IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

ROSLYN JOHNSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 2007 CA 001600 B**
	:	
JONETTA BARRAS, *et al.*	:	
	:	
Defendants.	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' GARY IMHOFF, DOROTHY A. BRIZILL AND DCWATCH MOTION TO DISMISS THE COMPLAINT

COMES NOW, the Plaintiff, Roslyn Johnson, by and through undersigned counsel, and hereby opposes the Motion to Dismiss filed by Defendants Gary Imhoff, Dorothy A. Brizill and DCWatch (collectively "Defendants"), and in support thereof states as follows:

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I. INTRODUCTION

Defendants have essentially two arguments: (1) they deserve immunity under the Communications Decency Act of 1997 ("CDA"), 47 U.S.C. §230 and (2) that the "gist" of the allegations made by Defendant Barras are true, thus providing them with the defense of truth. Defendants are wrong, and their Motion to Dismiss fails.

The CDA only provides immunity for "interactive computer services" or users of "interactive computer services" for publishing comments of **third parties** [emphasis added]. *See* 47 U.S.C. §230(c)(1). Defendant Barras is listed as a "guest columnist" on DCWatch's website, and as such, she is an agent of Defendant DCWatch or has apparent authority to write columns for or post other material on DCWatch. Consequently, as its agent or one imbued with apparent authority, she is not a third party. Therefore, Defendants are not entitled to immunity under the CDA. Moreover, Defendant DCWatch is not an "interactive computer service" or a user of "interactive computer service" simply because it has a website, and Defendants are not entitled to immunity under the CDA on these grounds as well.

Finally, the Defendants claim the defense of truth to Ms. Johnson's complaint, arguing that the "gist" of the allegations made by Defendant Barras are true. The premature defense claim of truth by the Defendants is completely off the mark. The facts, as will be shown below, are not trivial and therefore the "gist" of the Defendants' accusation were false and known to be so. Consequently, the Defense of truth is not available to Defendants. For these reasons, the Motion to Dismiss must be denied.

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II. BACKGROUND

On or about July 6, 2005, Ms. Johnson was contacted by the Human Resources department ("HR") of the D.C. Department of Parks and Recreation ("DPR"), and informed of the Deputy Director of Programs position in DPR. Ms. Johnson was invited to apply for a position within DPR, and was asked to submit a copy of her resume and application for review. *See Complaint* at ¶11-12. The application and draft of her resume were submitted to HR on July 7, 2005. Because of the urgent nature of this request, Ms. Johnson forwarded a draft, unofficial first resume to Ms. Shawniqua Ottley, who at the time worked for DPR as the Acting Manager for HR, and was the liaison between Ms. Johnson and the D.C. Office of Personnel (hereinafter referred to as "DCOP"). Compl. at ¶ 12.

The first resume was revised and updated to conform to the information requested by HR while Ms. Johnson's application was being reviewed and before she was hired to fulfill any position with DPR. Compl. at ¶ 13. The first resume was updated and a revised second resume was submitted and sent to HR by Ms. Johnson on or about July 8, 2005. Compl. at ¶ 14.

On or about July 12, 2005, HR forwarded a copy of the first resume submitted by Ms. Johnson to DCOP. Compl. at ¶ 15. The revised and updated second resume, which was updated one day after having sent the first resume, was provided to Ms. Anita Bonner, who at the time was employed with DCOP as the Deputy Director. Ms. Bonner acknowledged receipt of the revised and updated resume. Compl. at ¶ 16.

On or about July 19, 2005, Ms. Johnson received a verbal offer of employment from Vanessa Glaspie, on behalf of DCOP. Compl. at ¶19. On August 22, 2005, Ms. Johnson was hired by DCOP to hold a "temporary appointment pending the establishment of a registered

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position" ("TAPER") as Deputy Director of Programs. Compl. at ¶20. On September 9, 2005, a vacancy listing was posted for the position of Deputy Director of Programs on DCOP's website. Compl. at ¶21.

On September 16, 2005, Ms. Johnson submitted application materials in response to this posting. The application materials included a third and further updated copy of Ms. Johnson's resume and application. On September 23, 2005, after a review of her application materials and required interviews, Ms. Johnson was hired to fill the position of Deputy Director of Programs for DPR. Compl. at ¶21-23. On October 3, 2005, Ms. Johnson's position was officially changed from the temporary appointment to a permanent position as Deputy Director of Programs for DPR. Compl. at ¶24.

