether specific personal jurisdiction exists: (i) the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities; (ii) the defendant's contacts must be a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making it foreseeable that the defendant would have to appear in that state's courts; and (iii) the exercise of personal jurisdiction must be reasonable in light of the so-called "gestalt" factors. *United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp*. 960 F.2d 1080, 1089 (1st Cir. 1992). None of the foregoing elements supports the exercise of personal jurisdiction here.[6]

First, neither the Complaint nor the MDS alleges any forum-state activities at all, and therefore the claims cannot be deemed to "arise out of or relate to" such non-existent forum-state activities. The mere fact that two of the plaintiffs allegedly suffered an "effect" in Massachusetts does not satisfy the relatedness inquiry:

> The court of appeals for this circuit has repeatedly held, when conducting relatedness inquiries, that "the in-forum effects of extra-forum activities [do not] suffice to constitute minimum contacts."

[6] Defendant Garg was served pursuant to the Hague Convention on Service of Process, and thus service satisfied Fed. R. Civ. P. 4(f)(1). However, proper service alone does not establish personal jurisdiction unless the defendant is subject to jurisdiction in the forum state or, in the case of a claim arising under federal law, if the defendant is not subject to any state's jurisdiction and personal jurisdiction is consistent with the Due Process Clause. Fed. R. Civ. P. 4(k)(1) – (2). Here, Garg is not subject to personal jurisdiction under the Massachusetts long-arm statute, there are no federal claims, and jurisdiction would conflict with Due Process. That service of process was effected pursuant to the Hague Convention therefore has no bearing on the matter.

NeoDevices, Inc. v. NeoMed, Inc. 2009 WL 689881, *4 (D.N.H. 2009) (quoting *U.S. v. Swiss Am. Bank,* 274 F.3d 610, 625 (1st Cir. 2001) (in turn quoting *Mass. Sch. of Law v. Am. Bar Ass'n,* 142 F.3d 26, 36 (1st Cir.1998)); *Sawtelle v. Farrell,* 70 F.3d 1381, 1390-91 (1st Cir. 1995).

Second, because Garg conducted no activities at all in Massachusetts, he by definition cannot have purposefully availed himself of the privilege of conducting such activities here. The "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), is of no assistance to Plaintiffs. The Complaint does not allege – and there would be no basis for alleging – that Garg specifically targeted Plaintiffs *in Massachusetts*; there is not even an allegation that Garg knew where any of the Plaintiffs were located (and Plaintiff Werner resides in Kentucky). Moreover, the *Calder* theory simply emphasizes the lack of personal jurisdiction under the Massachusetts long-arm statute because the underlying premise of the "effects" test is that the act complained of did not itself occur in the forum. Since the pertinent parts of the Massachusetts long-arm require either an in-state act or an out-of-state act where the defendant regularly conducts business or derives substantial revenues from Massachusetts and that is not the case here, the "effects" test is of no relevance.

Moreover, it is well-established that the mere fact that the effect of alleged defamation was felt (here, only partially) in the forum is insufficient to satisfy the purposeful availment requirement:

> While *Hugel* and *Calder* can be fairly read to add an "effects" test to the jurisdictional mix in defamation cases, they also make clear that a defamatory "effect" by itself is not sufficient to confer jurisdiction over a foreign defendant. Rather, to make a prima facie showing, the victim of the defamatory statement must demonstrate that its author *intended* the libel to be felt in the forum state. This intentionality requirement flows directly from the purposeful availment dictate of *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2184.

Noonan v. Winston Co. 902 F.Supp. 298, 305 (D. Mass.1995). Other courts agree and similarly apply this reasoning in cases involving defamation on the Internet. *See, e.g., Young v. New Haven Advocate*, 315 F.3d 256, 263-64 (4th Cir. 2002) (no personal jurisdiction over defamatory statements on website where website did not "manifest an intent to target and focus on Virginia readers"); *Griffis v. Luban*, 646 N.W.2d 527, 536 (Minn. 2002) (mere fact that defendant knew plaintiff lived and worked in state was not sufficient for personal jurisdiction over claims based on defamatory statements on the Internet because that knowledge did not demonstrate defendant targeted that state as the focal point of the statements).

