No. 07-4182

In the
United States Court of Appeals
For the Sixth Circuit

JOHN DOE,
Plaintiff-Appellant,

v.

SEXSEARCH.COM; CYBER FLOW SOLUTIONS, INC.; MANIC MEDIA; STALLION.COM FSC LIMITED; DNR; EXPERIENCED INTERNET.COM, INC.; FIESTA CATERING INTERNATIONAL, INC.; ADAM SMALL; CAMELIA FRANCIS; DAMIAN CROSS; ED KUNKEL; MAURICIO BEDOYA; PATRICIA QUESADA; RICHARD LEVINE,
Defendants-Appellees.

CYTEK, LTD.,
Defendant/Intervenor-Appellee.

On Appeal from the United States District Court
For the Northern District of Ohio at Toledo

BRIEF OF APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, **CYTEK, LTD.; SEXSEARCH.COM; CYBER FLOW SOLUTIONS, INC.; MANIC MEDIA; STALLION.COM FSC LIMITED; DNR; EXPERIENCED INTERNET.COM, INC.; FIESTA CATERING INTERNATIONAL, INC.; ADAM SMALL; CAMELIA FRANCIS; DAMIAN CROSS; ED KUNKEL; MAURICIO BEDOYA; PATRICIA QUESADA; RICHARD LEVINE** make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO

May 27, 2008

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II. WHETHER THE DISTRICT COURT WAS CORRECT IN DISMISSING JOHN DOE'S COMPLAINT WHERE EACH AND EVERY CLAIM FAILS AS A MATTER OF LAW.

STATEMENT OF THE CASE

John Doe is seeking monetary compensation for having sex with a fourteen-year-old-girl ("Jane Roe"). Jane Roe lied about her age to gain access to an online dating site and then created a false profile reflecting that lie. John Doe found her profile, contacted and communicated with her and then met her in person for an illicit sexual encounter at her home. John Doe, who has two minor children of his own, wants someone else to take the blame because he got caught. He now asks this Court to give child molesters a free pass if they happen to meet their victims online.

This case is as absurd as it sounds. No reasonable person should or would rely on technology to do what Ohio law requires he do for himself – verify age before having sex. It is common knowledge that a website has limited capability to verify age. The Supreme Court has acknowledged that there is no reliable age-verification method that does not also impermissibly restrict free speech. Furthermore, John Doe was not arrested for *communicating* online with Jane Roe – he was arrested for *actually having sex* with her. John Doe had the best and most reasonable opportunity to verify Jane Roe's age **in person** prior to having sex with her.

On March 1, 2005, John Doe filed a complaint in the Northern District of Ohio alleging 14 causes of action against 21 different defendants, including

Defendants-Appellees Experienced Internet.com, Inc.; Patricia Quesada; Mauricio Bedoya; Stallion.com FSC Limited; DNR; Manic Media (aka Manic Media, Inc.); Fiesta Catering International, Inc.; Damian Cross; Ed Kunkel; Camelia Francis; Adam Small; Cyber Flow Solutions, Inc.; and Richard Levine ("Defendants"). (R.1, Complaint, Apx. pg. 24).

John Doe then sought a sweeping *ex parte* restraining order of Defendants' business activity without service of the complaint or any notice whatsoever to any named defendant, originally granted on March 2, 2007 (R.11, Temporary Restraining Order, Apx. pg. 160), but subsequently dissolved after notice to Defendants and a hearing on April 16, 2007. (R.130, Order, Apx. pg. 505).

On April 13, 2007, Defendants filed motions to dismiss on the merits (pursuant to Rule 12(b)(6)) and for lack of personal jurisdiction (pursuant to Rule 12(b)(2)). (R.113, 117, 118, 123, Motions to Dismiss, Apx. pgs. 449, 455, 462, 464). For the sake of judicial economy, the operator of the website, intervenor Cytek Ltd., offered to enter an appearance and waive all service of process and personal jurisdiction issues, allowing the District Court to consider a Rule 12(b)(6) motion to dismiss on the merits before undertaking what the District Court characterized as "the weighty task of evaluating personal jurisdiction for each of the sixteen remaining Defendants." (R.110, Order, Apx, pg. 447). Defendants'

motions to dismiss on personal jurisdiction grounds were held in abeyance pending the outcome of their motion on the merits. (R.142, Order, Apx. pg. 507).

The District Court saw this case for what it is: a shakedown. And on August 22, 2007, in a thorough and well-reasoned opinion, the District Court held that despite taking a "double-barreled shotgun approach" to drafting his complaint, John Doe failed to hit a single, solitary claim upon which relief could be granted.[1] (R.153, Opinion and Order, Apx. pg. 103).

Undeterred by this rebuke, on September 19, 2007, John Doe filed a notice of appeal to this Court. (R.155, Notice of Appeal, Apx. pg. 133). Once again, he has loaded both barrels and taken aim at sound case law and unambiguous statutory authority. However, his aim remains woefully off the mark. Therefore, this Court should affirm the District Court's order of dismissal and not allow John Doe a second chance to benefit from his contemptible behavior.

[1] The Opinion is published at 502 F.Supp.2d 719 (N.D. Ohio 2007).

STATEMENT OF FACTS

On November 15, 2005, John Doe, an adult male, had illicit sex with a fourteen year old girl ("Jane Roe"). (R.1, Complaint, Apx. pg. 41). He did so of his own free will, after contacting Jane Roe online and arranging a rendezvous at her house. (R. 1, Complaint, Apx. pg. 41).