On April 28, 2006, Jonetta Rose Barras (hereinafter referred to as "Ms. Barras"), while doing an investigation into the hiring practices of the DCOP and DPR, called the Public Information Manager for DPR and others in her capacity as a reporter. Ms. Barras is a freelance reporter, writes for the *Examiner*, and is also a columnist writer for Defendant DCWatch.[1]

DCWatch is an "On-Line Magazine" that publishes articles about politics and public affairs in the District of Columbia. *See* DC Watch Homepage, available at http://www.dcwatch.com/columns/default.htm (visited April27, 2007), attached hereto as Exhibit 1; *see also* DCWatch *Columns*, available at http://www.dcwatch.com/columns/default.htm (visited April 27, 2007) (listing Ms. Barras as a "guest columnist"), attached hereto as Exhibit 2. Moreover, as the website demonstrates, the proprietors and editors of the on-line magazine use a screening process to determine who

[1] *See* DCWatch Homepage, available at http://www.dcwatch.com/columns/default.htm (visited April 27, 2007)

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receives the title of "columnist" for DCWatch. Only a handful of individuals have been bestowed with the title "columnist ." *See* DCWatch *Columns*, *supra* (noting "Do you want to write for DCWatch? **Apply** to the webmaster . . .) [emphasis in original]. DCWatch is also readily aware that the information written by its columnists often is not accurate by noting, , ". . . *some of them* [columnists] *are barely responsible themselves" Id.* (emphasis in original). *Id.*

On or about April 24, 2006, Ms. Johnson received a call while at work from Ms. Barras, who requested an interview via telephone with Ms. Johnson. Ms. Johnson agreed to be interviewed, and in fact engaged Ms. Barras in a discussion regarding an article Ms. Barras claimed she was writing for *The Examiner*. Ms. Johnson talked to Ms. Barras on the speaker phone in the presence of Regina Williams, the Manager of Communications for DPR. *See* Compl. at ¶ 27-29.

At some time between Ms. Johnson's commencement of employment and the publication of the first article by Ms. Barras, Ms. Barras received, either directly or indirectly through a third party, confidential and private personnel information on Ms. Johnson from DCOP and/or the HR department of DPR. The personal and confidential information obtained from Ms. Johnson personnel file were used as part of Ms. Barras' basis for writing and publishing the defamatory articles. Compl. at ¶30. Ms. Johnson's efforts to clarify and correct the false assumptions, factual errors, and misinformation in Ms. Barras' record were snubbed by Ms. Barras. Compl. at ¶ 32.

When efforts were made by Ms. Johnson a second time to correct Ms. Barras' misinformation, Ms. Barras was hostile, yelled at Ms. Johnson, and ultimately hung-up on

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Ms. Johnson without allowing Ms. Johnson to fully respond to the questions, innuendo, and incorrect conclusions of fact drawn by Ms. Barras. Compl. at ¶ 32.

On or about May, 2006 through August, 2006, Jonetta Rose Barras willfully and intentionally engaged in a malicious campaign to publicly ridicule and defame Ms. Johnson. Ms. Barras published successive articles containing further defamatory information about Ms. Johnson. Ms. Barras wrote approximately six (6) articles about DCOP, DPR, and its hiring practices, and in the process filled her articles with deceitful and incorrect information with the intent to smear and discredit Ms. Johnson's good character and name. Compl. at ¶ 34-36.

Ms. Barras made numerous false factual statements regarding Ms. Johnson's fitness and qualifications for the position of Deputy Director of DPR, and further stated as a matter of fact that Ms. Johnson intentionally misrepresented information on her resume to secure employment with DPR and earn a higher salary than qualified or justified. *See Show Me the Money*, by Jonetta Rose Barras, in July 16, 2006 issue of "the mail@dcwatch", *Tempted* (http://www.dcwatch.com/themail/2006/06-07-16.htm. The defamatory articles and comments were written, orally stated, and publicly disseminated on Ms. Barras' web site (found at www.jrbarras.com), on the DC Watch website (an online magazine)[2] [*See* The full

[2] *See* DCWatch, *Tempted: Show Me the Money,* Jonetta Rose Barras, http://www.dcwatch.com/themail/2006/06-07-16.htm (July 16, 2006), where Defendant Barras writes, ". . . [Ms. Johnson] misrepresented her credentials and salary history on the resume used to secure her position."

See also, DCWatch, *Task Force: Little White Lies, Part 2*, Jonetta Rose Barras, http://www.dcwatch.com/themail/2006/06-05-14.htm (May 14, 2006), where Defendant Barras writes, ". . . [Ms. Johnson] . . . continues to draw her . . . salary, although she inflated her resume. Anyone found to have provided false information to receive his or her employment with the government can be terminated and may be subject to criminal prosecution. . . . "

See also, DCWatch, *Rates: Ignoring Sins*, Jonetta Rose Barras, http://www.dcwatch.com/themail/2006/06-06-04.htm (June 4, 2006), where Defendant Barras writes: a) Ms. Johnson "knowingly inflated her resume and lied about it"; b) ". . . DPR . . . is being mismanaged by people who cheated their way to the top. . . ."; c) "[Ms. Johnson] . . . had conspired to break the rules to ensure [Ms.] Johnson got the job."; d) ". . . when I interviewed [Ms.] Johnson by telephone . . . she admitted to other misrepresentations on her resume."