This is especially true here, since one of the Plaintiffs is a resident of Kentucky, not Massachusetts. *See BroadVoice, Inc. v. TP Innovations LLC,* 733 F. Supp. 2d 219, 225-26 (D. Mass. 2010) (discussing *Calder* and holding that defendants' allegedly defamatory website postings were insufficient to establish purposeful availment where it was no more aimed at Massachusetts than at the rest of the world and where one of the plaintiffs was a New Hampshire resident). *Compare Acronis, Inc. v. Lucid8, LLC*, 2011 WL 5117669 (D. Mass. Oct. 26, 2011) (Casper, J.) (exercising personal jurisdiction where defamatory email was sent directly to Massachusetts-based investor and Massachusetts board member, defendant had multiple contacts with plaintiff in Massachusetts via email and telephone for the purpose of establishing a business relationship and those contacts were "instrumental in the formation of the business relationship" between them, which was at the heart of certain counts of the complaint).

Third, the exercise of jurisdiction would not be reasonable in light of the "gestalt" factors. The "gestalt" factors include the following: (i) the burden to the defendant of appearing; (ii) the forum state's interest in adjudicating the dispute; (iii) the plaintiff's interest in obtaining convenient and effective relief; (iv) the judicial system's interest in obtaining the most effective

resolution; and (v) the common interests of all sovereigns in promoting substantive social policies. *United Elec.*, 960 F.2d at 1088.

Preliminarily, although "[i]n very close cases, the gestalt factors may tip the constitutional balance," *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 209 (1994), Garg submits that this is not a "close case" at all given the lack of any forum-state activities or of any purposeful availment. Moreover, "the weaker the plaintiff's showing on the first two prongs of the Due Process analysis (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Id.* at 210. *See, e.g.*, *BroadVoice*, 733 F. Supp. 2d at 227 ("As the purposeful availment element is not met, the so-called "Gestalt factors," which are used to test due process considerations of fairness, need not be discussed ….").

To the extent that it is necessary to examine the gestalt factors at all, the first factor is determinative here. The Supreme Court has stated that the burden on the defendant "is always a primary concern." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1994). This is especially true where the defendant can demonstrate "some kind of special or unusual burden." *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994). Although long-distance travel standing alone may be simply an "ancillary cost of doing business within this district," *Nwak v. Tak How Invests., Ltd.*, 899 F. Supp. 25, 34 (D. Mass. 1995), such is not the case where the defendant has never conducted business within Massachusetts at all.

In *Ticketmaster*, the court held that forcing a practicing California attorney engaged in litigation against Ticketmaster to litigate in Massachusetts would be "onerous in terms of distance" and that this was "entitled to substantial weight in calibrating the jurisdictional scales." 26 F.3d at 210. The court observed that most of the cases dismissed on the basis of

unreasonableness of the burden are cases in which the defendant's "center of gravity, be it place of residence or place of business, was located at an appreciable distance from the forum." *Id.* (collecting cases).

Defendant Garg is a young man of modest means who resides in New Delhi, India, more than 7,000 miles from Boston, or approximately 20 hours air travel time at a cost in excess of $1,000 (*see,* www.orbitz.com), with all the complications and burdens of international travel. There is no question that Garg's "center of gravity" is substantially distant, and considering that the First Circuit has held that forcing a practicing attorney to travel from relatively nearby California was sufficiently unreasonable as to defeat personal jurisdiction, there can be no doubt that the same result is mandated here.

Because the exercise of personal jurisdiction is not authorized by the Massachusetts long-arm statute and would be inconsistent with the Due Process Clause, the Court should dismiss the Complaint in its entirety as to Defendant Garg.

II. The Complaint Fails to State a Claim Because Federal Law Renders Garg Absolutely Immune to Claims Based on Defamatory Statements Made by Others

A. Legal Standard

There is a slight difference between a Rule 12(c) motion for judgment on the pleadings and a Rule 12(b)(6) motion to dismiss in that the former implicates the pleadings as a whole and not just the complaint. *See Aponte-Torres v. University of Puerto Rico,* 445 F.3d 50, 54-55 (1st Cir. 2006). Still, both motions are analyzed under the same standard: the pleadings must establish a "plausible entitlement to relief." *ACA Financial Guaranty Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (2008) (quoting *Bell Atlantic*, 550 U.S. 544, 127 S. Ct. at 1967-69 (2007)); *Rodriquez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007). The facts alleged to "must be enough to raise a right to relief above the speculative level." *Faust v. Coakley*, 2008

WL 190769 at *2 (D. Mass 2008). However, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (internal quotation and citation omitted); *Sisco v. DLA Piper LLP*, 2011 WL 2413496, *1 (D. Mass. June 15, 2011) (Casper, J.).