John Doe met Jane Roe while browsing user profiles on SexSearch.com ("SexSearch"),[2] an adult dating website of which John Doe and Jane Doe were both members. (R.1, Complaint, Apx. pg. 40). John Doe was a "Gold Member" of SexSearch, a level he attained after paying a membership fee and reviewing and agreeing to SexSearch's Terms and Conditions. (R.1, Complaint, Apx. pg. 38). Jane Roe was also a Gold Member, but only because she supplied false information indicating that she was over 18. (R.1, Complaint, Apx. pg. 40). Jane Roe's false information was included in her SexSearch dating profile. (R.1, Complaint, Apx. pg. 40). John Doe began communicating with Jane Roe, and she ultimately invited him to her home for a sexual encounter. (R.1, Complaint, Apx. pg. 41). Local law enforcement later arrested John Doe and charged him with three felony counts of engaging in unlawful sexual conduct with a minor. (R.1,

[2] Although the moving party and actual operator of the website is Cytek, Ltd., for ease of reference the term "SexSearch" refers to both the site and its operator.

Complaint, Apx. pg. 42). The charges were subsequently dropped. (R.152, Notice, Apx. pg. 563).[3]

[3] Defendants dispute most of the above-described facts, which must be assumed true for purposes of a motion to dismiss.

SUMMARY OF THE ARGUMENTS

The District Court was correct in dismissing John Doe's claims because under Section 230 of the Communications Decency Act ("CDA" or "Section 230"), SexSearch is immune from liability for false content provided by third parties. The CDA provides that no cause of action may be brought under any State or local law that treats an interactive computer service as the publisher or speaker of information provided by a third party. SexSearch is an interactive computer service. John Doe sought to hold SexSearch liable for its publication and dissemination of false content provided to SexSearch by Jane Roe. Therefore, even assuming all of John Doe's allegations are true, SexSearch is immune from liability on any cause of action that treats SexSearch as the publisher of false content provided by Jane Roe. Furthermore, even if SexSearch were not immune from liability, each of John Doe's causes of action fail as a matter of law because he can present no set of facts that would entitle him to relief.

STANDARD OF REVIEW

Whether the District Court correctly dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6) is a question of law subject to *de novo* review. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993); *In Re DeLorean Motor Co.*, 991 F.2d 1236, 1239-40 (6th Cir. 1993). In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), while viewing the complaint in a light most favorable to the Plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). However, this Court need not accept as true Plaintiff's legal conclusions or unwarranted factual inferences. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). The District Court's order of dismissal should be affirmed if it can be demonstrated beyond a doubt that Plaintiff can prove no set of facts which would entitle him to relief. *See generally Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Westlake*, 537 F.2d at 858.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN DISMISSING JOHN DOE'S COMPLAINT BECAUSE THE COMMUNICATIONS DECENCY ACT IMMUNIZES SEXSEARCH FROM LIABILITY FOR PUBLISHING FALSE CONTENT PROVIDED BY JANE ROE.

SexSearch is an interactive computer service and therefore immune from liability for publishing false content provided by Jane Roe. Specifically, SexSearch is immune from liability on the claims for breach of contract; fraud; negligent infliction of emotional distress; negligent misrepresentation; breach of warranty; violation of the Ohio Consumer Sales Practices Act; and failure to warn. Therefore, this Court should affirm the District Court's order dismissing John Doe's complaint for failure to state a claim.

The CDA's policy is the promotion of "the continued development of the Internet and other interactive computer services. . . ." 47 U.S.C. § 230(b)(1). Section 230 'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content." *Dimeo v. Max,* 433 F.Supp.2d 523, 528 (E.D. Pa. 2006), *quoting Green v. America Online,* 318 F.3d 465, 471 (3d Cir. 2003); *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997).

Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Therefore, SexSearch is immune from liability if: (1) SexSearch is a "provider or user of an interactive computer service;" (2) the claim is based on "information provided by another information content provider;" and (3) the claim would treat SexSearch "as publisher or speaker" of that information. *Universal Communication Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007). John Doe argues that the CDA does not impliedly preempt the Ohio Consumer Sales Practices Act. This argument is without merit. Section 230 unambiguously preempts **inconsistent** state law claims. 47 U.S.C. § 230(e)(3). Therefore, state law claims that attempts to treat an interactive computer service provider as the publisher or speaker of content provided by another information content provider are expressly preempted. As discussed below, John Doe's state law claims attempt to do exactly that – treat SexSearch (an interactive computer service provider) as the publisher of content provided by Jane Roe (an information content provider).

A. SexSearch Is An Interactive Computer Service Provider.

Section 230 defines an interactive computer service provider as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2). SexSearch "functions as an intermediary by providing a forum for the exchange of information between third party users." *See Doe v. MySpace, Inc.*, 474 F. Supp.2d 843, 849 (W.D. Tex. 2007).[4] Therefore, there is no question, and John Doe does not dispute, that the District Court was correct in holding that SexSearch is a provider of an interactive computer service. (R.153, Opinion and Order, Apx. pg. 109).

B. Jane Roe Is An Information Content Provider.

Section 230 defines an information content provider as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). John Doe does not dispute that Jane Roe is an information content provider.

[4] Essentially, an interactive computer service provider is a newspaper classified section. One party places an advertisement, another party responds, and the website provides a forum for this interaction.