See also, DCWatch, *Getting Schooled: The Saga Continues*, Jonetta Rose Barras, http://www.dcwatch.com/themail/2006/06-05-21.htm (May 21, 2006), where Defendant Barras writes: a) ". . .

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copy of the articles published by DC Watch which are attached hereto as Exhibit 4], and on the Kojo Nnamdi radio show during the period in question.

Consequently, due to the nature of the allegations made against Ms. Johnson by Ms. Barras, on October 13, 2006, the District terminated Ms. Johnson's employment. The defamatory articles and statements have made it virtually impossible for Ms. Johnson to continue to work in her area of expertise in the Washington D.C./Maryland metropolitan area, which has been her home and area of employment all of her career. Ms. Johnson has had to uproot herself to seek employment outside of the metropolitan area in an attempt to avert the negative and damaging effect of Ms. Barras' actions. Ms. Johnson has suffered extreme humiliation, prejudice, and embarrassment because of the allegations made by Ms. Barras and the public dissemination through print and radio media and online through the DCWatch on-line magazine website.

On or about February 8, 2007, the District of Columbia Inspector General ("DCIG") issued an audit report in part addressing Ms. Johnson's application and hire by the District of Columbia government. *See* Motion to Dismiss at Exhibit A. In the report, the DCIG found that Ms. Johnson was qualified for her position. *Id.* at page 4 (stating "All five employees [including Employee A] were qualified for their respective positions"). Additionally, the DCIG audit specifically noted that it could not conclude that Plaintiff intentionally mislead anyone with the submission of her first resume. *Id.* at 25 ("We could not determine whether Employee A erred or intended to inflate the Company A salary provided on her first resume").

[Ms.] Johnson . . . admitted to this reporter that she inflated her salary and employment history in a resume provided to DC Office of Personnel to obtain her . . . position at the DPR."; b) "a second resume, the one obtained by me, was . . . , by [Ms.] Johnson's own admission, inflated."

See also, DCWatch, *Supplement to the Death of Jane Jacobs: What's A Little White Lie Among Friends*, Jonetta Rose Barras, http://www.dcwatch.com/themail/2006/060503a.htm (May 3, 2006), where Defendant Barras writes, ". . . Johnson deliberately inflated her employment and compensation history to secure her position"; among other innuendo in article that Ms. Johnson "falsified a resume" to obtain position.

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Moreover, with the submission of the second resume, all of which was verifiable, DCOP had approximately four (4) business days to review, evaluate, and scrutinize Ms. Johnson's corrected resume before finally offering her the position and salary on July 19, 2005. *Id.* at 26.

In the Motion to Dismiss, the Defendants conveniently mischaracterize the facts to support their position. First, the Defendants state that Ms. Johnson "submitted an enhanced resume" which "expanded on her work experience." *See* Motion to Dismiss at 4. However, Ms. Johnson did not embellish on her resume as alluded by the Defendants. Ms. Johnson was **asked** to submit a more comprehensive resume that enhanced (or further extrapolated upon) the description of her previous work experience and salary history. *See* DCIG Audit at 25. Moreover, the Defendants seem intent on focusing on the hiring process adopted by DCOP and DPR. However, this case is not about the hiring processes of the respective District of Columbia agencies. Ms. Johnson does not attempt for one instant to speak of or debate the hiring practices of the District of Columbia. Indeed, that is an internal matter that the District is apt to address. Instead, this case is about the callous manner in which Ms. Barras, while reporting the concerns in the hiring practices of DPR and DCOP, used Ms. Johnson as a pond to bolster her negative reporting about the District, and in the process published defamatory and illegal statements of fact about Ms. Johnson.

III. STANDARD FOR MOTION TO DISMISS

In considering the Defendants' motion to dismiss, the Court must accept the allegations of the complaint as true, and construe all facts and inferences in Plaintiff's favor. *See In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006); *Atkins v. Industrial Telecommunications Assn.*, 660 A.2d 885, 887 (D.C. 1995); *Schuler v. United States,* 617 F.2d. 605, 608 (D.C.C. 1979). Viewing the facts as alleged in the Complaint in such a light,

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dismissal is plainly inappropriate. Plaintiff's Complaint unquestionably asserts viable causes of action, and the facts, accepted as true, clearly support those allegations.

Additionally, in evaluating a Rule 12 (b)(6) motion to dismiss, when matters outside the pleading are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion. *See* Superior Court Rule 12 (b)(6).[3]

IV. ARGUMENT

A. Defendant Barras is an Agent of DCWatch or Has the Apparent Authority to Act as an Agent of DCWatch. Therefore, Immunity Under the CDA Is Not Present Because DCWatch Did Not Publish Third Party Statements But Its Own.