The analysis begins "by identifying and disregarding statements in the complaint that merely offer 'legal conclusions couched as … fact[]' or '[t]hreadbare recitals of the elements of a cause of action.'" *Sisco*, 2011 WL 2413496, at *1 (quoting *Ocasio-Hernandez*, 640 F.3d at 8). All well-pleaded factual allegations are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *Gray v. Evercore Restructuring L.P.*, 2007 WL 3104597 (D. Mass. 2007). However, legal conclusions couched as factual allegations, bald assertions, and conclusory or threadbare factual allegations are "disentitle[d] … to the presumption of truth." *Ocasio-Hernandez*, 640 F.3d at 12; *City of Boston v. Bureau of Special Educ. Appeals*, 2008 WL 2066989, *2 (D. Mass. 2008).

B. Section 230 of the Communications Decency Act Renders Garg Absolutely Immune from Claims of Defamation Based on Content Provided by Others

Even if Garg were amenable to personal jurisdiction, the Complaint must be dismissed because, as a matter of federal law, he is absolutely immune to suit based on allegedly defamatory statements made by other people, which is the only purported basis for Plaintiffs' claims against him.

Section 230 of the Communications Decency Act provides in part that:

> 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.

47 U.S.C. § 230(c)(1). Further, the statute provides 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." *Id.* § 230(c)(3). The statute defines "interactive computer services" as:

> any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Id. § 230(f)(2). The term "information content provider" in turn is defined as: "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

Both on its face and in light of the extensive and uniform judicial application of the statute, Section 230 is an unequivocal and insurmountable legal barrier to each of Plaintiffs' claims against Garg. The Complaint alleges that Garg owns the www.c10n.info Internet domain, which hosts a Blog where other people – specifically, Defendant Nelson and the John Doe defendants – have written and published allegedly defamatory statements. Both the Complaint and the MDS are devoid of any reference to a single allegedly defamatory statement written by Garg. The Complaint and MDS attempt to side-step the fact that Garg is not alleged to have written anything by treating "the Blog" as if it were an actor rather than a mere forum for interested persons to discuss various issues relating to data compression. (*See* Complaint § III ¶ 7) ("the Blog posted false and defamatory statements" while it was "maintained by Garg and Nelson."); MDS ¶ 13 ("The Blog has posted malicious, false, and misleading statements ….")). The MDS also includes the purely conclusory statement that the allegedly defamatory statements were "published on The Blog by Nelson and Garg in writing …" (MDS ¶ 14), without any

allegation that Garg has ever done anything beyond owning the Internet domain that hosts the Blog that contains statements made by other people.

Plaintiffs' barely-existent and threadbare allegations should be discarded. *Sisco*, 2011 WL 2413496, at *1. But even accepting Plaintiffs' conclusory and speculative allegations as true, the fact remains that the Complaint and MDS identify, and seek to hold Garg legally responsible only for, statements allegedly written by Defendant Nelson and do not allege that Garg was involved in any way.

Where, as here, a person who owns or operates a website upon which other people have posted content is accused of defamation, the courts have uniformly held as a matter of law that Section 230 confers absolute immunity and mandates dismissal for failure to state a claim upon which relief may be granted. Such cases are legion. The First Circuit has held that Section 230 grants "broad immunity to entities … that facilitate the speech of others on the Internet." *Universal Comm'ns, Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007). In *Universal*, just as in this case, the defendant operated web sites that allowed users to create message boards devoted to specific companies and to post comments about them. As in this case, Internet users would select an anonymous screen name under which their posts would appear, and were free to use multiple screen names to hide their identity when posting. As in this case, the plaintiff alleged that the message board operator was liable for posts written by Internet users. The First Circuit held that the claims were barred as a matter of law:

> Congress intended that, within broad limits, message board operators would not be held liable for the postings made by others on that board. No amount of artful pleading can avoid that result.