John Doe instead argues that because SexSearch "reserves the right, and does in fact, modify the content of profiles when they do not meet the profile guidelines," SexSearch loses its interactive computer service status and is therefore an information content provider for all purposes. To support this contention, John Doe cites, as his sole authority, *Anthony v. Yahoo! Inc.*, 421 F. Supp.2d 1257 (N.D. Cal. 2006). However, *Anthony* is absolutely distinguishable – the plaintiff in *Anthony* claimed that the Yahoo site created false profiles; John Doe does not.

The *Anthony* court held that the CDA did not immunize Yahoo from claims based on the alleged creation of false profiles because Yahoo itself was alleged to have created the content; not any third parties. 421 F.Supp.2d at 1262-63. Section 230 grants immunity only when the information that forms the basis for the state law claim has been provided by "another information content provider." 47 U.S.C. § 230(c)(1); *Lycos*, 478 F.3d at 419-20. The *Anthony* court was careful to differentiate claims based on creation of false profiles from claims based on a failure to delete false profiles. 421 F.Supp.2d at 1262.

While the *Anthony* court noted that a site "may simultaneously be both an 'information content provider' and an 'interactive computer service' provider." *Id*., c*iting*, *Lars Gentry v. eBay*, *Inc.*, 121 Cal.Rptr.2d 703, 715 (Cal. Ct. App. 2002), the critical issue is whether SexSearch "acted as an information content provider with respect to the [false] information . . . ." *Anthony*, 421 F. Supp.2d at

1263, n. 6; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) ("an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue")*; See also Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (upholding immunity for the on-line provision of stock information even though AOL communicated frequently with the stock quote providers and had occasionally deleted stock symbols and other information from its database in an effort to correct errors). In the instant case, there is absolutely no allegation that SexSearch created or modified Jane Roe's profile in any way. John Doe alleges only that SexSearch failed to delete Jane Roe's false profile. (R.1, Complaint, Apx. pg. 44). Therefore, the District Court was correct in holding that SexSearch is not an information content provider and Jane Roe is the information content provider solely responsible for the false content at issue.

C. John Doe's State Law Claims Would Involve Treating SexSearch As The Publisher Of False Content Provided By Jane Roe.

Section 230 provides that SexSearch will be immune from liability if John Doe's state law claims would involve treating SexSearch as the publisher of false information provided by Jane Roe. 47 U.S.C. 230(c)(1). In determining whether to apply the CDA, the central issue is whether the claim is directed toward the defendant in its publishing, editorial, and/or screening capacities, and seeking to

hold it "liable for its publication of third-party content or harms flowing from the dissemination of that content." *MySpace*, 474 F. Supp.2d at 849; *see also Green*, 318 F.3d at 471; *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538-39 (E.D. Va. 2003). John Doe's claims boil down to one theory: if SexSearch had not failed to discover and delete Jane Roe's fraudulent profile, he never would have contacted with her and subsequently never would have agreed to drive to her house and have sex with her. (R.153, Opinion and Order, Apx. pg. 107). This "Devil made me do it" argument is ridiculous at best.

To join SexSearch all users must agree to SexSearch's Terms and Conditions. (R.1, Complaint, Apx. pg. 34). The Terms and Conditions requires that all members warrant that they are 18 years of age or older. (R.123, Motion to Dismiss, Apx. pg. 492). Jane Roe provided SexSearch with false information (that she was 18). (R.1, Complaint, Apx. pg. 40). Jane Roe included this information in her profile, where John Doe subsequently discovered it and initiated communication. (R.1, Complaint, Apx. pg. 41). Therefore, John Doe is attempting to hold SexSearch liable for publication of third-party content and harms flowing from the dissemination of that content.

John Doe attempts to get around this fact by asserting that his claims are not based on the content of Jane Roe's profile, but rather on the fact that a minor was on SexSearch at all. This is the very same argument the *MySpace* plaintiffs

unsuccessfully advanced. Like John Doe, the *MySpace* plaintiffs asserted that "the CDA does not bar their claims against MySpace because their claims are not directed toward MySpace in its capacity as a publisher. Plaintiffs argue this suit is based on MySpace's negligent failure to take reasonable safety measures to keep young children off of its site and not based on MySpace's editorial acts." 474 F. Supp.2d at 849. The *MySpace* court found this "artful pleading" to be "disingenuous," and held that the CDA immunized MySpace from liability because plaintiffs were seeking to hold MySpace liable for publishing content provided by third parties. *Id.* at 849-50 ("It is quite obvious the underlying basis of Plaintiffs' claim is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Jane Doe. If MySpace had not published [their content], Plaintiffs assert they never would have met and the sexual assault never would have occurred"). Here, as the District Court noted, John Doe attempts to do the same thing – hold SexSearch liable for its publication of third-party content and harms flowing from the dissemination thereof. (R.153, Opinion and Order, Apx. pg. 114).

SexSearch is an interactive computer service provider and not an information content provider in relation to the content at issue. Jane Roe is an information content provider, Jane Roe provided false information to SexSearch.

John Doe attempts to hold SexSearch liable on state law claims that would treat SexSearch as the publisher of that false information. Therefore, this Court should affirm the District Court's holding that the CDA immunizes SexSearch from liability for breach of contract; fraud; negligent infliction of emotional distress; negligent misrepresentation; breach of warranty; violation of the Ohio Consumer Sales Practices Act; and failure to warn.