Defendant DCWatch is responsible for Defendant Barras's actions as she was its agent and/or had apparent authority to act as its agent. The CDA only provides immunity for "providers of interactive computer services from civil liability in tort with respect to material disseminated by them but **created by others**." *See e.g. Whitney Information Network, Inc. v. Xcentric Venture, LLC*, 199 Fed.Appx. 738, 740-45 (11th Cir. 2006) (vacating and remanding trial court's decision to grant immunity based upon the CDA in defamation action against operator of website because a factual dispute arose as to whether the agents of the operator

[3] Defendants have entered evidence outside the pleadings, namely a District of Columbia Inspector General audit. *See* Motion to Dismiss at Exhibit A. However, they wish to do so without placing their motion within the summary judgment standard by asserting that this Court can take "judicial notice" of the facts contained in the audit. *Id.* at 2. The Court cannot take judicial notice of the findings of fact contained in the District of Columbia Inspector General audit report as these facts are disputed. *See* Black's Law Dictionary 6th Ed. at p. 848 (defining judicial notice as "cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them"); *Poulnot v. District of Columbia*, 608 A.2d 134, 142 (D.C. 1992) (holding the standard for judicial notice is that a fact must be either "well-known by all reasonably intelligent people in community, or its existence is easily determinable with certainty from unimpeachable sources" for a court to invoke the doctrine of judicial notice and properly using judicial notice for the "well-known and undisputed facts about the effect of alcohol on the human body"). Therefore, this action by the Defendants is improper. Moreover, as will be more fully developed below, the IG made no finding that Plaintiff was unethical and untruthful, which is the central issue here so facts are in dispute. *See* Motion to Dismiss at Exhibit A p. 25.

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"'were the authors of some of the statements on their website,' [and] not merely publishers of third-party statements[,]" thus denying defendant immunity under the CDA); *Blumenthal v. Drudge*, 992 F.Supp. 44, 49 (D.D.C. 1998); 47 U.S.C. §230(c)(1) ("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") (emphasis added); *see also Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F.Supp.2d 1142, 1149 (D.Ariz.2005) (declining to grant defendants' motion to dismiss based on CDA immunity in part because plaintiffs alleged that defendants solicited others to write content for their website).

Immunity for a principal is not granted under the CDA when its agent or one who has apparent authority as an agent has committed tortious defamatory conduct. In sum, in these scenarios, the agent and principal are not two different "information content provider[s]" but are one and the same. *See e.g. American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982) ("if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement") (citing Restatement (Second) of Agency §§ 247, 254 (1957)); *Whitney Information Network, Inc.*, 199 Fed.Appx. at 740-45; *Blumenthal*, 992 F.Supp. at 50 (noting that immunity would not have been found under the CDA had there been evidence to support that there was an agency relationship).

Defendant Barras is listed by DCWatch as one of its limited number of "columnists." Exhibit 2. Therefore, information from the principal (DCWatch) indicates that Defendant Barras is and/or was its agent or at least had the apparent authority of an agent to write columns for DCWatch, thus the title being bestowed upon her of "columnist."

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As DCWatch's website makes clear, there is a screening process used to designate who is listed as "columnist" for the website. *See* DCWatch *Columns*, *supra* (noting "Do you want to write for DCWatch? Apply to the webmaster . . .). DCWatch is also readily aware that the information written by its columnists may not be accurate, stating "*some of [the columnists] are barely responsible themselves" Id.* (emphasis in original). Certainly, not everyone who writes for the on-line magazine is designated as a "columnist" as there are only eleven (11) individuals listed as "columnists" — significantly fewer than the number of individuals who access and post on the website.

Given that Defendant Barras is and was listed as one of these select few "columnists," Plaintiff, at minimum, is entitled to probe who DCWatch deems worthy of receiving this title of "columnist" through discovery and granting a motion to dismiss is not proper in this case. *See Hy Cite Corp. v. badbusinessbureau.com, L.L.C.,* 418 F.Supp.2d 1142, 1149 (D.Ariz.2005) (declining to grant defendants' motion to dismiss based on CDA immunity in part because plaintiffs alleged that defendants solicited others to write content for their website).

In fact, whether someone is an agent of a principal is a fact determination, thus necessitating discovery. *See Lewis v. Washington Metro. Area Transit Auth.,* 463 A.2d 666, 673 (D.C.1983), (noting that while "the party relying upon the agent's authority to bind his principal bears the burden of proving that the agent's act was authorized initially or *nunc pro tunc* by ratification" "[i]t is well settled that, where the evidence permits reasonably conflicting inferences, as here, the existence of agency, and its nature and extent, are questions of fact"); *Smith v. Jenkins,* 452 A.2d 333, 335 (D.C.1982) (same). Furthermore, while the "determinative factor" is "the measure of control" over an agent, "[c]onduct or

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words by a person which cause the other reasonably to believe that that person desires him to act on his account and subject to his control are sufficient to establish such authority." *See Smith,* 452 A.2d at 335. Consequently, the title of "columnist" bestowed upon Defendant Barras by Defendant DCWatch is enough to create a factual dispute that deserves resolution by a jury — namely, whether Defendant Barras was an agent who wrote (or had apparent authority to write) "columns" and put other material on the website.