Id. at 418. Specifically, the court held that website operators are "providers of interactive services within the meaning of Section 230" and that messages posted on Internet message boards are "information provided by another information content provider." *Id.* at 419-209.

Plaintiffs attempt – though only in passing and somewhat half-heartedly – to suggest that Garg has personal responsibility for the third-party posts. They allege, for example, that "the Blog provides a platform for Internet users to register under aliases in order to attempt to avoid attribution" (Complaint § III ¶ 3; MDS ¶ 11), that "the Blog has perpetuated further defamatory content through encouraging online visitors to register with the Blog under aliases in order to publish content about Plaintiffs" (Complaint § III ¶10), and that Garg has "provided a platform for Defendants to publish defamatory statements." (Complaint § III ¶ 12.) The First Circuit explicitly rejected similar attempts at bypassing Section 230 immunity:

> At best, UCS's allegations establish that Lycos's conduct may have made it marginally easier for others to develop and disseminate misinformation. That is not enough to overcome Section 230 immunity. … UCS points to the fact that Lycos does not prevent a single individual from registering under multiple screen names, [under the] theory that these features … make it possible for individuals to spread misinformation more credibly, by doing so under multiple screen names …. Here there is not even a colorable argument that any misinformation was prompted by Lycos's registration process or its link structure. There is no indication that the Lycos features that UCS criticizes are anything but standard for message boards and other web sites. To impose liability here would contravene Congress's intent and eviscerate Section 230 immunity.

Universal, 478 F.3d at 420. *See also Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 295 (D.N.H. 2008) (Section 230 confers immunity in the face of allegation that website operator "acted wrongfully by encouraging the anonymous submission of profiles or by failing to verify that a profile corresponded to the submitter's true identity."); *see generally Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010) (collecting cases).

The same is true here. Accordingly, Garg has absolute immunity from any claim that requires that he be treated and held liable as the publisher of information provided by third

parties, whether by Defendant Nelson or any of the John Doe defendants. The Complaint therefore fails to state a claim as a matter of law and must be dismissed in its entirety as to Garg.

CONCLUSION

For the foregoing reasons – as well as those reasons set forth in the analogous motion submitted by Defendant Nelson – Defendant Garg respectfully requests that the Court enter judgment on the pleadings and dismiss the Complaint in its entirety as to him.

Respectfully submitted,

SACHIN GARG,

By his attorney,

/s/ Mitchell J. Matorin
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Dated: January 12, 2012

Local Rule 7.1 Certification

I certify that I have conferred with counsel for Plaintiffs in a good faith attempt to resolve or narrow the issues presented in this motion.

/s/ Mitchell J. Matorin

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)

and paper copies will be sent to those indicated as non registered participants on January 12, 2012.

/s/ Mitchell J. Matorin

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SUIT FOR RECOVERY

CS(OS) No. 2006/2002

Date of decision: 13.01.2009

SRI CHAND . Plaintiff
Through: Mr. J. K. Das and Mr. Avijit Bhujbal, Advocates

Versus

SHRI JAI BHAGWAN SHARMA and ORS. .... Defendants
Through: Ms. Ruchi Sindhwani, Advocate

RAJIV SAHAI ENDLAW, J.

1. The plaintiff has instituted this suit for recovery of Rs. 25 lacs with pendente lite and future interest at 18 % per annum, by way of damages for defamation by the defendants of the plaintiff. The defendant No. 1 is described as an inspector, the defendants No. 2 and 3, Head Constables of Delhi Police. It is inter alia the case of the plaintiff that the plaintiff is a highly respectable person and Pradhan of a Society and is involved in various charitable and philanthropic activities and enjoys a high reputation and status in the society. The plaintiff claims to have earlier instituted a suit in the Court of the Civil Judge, Delhi against some persons who are not parties to the present suit; in the said previous suit an interim order is stated to have been granted in favour of the plaintiff and against the defendants in that suit; the defendants in that suit are stated to have violated the interim order; the plaintiff claims to have on 13th July, 1999 instituted contempt proceedings against the defendants No. 1 to 3 in this suit as well as certain other persons, before the Court of Civil Judge where the other suit is pending, for breach of the interim order aforesaid; the defendants No. 1 to 3 are stated to have filed a reply on 30th November, 1999 to the contempt proceedings of the plaintiff and in which reply, the defendants No. 1 to 3 are stated to have pleaded as under:- .. It is further submitted that the applicant is a professional land grabber and have very bad reputation in police record and tries to take police departments help in carrying out illegal activities.

