

**C O V E R****FAX****S H E E T**

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**Subject:** Anthony Dimeo, III v. Tucker Max  
Civ. No. 06-1544

**Date:** May 26, 2006

**Pages:** 23, including this cover sheet.

**COMMENTS:**

Please see the following.

From the chambers of...

**Judge Stewart Dalzell**  
United States District Court  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY DIMEO, III : CIVIL ACTION  
 :  
 v. :  
 :  
 TUCKER MAX : NO. 06-1544

MEMORANDUM

Dalzell, J.

May 26, 2006

Tucker Max describes himself as an aspiring celebrity "drunk" and "asshole" who uses his Web site, [www.tuckermax.com](http://www.tuckermax.com), to "share [his] adventures with the world."<sup>1</sup> Anthony DiMeo, III, who says he is an heir and co-owner of a large New Jersey blueberry farm, threw a New Year's Eve party this past December that, apparently, ended in a shambles. The paths of these two men converge on Max's Web site, which hosts a number of message boards that allow Internet users to post anonymous comments on different topics. One of those topics is DiMeo's New Year's Eve party.

DiMeo sues Max for six postings that he finds offensive. DiMeo does not allege that Max authored the posts. Rather, he claims that Max "through his [Web site] publishes defamatory statements aimed at Plaintiff. . . ." Comp. ¶ 5. DiMeo sues for defamation and for Max's alleged violation of 47 U.S.C. § 223(a)(1)(3), a criminal statute that prohibits anonymously using a telecommunications device to harass someone.

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<sup>1</sup> See Tucker Max Homepage, at <http://www.tuckermax.com> (last visited May 18, 2006).

## I. Factual and Procedural Background

On December 31, 2005, Renamity, Anthony DiMeo's publicity firm, organized what turned out to be the New Year's Eve party from hell.<sup>2</sup> See, e.g., Michael Klein, Real Noisemaking Begins After New Year's Party Fracas, Phila. Inquirer, Jan. 5, 2006, at E3 (hereinafter "Real Noisemaking"); The Art of the Deal: An Artist's Paintings Are Stolen and Damaged at a New Year's Party Gone Terribly Wrong, Phila. Weekly, Jan. 11, 2006, at 18; Michael Klein, The Party's Very Much Over: Promoter Is Suing, Phila. Inquirer, Jan. 19, 2006, at E3 (hereinafter "Promoter Is Suing"). Renamity first contracted with Athmane Kabir, owner of Le Jardin, a restaurant located in the Philadelphia Art Alliance gallery, to host 325 guests on New Year's Eve for a four-hour party with food and an open bar. Real Noisemaking, at E3. Twice as many people appeared. Id. When alcohol and food ran out well before midnight, attendees -- who had paid \$100 each -- became disenchanted:

The staid, sprawling landmark on Rittenhouse Square never saw such a ruckus. Patrons seeking food burst through doors leading into a dining room of Kabir's Le Jardin restaurant. Two mixed-media works on loan by Antonio Puri were stolen from museum walls. Sconces were torn. Someone tried to haul off the donations box. Kabir, fearing injuries, called police about 10:30 p.m.

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<sup>2</sup> These facts place the postings at issue in proper context. On DiMeo's Web site, he describes Renamity as "specializing in . . . VIP launch events and special event production." See Anthony DiMeo III Web site at <http://www.anthonydimeo.com> (last visited May 26, 2006).

Id. While the arrival of police dispersed the crowd, it did not dissipate its anger, which apparently needed an outlet.<sup>3</sup>

Enter Tucker Max, a Duke Law School graduate whose professed goal in life is "[t]o be a celebrity that gets paid to

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<sup>3</sup> This lawsuit is not the only one to emerge from the New Year's Eve fiasco. According to the Philadelphia Inquirer, on January 10, 2006, DiMeo sued Le Jardin for "misstatements." Promoter Is Suing, at E3. In that article, Le Jardin's attorney reported that his client would counter-sue. Id.

Neither DiMeo nor Max is a stranger to court proceedings. Last year, DiMeo sued Philadelphia Weekly and its former gossip columnist, Jessica Pressler, after Pressler parodied the holiday card DiMeo emailed to his friends and family. Josh Cornfield, Party Heads to Court: Lawsuits in Works Over New Year's Eve Bash Gone Bad, Philly Metro, at [http://philly.metro.us/metro/local/article/Party heads to court/765.html](http://philly.metro.us/metro/local/article/Party%20heads%20to%20court/765.html); Doron Taussig, Here's What's Fun -- You're Getting Served, Philadelphia City Paper, at <http://citypaper.net/articles/2005-03-03/fineprint.shtml> [hereinafter Taussig]. The card displayed DiMeo posing next to a Christmas tree. Next to an image of the card that she displayed in her column, Pressler wrote, "In 2004, I learned that I am so amazing that I get off all day simply on the incredible feeling of being myself." Taussig.