Additionally, Defendant Barras's title as "columnist," on its own, is enough of a dispute necessitating discovery.

> *c. Inferences from agent's position.* Acts are interpreted in the light of ordinary human experience. **If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the ordinary habits of persons in the locality, trade or profession, it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority, in the absence of reason to know otherwise. The content of such apparent authority is a matter to be determined from the facts.**

See Restatement (Second) of Agency §49 cmt. C (emphasis added); *Williams v. Washington Metropolitan Area Transit Authority*, 721 F.2d 1412, 1417-18 & n. 6 (D.C.Cir. 1983) (apparent authority is present when "it is reasonable for the third person dealing with the agent to believe the agent is authorized") (citing with approval Restatement (Second) of Agency §8 cmt. C, §49 cmt. C); *U.S. v. Incorporated Village of Island Park*, 888 F.Supp. 419, 437-38 (E.D.N.Y. 1995) ("Apparent authority is the authority which outsiders would normally assume the agent to have, judging from his position with the corporation and the circumstances of his conduct"); *U.S. v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984) (same); *U. S. v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 205 (3rd Cir. 1970) (same); *Continental Baking Co. v. U.S.*, 281 F.2d 137, 150-51 (6th Cir. 1960) (same).

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Importantly, as noted above, if apparent authority is established, then DCWatch would be liable for Defendant Barras's actions. *See e.g. American Soc. of Mechanical Engineers, Inc.*, 456 U.S. at 566 ("if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement"). While the burden still remains with the Plaintiff, establishing apparent agency is not a high hurdle. "Specifically, in this jurisdiction 'apparent authority of an agent arises when the principal places the agent in such a position as to *mislead* third persons into believing that the agent is clothed with authority which in fact he does not possess.'" *See Stieger v. Chevy Chase Sav. Bank, F.S.B.*, 666 A.2d 479, 482 (D.C. 1995) (quoting *Jack Pry, Inc. v. Harry Drazin,* 173 A.2d 222, 223 (D.C.1961) (emphasis in original); *Insurance Management of Washington, Inc. v. End & Howard Plumbing Corp.,* 348 A.2d 310, 313 (D.C.1975) (written statements from the principal such as business cards are sufficient to establish apparent agency). Certainly, the title of "columnist" alone is enough to "mislead" others to think Defendant Barras can write columns for DCWatch and has authority to post on DCWatch's website! Moreover, the fact that Defendant Barras went through a screening process and is only one of eleven individuals listed by the putative principal (DCWatch) as a "columnist" would imply to a reasonable person that she had the authority to write and post the information she put onto the website. *See e.g.* Restatement (Second) of Agency §49 cmt. C.

Again, Defendant DCWatch bestowed upon Defendant Barras the title "columnist." So even assuming, *arguendo*, that Ms. Barras wrote the column for her own purposes, there is still apparent authority to bind the putative principal, DCWatch. *See* Restatement (Second) of Agency §§ 254 ("A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact

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that the servant or other agent acts entirely for his own purposes, unless the other has notice of this"). At a minimum, Plaintiff must be allowed discovery on this issue of Defendant Barras's relationship with Defendant DCWatch. Thus, because no third party is present in this case and Defendant Barras is either an agent or has apparent authority, the CDA immunity does not apply and a denial of the Motion to Dismiss is the only proper result.

B. Defendant DCWatch is Not An Interactive Computer Service or A User Entitled to Immunity Under the CDA

Defendants assert that the "**Communications Decency Act Bars All of Plaintiff's Common Law Tort Claims Against the DCWatch Defendants**" because DCWatch is an "interactive computer service" and a "user" as defined under 47 U.S.C. §230(c). *See* Motion to Dismiss at 6-11. This is simply false.

An "interactive computer service" is "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." *See* 47 U.S.C. §230(f)(1). DCWatch does not meet this definition.

Unlike AOL and other true "interactive computer services," DCWatch does not provide access to any computer system. The difference between an actual "interactive computer service" who the CDA was meant to protect and a website like DCWatch was best demonstrated in *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F.Supp.2d 273 (D.N.J. 2006).

> The purpose of the Communications Decency Act is to promote self-regulation of Internet service providers. **Basically, the Act shields service providers from liability for the content of websites of third parties that are accessed through the Internet**. The Act affords immunity to 'interactive computer services,' defined 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 provide access to the Internet and such systems offered by

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libraries or educational institutions.' 47 U.S.C. § 230(c)(1).

> The Court is not persuaded that GoTo qualifies for immunity under the Act. GoTo contends that it is an 'interactive computer service' because it is an 'information service ... that provides or enables computer access by multiple users to a computer server. [and] provides access to the Internet....' **However, as far as this Court can tell, GoTo does not provide access to the Internet like service providers such as AOL.** The only authority cited in support of GoTo qualifying for this designation is an unpublished Superior Court of California case where it was undisputed that eBay qualified as an 'interactive computer service.' The Court does not find that argument persuasive.