II. THE DISTRICT COURT WAS CORRECT IN DISMISSING JOHN DOE'S COMPLAINT BECAUSE EACH AND EVERY ONE OF HIS CLAIMS FAIL AS A MATTER OF LAW.

Even if SexSearch were not immune under the CDA, John Doe can prove no set of facts that would entitle him to relief on any of his fourteen claims. As he did in the District Court (*see* R.146, Response, Apx. pg. 509), John Doe relies on legal conclusions masquerading as facts, ignores established case law and provides no legal arguments to support his claims.

A. John Doe's Breach of Contract Claim Fails As A Matter of Law Because SexSearch Complied With The Terms And Conditions.

To prove a breach of contract under Ohio law, John Doe must demonstrate by a preponderance of evidence that: (1) a contract existed; (2) plaintiff fulfilled his obligations; (3) defendant failed to fulfill his obligations; and (4) damages resulted from this failure. *Lawrence v. Lorian Cty. Cmty. College*, 713 N.E.2d 478, 479-480 (Ohio Ct. App. 1998). Therefore, this Court should first determine whether a contract existed and its essential terms.

When John Doe joined SexSearch, he was required to check a box that states: "I am over 18, I have read and agree to the terms and conditions and the privacy policy." (R.123, Mot. to Dismiss, Apx. pg. 492).[5] John Doe admits that he agreed to the Terms and Conditions when he joined SexSearch. (R.1, Complaint, Apx. pgs. 38, 39). Therefore, a contract existed between John Doe and SexSearch.

John Doe alleges that SexSearch breached that contract by "permitting minors to become paid members" and by "deliver[ing] a minor to Plaintiff for the purpose of sexual relations." (R.1, Complaint, Apx. pg. 46). However, when the terms of a contract are unambiguous, courts look to the plain language of the document and interpret it as a matter of law." *Ohio Univ. Bd. of Trustees v. Smith*, 724 N.E.2d 1155, 1161 (Ohio Ct. App. 1999). Here, the Terms and Conditions provide that SexSearch does not "assume any responsibility for verifying[ ] the accuracy of the information provided by other users of the Service." (*See* R.123, Motion to Dismiss, Apx. pg. 497). Therefore, the District Court was correct in holding that SexSearch complied with the Terms and Conditions, and that John Doe's breach of contract claim fails as a matter of law.

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[5] This box is what is commonly referred to as a "clickwrap" agreement. "A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction." *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa. 2007) (*citing Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 22 (2d Cir. 2002)).

B. John Doe's Fraud Claim Fails Because His Purported Reliance On SexSearch Representations Was Unreasonable As A Matter of Law.

The elements of a fraud claim are:

> (a) a representation. . . , (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Orbit Electronics, Inc. v. Helm Instrument Co., Inc., 855 N.E.2d 91, 100 (Ohio Ct. App. 2006).

John Doe alleges that SexSearch fraudulently represented that "all persons on its site are '18+' years of age," and that it "verifies all members profiles prior to posting," and that he reasonably relied on these representations. (R.1, Complaint, Apx. pg. 47). As a matter of law, John Doe did not act reasonably in relying on the purported representation. John Doe knew that all members only had to state that they were 18 by checking a box. (R.1, Complaint, Apx. pg. 38). More importantly, as the District Court noted, SexSearch's Terms and Conditions and privacy policies gave additional warnings that the site did not guarantee (or take responsibility for verifying) members' ages. (R.153, Opinion and Order, Apx. pg. 118); (R.123, Mot. to Dismiss, Apx. pg. 497). John Doe specifically reviewed and agreed to the Terms and Conditions and agrees that they constitute the contract

between himself and SexSearch. (R.1, Complaint, Apx. pgs. 38-39). Whether he actually read the Terms and Conditions is of no consequence. *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574, 579 (Ohio 1998) (*quoting McAdams v. McAdams*, 88 N.E. 542, 544 (Ohio 1909)).

John Doe had a first-hand opportunity to confirm Jane Roe's age when he met her in person before he had sex with her, yet failed to do so. (R.1, Complaint, Apx. pg. 41). John Doe's complaint alleges that his reliance was reasonable. However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721, 733 (6th Cir. 2007) (*quoting Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)) (holding plaintiff's conclusory allegation that the application process is "inherently deceptive" is not enough to survive a 12(b)(6) motion). Therefore, the District Court was correct in holding that John Doe's reliance upon the purported representations was not reasonable as a matter of law in light of the language in the Terms and Conditions, and his fraud claim should be dismissed.

C. John Doe's Negligent Infliction Of Emotional Distress Claim Fails As A Matter Of Law Because John Doe Was Not In Any Zone Of Physical Danger.