Max's introduction to the court system occurred in 2003 when Katy Johnson, who was Miss Vermont in both 1999 and 2001, sued him. See, e.g., Adam Liptak, Internet Battle Raises Questions About Privacy and the First Amendment, N.Y. Times, June 2, 2003, at A13. On his Web site, Max posted an article that "contained a long account of his relationship with Ms. Johnson, whom he portrayed, according to court papers, as vapid, promiscuous and an unlikely candidate for membership in the Sobriety Society [that she founded]." Id. Johnson's attorneys persuaded the Honorable Diana Lewis of the Circuit Court in West Palm Beach, Florida to enjoin Max -- without service or a hearing -- from writing about Johnson. Id. Judge Lewis's ruling, which one legal commentator called "not only a prior restraint of Max's speech activities, but one of remarkable breadth," sparked "a flurry of worldwide media attention." Stewart Harris, A Tale of Two Sites and a Lawsuit: Injunction Against Web Site Owner Was the Legal Issue in Suit Over Salacious Story, Nat. L.J., July 28, 2003, at 19. On June 6, 2003, Max removed that case to federal court, filed a motion to dismiss, and filed a motion (endorsed by the American Civil Liberties Union) to dissolve the temporary injunction. Id. Shortly after Max's counter-attack, Johnson voluntarily dismissed her case. Id.

get drunk, act like an asshole, and get drunk some more." Tucker Max Personal Info, at [http://www.tuckermax.com/archives/entries/personal\\_info.phtml](http://www.tuckermax.com/archives/entries/personal_info.phtml) (last visited May 18, 2006). His Homepage reports that he has achieved his second aspiration. Id. Max spends much of his time running [www.tuckermax.com](http://www.tuckermax.com), which he often uses to post anecdotes about his life. Max's Web site also hosts a number of message boards, with several devoted to DiMeo's New Year's Eve party.

The posts on these message boards -- many of them laden with vulgarity -- fall into three categories. First, a number comment about DiMeo's event. One author, for example, under the pseudonym "Jerkoff", wrote, "So what happened? Just shitty planning? From the looks of it, they got way more people that [sic] they wanted, the crowd was nasty, and the bartenders were stoned." Def.'s Mot. to Dismiss Mem., Ex. I, at 2.

The second group of posts ridicules DiMeo. Noting an online photograph of DiMeo modeling,<sup>4</sup> for example, an author wrote:

When the fuck did he become a model?

And what the fuck does the photographer say to him to get him to make that face?

OK Anthony, I have this. . . this . . . this brilliant idea. Hear me out now. I want you

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<sup>4</sup> According to his Web site, DiMeo generates income by (a) helping to run his family's southern New Jersey blueberry farms, (b) acting, (c) managing Renamity, and (d) working as a wealth manager. See Anthony DiMeo III Web site, at <http://www.anthonydimeo.com> (last visited May 26, 2006). As a member of the Screen Actors Guild, DiMeo claims he has done "[c]ommerical print modeling." Id.

to make a face like you were getting fisted by an angry gorilla. Ok, now mold your face to what you think you would look like if a leper were about to take a shit in your mouth. WORK WITH ME. EXCELLENT!

Id. at 22.

The third category of posts expresses outright animosity toward DiMeo. One author wrote, for example, "What a douche-bag! This guy sounds like the type of pompous, pretentious jackass that I take great pleasure in giving reality checks to. . . but often can't locate. . . ." Id. at 45. Another poster wrote, "This guy is such a tool. . . I am amazed he has not been beaten in the street." Id. at 57.

On or around March 10, 2006, DiMeo sued Max in the Court of Common Pleas of Philadelphia County. In the complaint, he objected to six posts that, he claimed, typify those about him on Max's message boards:

(1) "Maybe you should find your validation elsewhere. . . preferably at the end of a magnum," Compl. ¶ 5.a;

(2) "I just wanted to let you know that I think that you are the biggest piece of shit I have ever heard of and I hope that you die soon," id. ¶ 5.b;

(3) "Now I know why Arlen Specter got invited to all those Renamity [Http://www.renamity.com/galary/birthdaybash/escf0009](http://www.renamity.com/galary/birthdaybash/escf0009) parties! Could it be. . . bribery of your local politician?" id. ¶ 5.c;

(4) "He's got a neat, nice little page there from which we can harass him," id. ¶ 5.d;

(5) "I can't believe no one has killed him yet," id. ¶ 5.e; and

(6) "You threw an absolutely disastrous party

on New Year's Eve precipitated by false advertising and possible fraud," *id.* ¶ 5.f.