Id. at 295 (ellipses and bracket in original) (emphasis added).

Moreover, DCWatch fails to meet the obligations that a true "interactive computer service" is required to meet under the CDA. These requirements have been in effect since 1998 when the statute was amended. *See* 47 U.S.C.A. §230.

> *Obligations of interactive computer service*
>
> A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

See 47 U.S.C. §230(d).

Specifically, nowhere on DCWatch's website does it provide individuals viewing the website this protective service for children as required by law. Also, it failed to provide any proof in its Motion to Dismiss that it provides this child protective service. Therefore, while it now asks that this Court provide it with the protections of the CDA, it has never at any time since 1998, when this requirement was added into law, acted as an "interactive computer service." Therefore, it seeks all the benefits of the CDA without upholding any of its legally required "obligations." *See id.*

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Additionally, DCWatch is not a "user" of an "interactive computer service" simply because it maintains a website. *See* Motion to Dismiss at 10-11. Defendants' definition of "user" is too broad and is contrary to the congressional intent of the CDA, which was meant to immunize companies that cannot possibly control the content they are receiving from outside sources, especially with respect to protecting children from inappropriate material.

> Whether wisely or not, it made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others. **In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.**

See Blumenthal v. Drudge, 992 F.Supp. 44, 49 (D.D.C. 1998) (emphasis added).

In short, DCWatch is significantly different than companies such as AOL and Prodigy that cannot possibly control the content on their servers for all of their customers, especially with respect to inappropriate content for children. *Id.* DCWatch invites others to write for it, reviews email submissions, and posts the emails twice a week after screening them. It also, as noted above, has "columnists" such as Ms. Barras who are its agents. As such, it does not have millions of users accessing the web through its servers, and the "near impossibility of regulating information content" on its website does not exist. *Id.* Therefore, DCWatch is not a company that Congress intended to immunize.

Maintaining a website does not immunize the website from liability under the CDA. There must be more. As the California Court of Appeals noted recently, there must be a demonstration that the website is in fact an "interactive computer service" and the fact that a website is operating is different from it actually being subject to immunity under the CDA.

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> Finally, [defendant] argues that it is immune from liability under section 230 of the Communications Decency Act, 47 United States Code section 230. **That statute applies, however, only to 'interactive computer services,' which are defined as 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server....'** There is no evidence in this record that [defendant] operates in this manner. Moreover, this argument was rejected in *Huntingdon Life Sciences*, supra, 129 Cal.App.4th at page 1258, 29 Cal.Rptr.3d 521 (2005), footnote. 9, because there, **as here, [defendant] put forth "no evidence that [defendant]'s web site is an 'interactive computer service.'**

Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 143 Cal.App.4th 1284, 1301, 50 Cal.Rptr.3d 27, 39-40 (2006) (emphasis added) (ellipse in original); *see supra GoTo.com, Inc.*, 437 F.Supp.2d at 295 (noting the difference between the defendant website and AOL); *Ben-Tech Indus. Automation v. Oakland University*, 2005 WL 50131 (Mich.App. 2005) (posting of student's paper accusing plaintiff of criminal and unethical conduct sufficient to survive summary judgment); *see also Fedders Corporation v. Elite Classics*, 279 F.Supp.2d 965 (S.D.Ill. 2003) (denying a motion for summary judgment on claim that company could be held liable for defamation for email written by outside counsel but then disseminated through email to clients of counterclaimant).

To hold that the definition of "user" encompasses any website simply because it is on the internet, as Defendants now seek, would in fact render the "obligations of interactive computer service" requirements added to the statute in 1998 superfluous and useless. *See* 47 U.S.C. §230(d). Specifically, all "interactive computer services" maintain websites on the internet. Under Defendants' definition of "user," all "interactive computer services" could therefore seek the protections of immunity under the "user" provision of the CDA in section 47 U.S.C. §230(c). As such, they could simply ignore the requirements ("obligations") they have under the CDA to provide information to protect children from objectionable material under 47 U.S.C. §230(d) by claiming to be a "user" and not an actual "interactive computer

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service." Clearly, this was not what Congress intended in specifically amending the CDA in 1998 to add these protections for children. *Compare* §47 U.S.C. §230(c) *with* 47 U.S.C. §230(d). As such, Defendants' broad definition equating "user" with website should be rejected by this Court. Therefore, for these reasons, Defendants are not eligible for immunity under the CDA.

C. The "Gist" of the Statements Made by Defendants Are Not Substantially True so the Defense of Truth is Not Available [4]

Defendants also argue that the allegations made by Plaintiff are substantially true such that the Motion to Dismiss must be granted. *See* Motion to Dismiss at 15-18 (citing to the DCIG audit report attached as Exhibit A to the motion). Defendants' argument is fatally flawed because whether Plaintiff initially submitted a resume with inaccuracies is irrelevant to this discussion. What is relevant here is that Defendant Barras accused her of intentionally misleading others and committing intentional, unethical, and possibly illegal misconduct when this first resume was submitted. It is these accusations of misconduct, which resulted in Ms. Johnson losing her job, that are the defamatory part of the statements at issue.