Under Ohio law, a plaintiff may only bring a claim for negligent infliction of emotional distress where "the plaintiff is cognizant of real physical danger to

himself or another." *King v. Bogner*, 624 N.E.2d 364, 367 (Ohio Ct. App. 1993) (the plaintiff could not maintain a claim for negligent infliction of emotional distress where she was not cognizant of any physical danger resulting from a slanderous statement); *Heiner v. Moretuzzo*, 652 N.E.2d 664, 669 (Ohio 1995) (Ohio courts have limited "recovery for negligent infliction of emotional distress to instances where the plaintiff has either witnessed or experienced a dangerous accident or appreciated the actual physical peril"). John Doe alleges that he suffered emotional distress from his arrest and criminal indictment stemming from his sexual encounter with Jane Roe. (R.1, Complaint, Apx. pgs. 47-48). However, as the District Court noted, nowhere does John Doe allege that he was cognizant of any physical danger to himself or others. (R.153, Opinion and Order, Apx. pg. 119); (R.1, Complaint Apx. pgs. 47-48). Without this essential allegation, John Doe cannot recover for negligent infliction of emotional distress. *See Wigfall v. Society Nat'l Bank*, 669 N.E.2d 313, 319 (Ohio Ct. App. 1995); *see also Reeves v. Fox TV Network*, 983 F. Supp. 703, 711 (N.D. Ohio 1997). Moreover, SexSearch did not create the risk of harm; John Doe's and Jane Roe's actions of having illicit sex did. These acts are superseding and intervening causes of John Doe's alleged damages. As a result, John Doe cannot establish proximate causation. *Feitchner v. City of Cleveland*, 642 N.E.2d 657, 662 (Ohio Ct. App. 1994).

Therefore, the District Court was correct in dismissing John Doe's negligent infliction of emotional distress claim.

D. John Doe's Negligent Misrepresentation Claim Fails As A Matter Of Law Because He Had No Special Relationship With SexSearch.

John Doe alleges that SexSearch made a negligent misrepresentation by promising that all SexSearch members were adults. (R.1, Complaint, Apx. pg. 48). A defendant is liable for negligent misrepresentation if he: (1) supplies false information; (2) for the guidance of others in their business transactions; (3) causing pecuniary loss to the plaintiff; (4) while the plaintiff justifiably relied upon the information; (5) and the defendant failed to exercise reasonable care or competence in obtaining or communicating the information. *Delman v. City of Cleveland Heights,* 534 N.E.2d 835, 838 (Ohio 1989). In addition, "[a] core requirement in a claim for negligent misrepresentation is a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in its business transaction." *Ziegler v. Findlay Indus.*, 464 F. Supp.2d 733, 738 (N.D. Ohio 2006) (*quoting Hayes v. Computer Assoc. Inc.*, No. 3:02CV7452, 2003 WL 21478930, at *6 (N.D. Ohio June 24, 2003)). "Usually the defendant is a professional (e.g., an accountant) who is in the business of rendering opinions to others for their use in guiding their business, and the plaintiff is a member of a limited class. This 'special relationship' does not exist in ordinary business transactions." *Ziegler,* 464 F. Supp.2d at 738. In the absence of a

fiduciary relationship, the law requires a person to exercise proper diligence in his or her dealings, such that when a person is put on notice as to any doubt as to the truth of a representation, that person is under a duty to reasonably investigate before relying on the representation. *Finomore v. Epstein*, 481 N.E.2d 1193 (Ohio Ct. App. 1984); *Foust v. Valleybrook Realty Co*., 446 N.E.2d 1122 (Ohio Ct. App. 1981).

John Doe's dealings with SexSearch do not qualify as a "special relationship" as required for a negligent misrepresentation claim. Moreover, John Doe does not allege that one existed. (R.153, Opinion and Order, Apx. pg. 120); (*see* R.1, Complaint, Apx. pg. 48). Accordingly, the District Court was correct in dismissing John Doe's negligent misrepresentation claim.

E. John Doe's Breach Of Warranty Claim Fails As A Matter Of Law Because Ohio Rev. Code § 1302.26 Applies Solely To The Sale Of Goods.

The only apparent basis for a breach of warranty claim is Ohio R.C. § 1302.26, which reads in pertinent part as follows:

> (A) Express warranties by the seller are created as follows:
>
> (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

This section specifically states that it applies only to the sale of goods. John Doe's membership in SexSearch is a service, not a good. *See Brown v. Christopher Inn*

Co., 344 N.E.2d 140, 143 (Ohio Ct. App. 1975) (Section 1302.26 does not apply where there has been no sale of goods as defined under the Uniform Commercial Code, U.C.C. § 2-105); Ohio Rev. Code Ann. § 1302.01 ("'Goods' means all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action."). Therefore, the District Court was correct in dismissing John Doe's breach of warranty claim as a matter of law.

F. All Of John Doe's Claims Under The Ohio Consumer Sales Practices Act Fail As A Matter Of Law.

John Doe bases five of his fourteen causes of action on the OCSPA. Specifically, causes of action six and seven allege that SexSearch engaged in deceptive trade practices by warranting that no SexSearch member was a minor in violation of Ohio Rev. Code §§ 1345.02(B)(10) and 1345.02(A). (R.1, Complaint, Apx. pgs. 49-52). Causes of action eight through ten allege that SexSearch's Terms and Conditions incorporated unconscionable clauses limiting damages for its breach to the amount of the contract and allowing the supplier to unilaterally cancel the contract after the consumer's three (3) day right to cancel has passed without allowing the consumer the same option in violation of Ohio Rev. Code §§ 1345.02(A) and 1345.03, (R.1, Complaint, Apx. pgs. 52-53).

1. John Doe's deceptive trade practice claims fail because SexSearch's warning language was not deceptive as a matter of law.