2. It is the averment of the plaintiff that the aforesaid averments in the reply filed by the defendants to the contempt petition are not only false, frivolous but defamatory, libelous and derogatory and have lowered the reputation and honour of the plaintiff. The plaintiff has further pleaded that the defendants herein have also circulated the copy of the said reply filed by them amongst friends, neighbours and relatives of the plaintiff,

thereby defaming the plaintiff and giving bad name to the plaintiff amongst his friends, neighbours and relations. The plaintiff has in para 9 of the plaint stated that since the defendants have made defamatory, derogatory and libelous allegations against the plaintiff in the reply filed in the court which is a judicial record and is a public document, as such all the defendants rendered themselves liable to compensate the plaintiff and plaintiff has become entitled to claim damages from them. The plaintiff has claimed a sum of Rs. 25 lacs by way of damages from the defendants.

3. The plaintiff further claimed to have sent notices dated 16th September, 2002 and 1st October, 2002 to the defendants. The plaintiff has in the cause of action paragraph in the plaint stated that the cause of action accrued to the plaintiff when the defendants filed their reply on 30th November, 1999 to the application of the plaintiff under Order 39 Rule 2 A of the CPC and the cause of action further arose when the legal notices dated 16th September, 2002 and 1st October, 2002 were served on the defendants.

4. The defendants filed a written statement taking various pleas. The plaintiff filed a replication thereto. The defendants also filed IA No. 9400/2003 under Order 7 Rule 11 of the CPC. On 25th August, 2004, the said application under Order 7 Rule 11 of the CPC was disposed of by framing the following preliminary issue:_ Whether the suit in the present form is not maintainable and barred by the provisions of Section 52 of the NCT of Delhi Act OPD

5. The statement of the counsel for the parties was recorded that no evidence is essential on that issue and the matter listed for arguments. The matter was adjourned from time to time, mostly on the request of the plaintiff. Ultimately on 17th July, 2008, when yet again the plaintiff requested for adjournment, it was ordered that since from the perusal of the plaint the claim also appeared to be barred by limitation, the arguments on the next date will be heard on the limitation aspect also. The counsel for the defendants then stated that the suit was also barred by Section 140 of the Delhi Police Act, 1978 and accordingly, it was ordered that the same also being a question of law, arguments thereon shall also be heard.

6. The counsel for the plaintiff and the counsel for the defendants have been heard on the preliminary issue aforesaid as well as on the aspect of limitation and Section 140 of the Delhi Police Act, 1978 also. The counsel for the plaintiff has also filed synopsis of the submission dated 18th September, 2008.

7. Taking up the aspect of limitation first, the suit is for compensation for libel within the meaning of Article 75 of Schedule 1 of the Limitation Act. The period of limitation prescribed for institution of such a suit is one year commencing from the date when the libel is published.

8. The libel pleaded in the present case is the reply filed by the defendants in judicial proceedings, i.e., to an application of the plaintiff under Order 39 Rule 2A of the CPC. The said reply, as per the averments in the plaint was filed on 30th November, 1999. That would be the date of publication of libel. The suit was instituted on 30th November,

2002. The suit is thus clearly beyond the period of one year from the date of publication of libel. The plaintiff appears to have proceeded on the premise that the limitation was of three years. In fact, the counsel for the plaintiff at the time of hearing did not even make argument on the aspect of limitation. However, in the written synopsis filed subsequently, it is urged that the suit is not for damages on account of defamation only but is also for damages for wrongful deprivation of the shop in question, the interim order in the other suit with respect whereto is stated to have been violated. Reliance in this regard is placed on para 5 of the plaint. It is next urged in the synopsis that it is also the averment in para 8 of the plaint that the defendants apart from filing the reply also circulated copy of the reply and the date on which said circulation was made will have to be established by evidence.