"To successfully assert th[e truth] defense, a defendant in a defamation action must prove that the statements made were substantially true, and that any minor misstatements of fact or inaccuracies of expression were immaterial." *See Lohrenz v. Donnelly*, 223 F.Supp.2d

[4] Plaintiff notes that Defendants do not appear to argue at this stage that "actual malice" cannot be found except through the truth defense. *See* Motion to Dismiss at 15-16. Without conceding that she is a "public official," should "actual malice" need to be proved and/or should Defendants be arguing that an absence "actual malice" supports granting their Motion to Dismiss, Plaintiff notes in this jurisdiction that it is not appropriate for a court to determine whether actual malice is present in a motion to dismiss as discovery is required on that issue. *See e.g. Nader v. de Toledano*, 408 A.2d 31, 49 (D.C. 1979) (noting that even at the summary judgment stage "the plaintiff is not required to prove to the court 'actual malice with convincing clarity' as he must do at trial because that would of necessity require a weighing of evidence by the court. We find no hint anywhere from the Supreme Court, that the judge must himself be convinced. [T]he **plaintiff need only present evidence which shows a genuine issue of material fact from which a reasonable jury could find actual malice** with convincing clarity") (emphasis added); *Lohrenz v. Donnelly*, 223 F.Supp.2d 25, 45-46 (D.D.C. 2002) ("Recognizing, however, that defendants are not likely to willingly confess their ill intentions, courts permit plaintiffs to prove 'actual malice' by relying upon circumstantial evidence").

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25, 60 (D.D.C. 2002). "'Substantially true means that the 'gist' of the statement is true or that the statement is substantially true, as it would be understood by its intended audience." *See Benic v. Reuters America, Inc.*, 357 F.Supp.2d 216, 221 (D.D.C. 2004) (quoting *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990). However, "[i]f it appears that the statements are at least capable of a defamatory meaning, whether they were defamatory and false are questions of fact to be resolved by the jury." *See Moss*, 580 A.2d at 1023. Therefore, if "both sides offered evidence to support their positions on falsity, [then] the issue [must be] properly submitted to the jury." *Id.*

In this matter, there is a huge difference between an unintentional, erroneous submission, which was what occurred with the first resume submission, and the statements made by Defendant Barras that Plaintiff is an unethical person who tried to falsify her resume to obtain a position. These statements about her being unethical and dishonest are pertinent here and do not justify granting the motion based upon the truth defense. *See Benic*, 357 F.Supp.2d 221-222 (granting summary judgment but noting had the plaintiff produced any evidence that the statements at issue gave the "'implication that Plaintiff had engaged in criminal or unethical activity" then summary judgment would have been inappropriate under the truth defense); *id.* at 223 (noting that if the statements at issue could have been "interpreted" by the "average reasonable reader" that plaintiff "acted in a manner that was "odious, infamous, or ridiculous" then summary judgment should not be granted); *see Poullard v. Smithkline Beecham Corp.*, 2005 WL 3244192 at *17 (D.D.C. 2005) (granting summary judgment based upon the truth defense in a defamation suit alleging that the plaintiff was falsely accused of embezzlement because the plaintiff "failed to provide any supporting documentation that those monies were used for [defendant's] business-related purposes"),

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attached hereto as Exhibit 3. Therefore, the statements at issue are not substantially true nor are they "minor misstatements of fact or inaccuracies of expression" that are "immaterial" because they accuse Ms. Johnson of moral turpitude. *See Lohrenz v. Donnelly*, 223 F.Supp.2d at 60; *Global Relief Foundation, Inc. v. New York Times Co.*, 390 F.3d 973, 987 (7th Cir. 2004) (applying the following test to determine if the truth defense applies: "Any inaccuracies which do no incremental damage to the plaintiff's reputation do not injure the only interest that the law of defamation protects. We will thus ignore inaccuracies that do no more harm to [plaintiff] than do the true statements in the articles"). As these statements about her moral character do substantially harm her reputation and are factually disputed, the truth defense is inapplicable for purposes of a motion to dismiss.

Defendants seek to have this Court take judicial notice of the DCIG audit, which is not appropriate. *See supra* footnote 1. However, even if this Court could take "judicial notice" of the DCIG report, it does not support the argument that Plaintiff acted unethically or that she had intentionally acted to mislead anyone through her initial submission (first resume) submitted for the position. *See* Motion to Dismiss at Exhibit A at 6 (stating "Employee A met the minimum qualifications for the Deputy Director of Programs position"); *id.* at 25 ("We could not determine whether Employee A erred or intended to inflate the Company A salary provided on her first resume"). Therefore, the "gist" of the allegations are also not supported by the report.