When determining whether an act or practice is deceptive, the Court must view the incident from the consumer's standpoint. *Chesnut v. Progressive Cas. Ins. Co.*, 850 N.E.2d 751, 757 (Ohio Ct. App. 2006). "The basic test is one of fairness; the act need not rise to the level of fraud, negligence, or breach of contract." *Id.* "A deceptive act has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.'" *Id.* (*quoting McCullough v. Spitzer Motor Ctr.*, No. 64465, 1994 WL 24281, at *8 (Ohio Ct. App. Jan. 27, 1994)). The District Court found that there was nothing deceptive in SexSearch's WARNING that "all persons within this site are 18+." (R.153, Opinion and Order, Apx. pg. 123). As stated above, John Doe was well aware of the nature and extent of the age-verification process for registrants on the SexSearch site. Furthermore, he agreed to the Terms and Conditions, which stated that SexSearch did not guarantee or verify any information provided by other SexSearch members, and that nothing outside of the Terms and Conditions creates a warranty of any kind. (R.123, Mot. to Dismiss, Apx. pg. 497); *see, e.g., Rusk Industries v. Alexander*, No. L-01-1328, at ¶ 46, 2002 WL 850232, at *7 (Ohio Ct. App. May 3, 2002) ("the Consumer Sales Practices Act was not promulgated as a panacea by which any consumer would be able to avoid unpleasant contractual obligations").

Consequently, the District Court was correct in dismissing John Doe's claims under Ohio Rev. Code §§ 1345.02(B)(10) and 1345.02(A).

2. John Doe's unconscionable acts claims fail as a matter of law because the clauses at issue are commercially reasonable and not substantially one sided.

John Doe alleges that Sex Search committed unconscionable acts by limiting damages to the amount of the contract and providing for a unilateral right to cancel the contract after the consumer's three (3) day right to cancel has passed without allowing the consumer the same option. These claims fail as a matter of law. Ohio Rev.Code § 1345.03 provides:

> (A) No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.
>
> (B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:
>
> > (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier.

"In order to recover under Section 1345.03, a consumer must show that a supplier acted unconscionably and knowingly." *Karst v. Goldberg*, 623 N.E.2d 1348, 1351 (Ohio Ct. App. 1993). While proof of intent is not required to prove deception under Section 1345.02, proof of knowledge is a requirement to prove an unconscionable act under Section 1345.03. *Suttle v. DeCesare*, No. 81441, 2003

WL 21291053, at *6 (Ohio Ct.App. June 5, 2003) (*citing Karst*, 623 N.E.2d at 1351). "Knowledge," under Section 1345.01(E), "means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." *Suttle* at *6.

While viewed critically by the courts, limitation of liability clauses may be freely bargained for in Ohio, and "[a]bsent important public policy concerns, unconscionability,[6] or vague and ambiguous terms, [such] provisions will be upheld...." *Nahra v. Honeywell, Inc.*, 892 F.Supp. 962, 969 (N.D. Ohio 1995) (*quoting Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1298 (Ohio Ct. App. 1993)). Where the potential for liability is unpredictable and immensely disporortionate to the contract price, it is commercially reasonable to limit damages to the amount of the contract. *See Motorists Mut. Ins. Co. v. ADT Sec. Systems*, 1995 WL 461316, at *7 (Ohio Ct.App. Aug. 4, 1995).

[6] John Doe claims that limiting damages to the amount of the contract is a *de facto* deceptive trade practice. However, his sole authority for this proposition is a consent decree from an unreported Ohio state case. *State, ex el Montgomery v. Thermal Seal*, No. 00CV0706254, 2001 WL 1841771, (Ohio Com.Pl.,2001). In that case, the defendants were home improvement companies accused of soliciting customers to sign unconscionable and one-sided contracts for home improvements. The Ohio Attorney General sued under the consumer protection statutes and the defendants stipulated to the judgment that was published but not reported. This case has no precedential effect as it is a Consent Decree entered into by two parties to hotly contested litigation.

A SexSearch gold membership costs $29.95 per month, while basic membership is free (R.1, Complaint, Apx. pg. 35). As proven by John Doe and Jane Roe, SexSearch cannot control its member's actions once they actually meet. SexSearch's decision to limit damages to the contract price was commercially reasonable because, as the District Court noted, the extent of potential liability is unpredictable and potentially astronomical and could far exceed the meager contract price. (R.153, Opinion and Order, Apx. pg. 125); *See Collins*, 621 N.E.2d at 1299-1300; *Royal Indem. Co. v. Baker Protective Services, Inc.*, 515 N.E.2d 5, 7 (Ohio Ct. App. 1986) ("Ohio courts have held the concept of 'freedom of contract' to be fundamental to our society," and "an important function of contract law is to enforce the parties' agreed-upon allocation of risk"). Therefore, limiting damages to the amount of the contract was not unconscionable.

Moreover, SexSearch's unilateral right to cancel the contract after the consumer's three (3) day right to cancel has passed without allowing the consumer the same option does not render the contract substantially one-sided and unconscionable. That term is reasonable, in light of SexSearch's desire to ensure that its members don't harass each other, post advertisements or otherwise violate the Terms and Conditions. Members may cancel their membership at any time and are liable only for one-month's membership. In addition, if SexSearch cancels the membership, the member will receive a pro-rata refund. (R.123, Mot. to Dismiss,

Apx. pg. 495). The District Court correctly found that this clause is entirely reasonable and not substantially one-sided, especially in light of the fact that John Doe provides no legal support for this claim. (R.153, Opinion and Order, Apx. pg. 126).

Therefore, the District Court was correct in dismissing John Doe's eighth, ninth, and tenth causes of action as a matter of law.