As noted before, DiMeo does not allege that Max wrote any of these himself, but only that Max "through his [Web site] publishes defamatory statements aimed at Plaintiff. . . ." Comp. ¶ 5. Max does not dispute that he selects, removes, and alters posts on the message boards. *See, e.g.*, Def.'s Reply in Further Supp. of Mot. to Dismiss, at 2. Based on these allegations, DiMeo sues for defamation in Count One and, in Count Two, for Max's alleged violation of 47 U.S.C. § 223(a)(1)(3).<sup>5</sup>

On April 12, 2006, Max removed DiMeo's lawsuit to this Court.<sup>6</sup> About a week later, Max filed the instant motion to dismiss which DiMeo opposes. At the end of his response, DiMeo adds a one-sentence request for leave to file an amended complaint.<sup>7</sup> We shall grant Max's motion, deny DiMeo's request

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<sup>5</sup> Count Three is a claim for punitive damages. Because punitive damages are a legal remedy rather than a cause of action, we shall summarily dismiss it.

<sup>6</sup> On April 24, 2006, DiMeo filed a petition to remand this matter back to the Court of Common Pleas. In an Order yesterday, we denied that frivolous petition. As DiMeo's action invokes a federal statute as a basis for relief, we have federal question jurisdiction. There seems to be no dispute that we also have diversity jurisdiction, as the parties are citizens of different states (DiMeo of Pennsylvania and Max of New York) and the amount in controversy exceeds \$75,000.

<sup>7</sup> DiMeo's response contained new factual allegations that we set forth in footnote 17, *infra*.

Plaintiff's counsel requested the opportunity for additional briefing. We granted his request and permitted him to file a consolidated supplemental brief by noon on May 14, 2006. Curiously (in light of his request), about ten minutes before that noon deadline, plaintiff's counsel faxed us a letter advising, "Plaintiff has decided to rest on his briefs already submitted." Thus, he declined to avail himself of the



computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Because of a preemption clause in § 230(e)(3),<sup>9</sup> § 230(c)(1) overrides the traditional treatment of publishers under statutory and common law:

The provision "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."

Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003) (quoting Zeran v. America Online Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

Congress enacted § 230(c)(1) to advance two objectives. First, Congress wanted to promote the free exchange of information and ideas over the Internet. In specific statutory findings, Congress stressed that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." § 230(a)(3); see also § 230(a)(5) ("Increasingly Americans are relying on interactive media for a variety of political, educational, cultural and entertainment services."); § 230(a)(1)

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<sup>9</sup> That provision reads, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

("The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens."). In these findings Congress also took pains to emphasize that, "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." § 230(a)(4) (emphasis added).

Congress believed that § 230(c)(1) would promote these ideals. With the number of Internet users reaching the hundreds of millions, the quantum of information conveyed through interactive computer agencies is staggering:

The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.

Zeran, 129 F.3d at 331. In other words, absent federal statutory protection, interactive computer services would essentially have two choices: (1) employ an army of highly trained monitors to patrol (in real time) each chatroom, message board, and blog to screen any message that one could label defamatory, or (2) simply avoid such a massive headache and shut down these fora. Either option would profoundly chill Internet speech.<sup>10</sup>

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<sup>10</sup> Interestingly, the New York Times reports that the Chinese employ 50,000 censors to watch the Internet for anything

Congress enacted § 230 to advance a second goal -- to "encourage service providers to self-regulate the dissemination of offensive material over their services." Id. See also § 230(b)(4) ("It is the policy of the United States . . . to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."); 141 Cong. Rec. H8469-70 (Aug. 4, 1995) (statements of Reps. Cox, Wyden, and Barton); 141 Cong. Rec. H8469-72 (Aug. 4, 1995) (statements of Reps. Cox, Wyden, Lofgren, and Goodlatte).

Under pre-CDA jurisprudence, interactive service providers that removed offensive material from their sites risked liability. In Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at \*3-4 (N.Y. Sup. Ct. May 24, 1995), for example, New York's Supreme Court held a service provider liable because it screened and edited messages posted on its bulletin boards. Id. This editorial activity, the court reasoned, rendered the provider a publisher for defamation purposes and thus subject to strict liability. Id.

Concerned that cases like Stratton Oakmont would discourage providers from screening offensive content on their own sites, Congress enacted § 230(c)(2)(A) to insulate them from liability for

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the state regards as offensive. See Howard W. French, As Chinese Students Go Online, Little Sister Is Watching, N.Y. Times, May 9, 2006 at A3.

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

47 U.S.C. § 230(c)(2)(A). Both the House and Senate emphasized that "[o]ne of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own . . . ." H.R. Rep. No. 104-458, at 194 (1996); S. Rep. No. 104-230, at 194 (containing same quote).

a. Application of § 230(c)(1)

Three elements are required for § 230(c)(1) immunity. First, the defendant must be a provider or user of an "interactive computer service." Second, the asserted claims must treat the defendant as a publisher or speaker of information. Third, the challenged communication must be "information provided by another information content provider."

At the outset, DiMeo's defamation claim treats Max as the publisher or speaker of the six posts he finds offensive. DiMeo does not allege that Max wrote any of the posts. Instead, he claims only that Max "through his [Web site] publishes defamatory statements aimed at Plaintiff. . . ." Comp. ¶ 5.

As to the first element, "interactive computer service" means, in relevant part, "any information service, system, or