9. Both the pleas taken in the synopsis by the plaintiff are contrary to the plaint. The plaint expressly claims Rs. 25 lacs by way of damages/compensation for defamation and does not claim the same on account of deprivation of any property. This is also evident from the fact that had the claim been for deprivation of property, the suit would not have been confined against the defendants who are police officials and who are alleged to have assisted the defendants in the other suit filed by the plaintiff in violating the interim order.

10. Similarly, the other plea of the plaintiff raised for the first time in the synopsis is also contrary to the plaint. The plaintiff has neither given any date in para 8 when the copy of the reply is alleged to have been circulated by the defendants amongst friends, neighbours and relatives of the plaintiff, nor have in the cause of action paragraph pleaded that any cause of action accrued to the plaintiff on that date. The only two dates pleaded in the cause of action paragraph are of 30th November, 1999 and the date of the service of the legal notices. The plaintiff after taking adjournments for over four years to address on the preliminary issue cannot be permitted to so twist the facts. The claim in suit, from the averments in the plaint is barred by time and no purpose will be served in putting the suit to trial and the suit is liable to be dismissed as barred by time.

11. I may notice that the suit having been found to be barred by time, I am not expressing any opinion on as to whether a suit for defamation at all lies on the basis of the pleadings in a civil suit or till the veracity of the averments is established. On the date of the institution of the present suit, the other suit, in reply to an application under Order 39 Rule 2 (A) CPC wherein the alleged defamatory statements are stated to have been made, was still pending. The defendants have in their written statement pleaded that the plaintiff had been involved in number of criminal cases and at that time was also facing trial in two criminal cases particulars whereof were given. It was also pleaded in the written statement of the defendants that the defendants police officials had on the basis of the entries in their record stated that the applicant is a professional land grabber and had bad reputation in police record; the copies of the said records are stated to have been filed in the other proceedings. It was recently held by this Court in Ram Singh Batra vs. Smt Sharan Premi 133 2006 DLT 126 that the cause of action for defamation would arise only when the falsity of the plea is proved. However, as aforesaid it is not deemed necessary to enter into the said questions, the suit being barred by time.

12. The preliminary issue framed and the plea with respect to Section 140 of the Delhi Police Act can be taken up together. Section 52 of the Government of National Capital Territory of Delhi Act, 1991 provides that all suits and proceedings in connection with the administration of the capital shall be instituted by or against the Government of India. Section 140 of the Delhi Police Act, 1978 provides that in any case of alleged offence by a police officer or of a wrong alleged to have been done by such police officer by any act done under colour of duty or authority or in excess of such duty or authority, such suit shall not be entertained and if entertained shall be dismissed if it is instituted, more than three months after the date of the act complained of. Sub-section (2) provides for a notice of not less than one month of the intended suit.

13. I may, however, state that the plaintiff has filed before this Court only the reply stated to be containing the libelous allegations and copies of notices stated to have been sent and a trust deed executed by the plaintiff. Neither the plaintiff nor the defendants filed before this Court copy of the application under Order 39 Rule 2A of the CPC filed by the plaintiff and in reply whereto against the libelous allegations were made. From the material on record it thus cannot be stated whether the defendants herein were impleaded as parties to the application under Order 39 Rule 2A of the CPC in their personal capacity or in their capacity as police officials of the National Capital Territory of Delhi. All that can be seen from the record is that in the memo of parties the defendants were described as police officials that is in their official capacity. It may also be noticed that the defendants in paras 6 and 7 of their written statement pleaded that they are working under the authority and since the specific authority has not been impleaded the suit was liable to be dismissed. It was further pleaded that they have discharged their duties in accordance with law and on the basis of information and investigation conducted and no claim against them was maintainable. The plaintiff filed a replication in which the plaintiff denied all the said allegations. In the said state of records and particularly since the suit is found to be barred by time, I refrain from returning any finding on as to whether the action of the defendants necessitating impleadment of the defendants in order 39 Rule 2A of the CPC was in connection with the administration and or in the exercise of or colour of any duty.

14. The suit is, therefore, dismissed as barred by time. However, in the facts and circumstances, the parties are left to bear their own costs.

Sd./-
RAJIV SAHAI ENDLAW,J

January 13, 2009