Moreover, even if the report did support these conclusions, such a finding by a government agency would not dispose of this suit. *See Lohrenz*, 223 F.Supp.2d at 59 (noting in a defamation suit that despite a government issued report and other government information finding that the allegations were "substantially true" and "largely accurate" that

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other information in the record showed that whether the allegations were true was "extremely muddled" such that the court could not grant summary judgment based upon the findings made in government issued documents); *see also id.* (noting that the "fair reporting" privilege of an official government proceeding or report is privileged but "the privilege will not apply if the publication of the report is not fair and accurate"). In short, the Plaintiff has produced sufficient evidence [and Defendants in fact have also produced evidence through the DCIG report to support Plaintiff's position] to demonstrate that at a minimum the truth of material facts are in dispute. Therefore, the "gist" of the allegations are not true and the motion must be denied.

V. CONCLUSION

The Defendants cannot demonstrate that the Complaint fails to state claims such that relief cannot be granted. As noted, the CDA does not apply because Defendant Barras was an agent of DCWatch or had the apparent authority of DCWatch to publish the comments. Moreover, DCWatch is neither an "interactive computer services" nor user of an "interactive computer services" such that the CDA should provide it immunity. Finally, the truth defense is inapplicable because the statements at issue here imply that Plaintiff intentional falsified her credentials and committed other acts of moral turpitude that are not true.

Therefore, the complaint clearly states valid claims that would allow for damages to be recovered such that Defendants' Motion to Dismiss must be denied in its entirety. The foregoing premises having been considered, Plaintiffs move this Honorable Court to deny the Defendants' Motion to Dismiss the Complaint, and to grant such further relief as this Court deems proper.

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Dated: May 31, 2007

Respectfully submitted,

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By: _____

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and

_____

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Counsel for Plaintiff, Roslyn Johnson

REQUEST FOR HEARING

Plaintiffs respectfully request a hearing on Defendant's Motion to Dismiss and all matters related thereto.

_____
David Coaxum

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2007, a copy of the foregoing opposition to Defendants, Motion to Dismiss Complaint were served upon counsel for Defendants, DC Watch, Dorothy Brizill, Gary Imoff, Art Spitzer, American Civil Liberties Union, 1400 20th Street, NW, Washington, DC 20036, counsel for Defendants, Jonetta Barras and Talk Media Communications, LLC, A. Scott Bolden, D.C. Bar No. 428758, Anthony E. DiResta, Bar No. 464362, Daniel Z. Herbst, D.C. Bar No. 501161, Reed Smith, LLP, 1301 K Street, N.W., Suite 1100, East Tower, Washington, D.C. 20005, and upon Defendant, The District of Columbia, Corporation Counsel for the District of Columbia , 441 4th Street NW, Room 1060N, Washington, DC 20001 via e-mail through the Court's Case File Express System.
:

_____
David Coaxum

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IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

ROSLYN JOHNSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 2007 CA 001600 B**
	:	
JONETTA BARRAS, *et al.*	:	
	:	
Defendants.	:	
	:	

O R D ER

UPON CONSIDERATION of the Motion to Dismiss of Defendants Gary Imhoff, Dorothy A. Brizill and DCWatch, Plaintiff's Opposition thereto and any hearing on the matter, good cause having been shown, it is this ____ day of _____ 2007 by the Superior Court of the District of Columbia,

ORDERED, that the Motion to Dismiss of Defendants Gary Imhoff, Dorothy A. Brizill and DCWatch be, and the same hereby is, **DENIED** in its entirety.

_____

JUDGE, Superior Court of the
District of Columbia Civil Division

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VI. STATEMENT OF POINTS & AUTHORITIES

1. District of Columbia Superior Court Civil Procedure Rule 12 (b)
2. District of Columbia Superior Court Civil Procedure Rule 56
3. 47 U.S.C. §230(c)
4. 47 U.S.C. §230(d)
5. 47 U.S.C. §230(f)
6. 47 U.S.C.A. §230
7. *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F.Supp.2d 273 (D.N.J. 2006)
8. *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S.556 (1982)
9. *Atkins v. Industrial Telecommunications Assn.*, 660 A.2d 885 (D.C. 1995)
10. *Ben-Tech Indus. Automation v. Oakland University*, 2005 WL 50131 (Mich.App. 2005)
11. *Benic v. Reuters America, Inc.*, 357 F.Supp.2d 216 (D.D.C. 2004)
12. *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998)
13. *Continental Baking Co. v. U.S.*, 281 F.2d 137 (6th Cir. 1960)
14. *Fedders Corporation v. Elite Classics*, 279 F.Supp.2d 965 (S.D.Ill. 2003)
15. *Global Relief Foundation, Inc. v. New York Times Co.*, 390 F.3d 973 (7th Cir. 2004)
16. *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 29 Cal.Rptr.3d 521 (2005)
17. *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F.Supp.2d 1142 (D.Ariz.2005)

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