G. John Doe's Common Law Unconscionability Claims Fail As A Matter Of Law Because The Terms And Conditions Are Neither Procedurally Nor Substantively Unconscionable.

John Doe's eleventh, twelfth and thirteenth causes of action allege that SexSearch's Terms and Conditions are unconscionable because the limitation of liability and the disclaimer of warranties were misleading; he was not provided a meaningful choice with regard to accepting those terms; and the Terms and Conditions provide no guarantee Defendants would or could perform their contractual promises. (R.1, Complaint, Apx. pgs. 53-54). The District Court was correct in holding that the Terms and Conditions were not unconscionable as a matter of law.

Ohio's unconscionability doctrine consists of two prongs: (1) procedural unconscionability, and (2) substantive unconscionability. *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.*, 680 N.E.2d 240, 243 (Ohio Ct. App. 1996). A contract is unconscionable only if it meets both tests. *Collins*, 621 N.E.2d at 1299.

1. The contract is not procedurally unconscionable.

Procedural unconscionability involves factors relating to the "relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods in question.' " *Id.* (*quoting Johnson v. Mobil Oil Corp.,* 415 F.Supp. 264, 268 (E.D. Mich. 1976)).

John Doe alleges that execution of the contract in this case was procedurally unconscionable because he was provided no meaningful choice with regard to accepting the Terms and Conditions, and that he was not represented by counsel at the time of acceptance. (R.1, Complaint, Apx. pg. 54).

Assuming, *arguendo*, that John Doe could not have bargained with SexSearch to alter the Terms and Conditions, that "inability alone is insufficient to establish procedural unconscionability." *Collins,* 621 N.E.2d at 1300 (*citing Richard A. Berjian, D. O., Inc. v. Ohio Bell Tel. Co.,* 375 N.E.2d at 416 (Ohio 1978)). Moreover, John Doe was provided with a meaningful choice because there were alternative sources for the "goods" in question, i.e. numerous other adult-

dating websites with different terms and conditions to which he could have subscribed.[7] *See Collins*, 621 N.E.2d at 1299.

While the Court should consider whether the party claiming unconscionability was represented by counsel at the time the contract was executed, "the crucial question is whether 'each party to the contract, considering his obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print?'" *Post v. Procare Automotive Serv. Solutions*, No. 87646, 2007 WL 1290091, *4 (Ohio App. 8 Dist. 2007).

John Doe had an adequate opportunity to understand the Terms and Conditions before he freely agreed to them. He does not allege that any time limit was placed on his opportunity to understand them. (*See* R.1, Complaint, Apx. pg. 24).

Furthermore, the Terms and Conditions were sufficiently conspicuous and not hidden in a maze of fine print. Courts routinely hold that clickwrap agreements are enforceable and not unconscionable. *See, e.g.*, *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. Ct. App. 2005); *see also Novak v. Overture Services, Inc*. 309 F.Supp.2d 446 (E.D. N.Y. 2004). The *Hubbert* court held that where a website's

[7] The District Court took judicial notice of this fact. (*See* R.153, Opinion and Order, Apx. pg. 116).

terms and conditions had hyperlinks for terms in contrasting blue colors; [the] clause in question was partially in capital letters; and the beginning of the terms were in "bold, capital letters," the terms and conditions were sufficiently conspicuous so as not to be procedurally unconscionable. 835 N.E.2d at 124. The same is true of the Terms and Conditions in this case. The terms are highlighted in bold, capital letters, with hyperlinks to highlight the important terms. (R.9, Mot. for Injunction, Apx. pgs. 152-154). As the District Court noted, the limitation of liability and the disclaimer of warranties were not hidden from Plaintiff or in fine print, but were sufficiently conspicuous. (R.153, Opinion and Order, Apx. pg. 128); *see Hubbert,* 835 N.E.2d at 124; *Anderson v. Delta Funding Corp.*, 316 F.Supp.2d 554, 565 (N.D. Ohio 2004). Therefore, the District Court was correct in finding that there was no procedural unconscionability in the execution of this contract.

2. The contract is not substantively unconscionable.

In his twelfth and thirteenth causes of action, John Doe alleges that the limitation of liability and disclaimer of warranties clauses are unconscionable. (R.1, Complaint, Apx. pg. 53-54). As explained above, there was no procedural unconscionability in the execution of the contract at issue and the limitation of liability clause was commercially reasonable in light of the small contract price and astronomical potential liability. In addition, the District Court correctly held

that "because the Court does not find procedural unconscionability, it is unnecessary for the Court to address the issue of substantive unconscionability. (R.153, Opinion and Order, Apx. pg. 129) *citing Ball v. Ohio State Home Servs., Inc.*, 861 N.E.2d 553 (Ohio Ct. App. 2006).

Plaintiff's eleventh cause of action alleges that the Terms and Conditions provide no guarantee Defendants would or could perform their contractual promises, and therefore, the terms are unconscionable. (R.1, Complaint Apx. pg. 53). The District Court correctly held that "this claim is wholly without merit." (R.153, Opinion and Order, Apx. pg. 129). A contract is "a promise or a set of promises for the breach of which the law gives a remedy." *Rasnick v. Tubbs,* 710 N.E.2d 750, 752 (Ohio Ct. App. 1998). In order for a contract to be binding, there must be a "manifestation of mutual assent," which requires that each party "either make a promise or begin or render a performance." *Id.; Westfield Ins. Co. v. HULS Am., Inc.,* 714 N.E.2d 934, 948 (Ohio Ct. App. 1998). As the District Court explained "a contract is nothing other than a party's promise to perform its agreed upon obligations, and nowhere does the law require a party to guarantee it will perform its contractual obligations. If the Court were to hold a contract unconscionable merely because one of the parties did not guarantee it would perform as promised, the Court would implicitly be adding an additional requirement to the formation of a contract; i.e., one which requires the parties to

guarantee performance. The Court declines to change the time-tested rule that a contract is a promise, not a guarantee." (R.153, Opinion and Order, Apx. pg. 130). The District Court was correct in dismissing John Doe's eleventh cause of action for failure to state a claim.

The contract at issue in this case is neither procedurally nor substantively unconscionable. John Doe had meaningful choice in accepting the contract and ample opportunity to review and understand its terms. Furthermore, each and every contract term is commercially reasonable in light of the realities of internet commerce. Therefore, this Court should affirm the District Court's order dismissing John Doe's common law unconscionability claims as a matter of law.

H. John Doe's Failure To Warn Claim Fails As A Matter Of Law Because The Danger Was Open And Obvious.

John Doe's final cause of action alleges that SexSearch failed to warn him that a minor may be a SexSearch member. (R.1, Complaint, Apx. pgs. 54-55). However, this claim fails as a matter of law because John Doe was warned many times about an open and obvious danger.

A failure to warn claim consists of the following elements: (1) a duty to warn, (2) breach of that duty, and (3) injury proximately caused by the breach. *See Freas v. Prater Constr. Corp.*, 573 N.E.2d 27, 30 (Ohio 1991). However, there is no duty to warn of an open and obvious danger. *Livengood v. ABS Contrs. Supply*, 710 N.E.2d 770, 772 (Ohio Ct. App. 1998). "Where only one conclusion can be

drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law." *Klauss v. Glassman*, No. 84799, 2005 WL 678984, at *3 (Ohio Ct. App. Mar. 24, 2005).

In this case the danger was open and obvious. It is common knowledge that "young children all over America use the Internet." *U.S. v. Rice*, 61 Fed.Appx. 14, 19 (4th Cir. 2003). Furthermore, as the District Court noted, given the "anonymity of the Internet," the danger that a minor might enter an adult-only website was open and obvious, as persons wishing to gain access merely had to click a box stating they were above 18 years of age. (R.153, Opinion and Order, Apx. pg. 130); *See, e.g., U.S. v. Mitchell*, 353 F.3d 552, 553 (7th Cir. 2003) ("[t]he Internet has opened the doors for many to transact business and personal affairs with almost complete anonymity"). In this case, John Doe was well aware that all a minor like Jane Roe had to do to enter the site was to click a box stating that she was 18 or above.[8] Furthermore, SexSearch had no duty to warn John Doe of the obvious danger of anonymous posting of false content on the internet; internet anonymity is

[8] Federal courts have already found that it is impossible for website operators to easily confirm age and therefore they cannot be required to do so. *See ACLU v. Gonzales*, 478 F.Supp.2d 775 (E.D. Pa. 2007). The *Gonzales* court found "no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor." *Id.* at 801. The court held that parents could use filters to protect their children, and that the law requiring web publishers to do so violates the First and Fifth Amendments.

an open and obvious danger. *See, e.g., Gawloski v. Miller Brewing Co.*, 644 N.E.2d 731, 733 (Ohio Ct. App. 1994) ("brewers and distributors of alcoholic beverages do not have a duty to warn consumers of the dangers inherent in the excessive or prolonged use of alcohol because those dangers are within the body of knowledge common to the community"). Furthermore, even if SexSearch had a duty to warn, the Terms and Conditions clearly warned John Doe that "[SexSearch] cannot guarantee, and assume[s] no responsibility for verifying, the accuracy of the information provided by other users of the Service." (R.123, Mot. to Dismiss, Apx. pg. 497). Therefore, the District Court was correct in holding that John Doe's failure to warn claim fails as a matter of law.

CONCLUSION

The CDA immunizes SexSearch from liability because SexSearch is an internet service provider and John Doe's state law claims seek to hold SexSearch liable for publishing false content provided by Jane Roe. Moreover, even assuming the complaint's allegations are true, and viewing the facts in the light most favorable to John Doe, each and every one of his claims fail as a matter of law. Therefore, the District Court was correct in dismissing John Doe's complaint for failure to state a claim upon which relief could be granted.

John Doe tried his best to blame someone else for his actions. He employed a "double-barreled shotgun" approach yet failed to hit the mark. This Court should affirm the District Court's thorough and well-reasoned dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P. 32(a)(7)(B). The foregoing brief contains 7,912 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2003.

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APPELLEES' DESIGNATION OF APPENDIX

Description	Date Filed	Docket No.
Order	4/12/07	110
Motion to Dismiss (including all exhibits and attachments)	4/13/07	123

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellees' Brief was served via Federal Express to the parties listed below on May 27, 2008:

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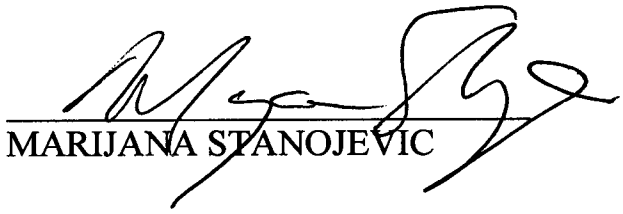

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