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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Google, Inc., Plaintiff and Counterclaim Defendant,	:	Case No. 09-CVH-10-14836
vs.	:	
myTriggers.com, Inc., Defendant and Counterclaim Plaintiff.	:	Judge John P. Bessey

BRIEF OF OHIO ATTORNEY GENERAL AS AMICUS CURIAE SUPPORTING DEFENDANT AND COUNTERCLAIM PLAINTIFF MYTRIGGERS.COM, INC.

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I. Interest of the Amicus Curiae

The Attorney General of the State of Ohio files this amicus curiae brief, in support of Defendant and Counterclaim Plaintiff myTriggers.com, Inc. ("myTriggers") on two issues. As the chief law enforcer of the State of Ohio, the Attorney General is charged, *inter alia,* with the duty of enforcing the antitrust laws. R.C. 109.81, 1331.11. Any decision that restricts the reach of those statutes or preempts their enforcement erodes the ability of Attorney General to carry out his mission. Here, Google's Motion to Dismiss asserts two propositions of law that present such a threat. Its assertion that the Valentine Act is preempted by the federal Communications Decency Act of 1996 would immunize an entire industry from the reach of this State's antitrust laws. Further, its proposed interpretation of R.C. 1331.01 as inapplicable to unilateral conduct would result in a significant restriction of antitrust enforcement in Ohio.

The Attorney General is committed to maximizing the vitality of competition in the State of Ohio in order to secure for its citizens the benefits of competitive markets. The issues addressed herein are of vital importance to that goal.

II. Argument

A. The Valentine Act is not preempted by 47 U.S.C. §230

Google contends that this Court's first duty is to answer the question of whether The Communications Decency Act of 1996, 47 U.S.C. §230(c)(2)(A) (the "CDA"), preempts the application of Ohio's antitrust law in this case, and that the answer to that question must be "yes." Such a conclusion expands the reach of the CDA far beyond Congress' intent and purpose.

The analysis of whether a state statute is preempted under the Supremacy Clause "starts with the basic assumption that Congress did *not* intend to displace state law." *Maryland v. Louisiana* (1981), 451 U.S. 725, 746 (emphasis added). Preemption is not favored "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142; *see also DeCanas v. Bico* (1976), 424 U.S. 351, 356. The conflict of law must be actual and irreconcilable such that both legislative schemes cannot stand without frustrating the operation of the other. *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966).

1. Congress did not intend to preempt state antitrust laws

Congress reflected this disfavor towards preemption when drafting the CDA. The statute provides: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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). No such inconsistency or irreconcilable conflict exists here.

Congress's primary objective in enacting the CDA was to "control the exposure of minors to indecent material." See *Batzel v. Smith* (9th Cir. 2003), 333 F.3d 1018, 1026. Another purpose of the CDA was to "preserve the vibrant and competitive free market" by promoting the development of e-commerce. 47 U.S.C. § 230(b)(2); *Batzel,* 333 F. 3d at 1027. It is thus evident that Congress recognized, when enacting the CDA, that the important goals of protecting children from harmful and exploitive material and preserving a competitive e-commerce market are compatible – even symbiotic.

2. No conflict exists here because Google's acts do not qualify for CDA immunity

In pursuit of its aims, the CDA provides two forms of protection for "'Good Samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c). First, the provider or user of an "interactive computer service" is deemed *not* to be the publisher or speaker of "information" provided by another. 47 U.S.C. § 230(c)(1). Second, express immunity is provided for any interactive computer service that restricts access to content considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2). These protections are consistent with the CDA's express and primary goal of protecting minors from exposure to harmful content on the Internet.

It is the foregoing "Good Samaritan" protections that Google claims shield it from liability under the Valentine Act. But Google does not profess that it took the acts at issue in this litigation for the purpose of safeguarding children from obscene, violent or offensive material. Rather, it makes the sweeping assertion that the CDA generally immunizes "'Internet search providers' decisions relating to inclusion or exclusion of information provided by third parties, including advertisers." Motion to Dismiss at 15. Google significantly overstates the statute's purpose and effect in an effort to conjure up an irreconcilable conflict between the CDA and the Valentine Act.

In support of its position, Google first cites a group of cases where state laws have been preempted by the CDA, including state law claims of defamation, invasion of privacy and negligence. *See, e.g., Parker v. Google* (3d Cir. 2007), 242 F. App'x 833, 838; *Universal Commc'n Sys., Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 421; *Jurin v. Google, Inc.*, 2010 U.S. Dist. LEXIS 18208 (E.D. Cal. Feb. 26, 2010). These claims,

however, were dismissed on the basis of the prohibition in Section 230 subpart (c)(1) against deeming the search provider to be the "publisher or speaker," rather than under the CDA's immunity for filtering obscene materials. *Parker*, 242 F. App'x at 838 (Defendant displayed information created by another "information content provider"); *Universal*, 478 F. 3d at 421 (Defendant was hosting material provided by a third party); *Jurin*, 2010 U.S. Dist. LEXIS 18208 (third parties posted digital fliers on Defendant's site). Here, no one has accused Google of being the publisher or speaker of any of the material contained on myTriggers' site. This line of cases is thus inapposite to the case at bar.

Google then argues that the portion of the statute that grants immunity for providers who edit or exclude material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" (47 U.S.C. § 230(c)(2)) must be read broadly enough to immunize *any* editorial decisions made by an Internet service provider. This argument is fatally flawed, as it violates a longstanding canon of statutory construction.

Under the canon of *ejusdem generis*, general words in a statute which follow more specific ones are interpreted to be similar in meaning to the words they follow. *Hill v. Rent-a-Center, Inc. (11th Cir. 2005)*, 398 F.3d 1286, 1289; *see also Hall Street Assocs., L.L.C. v. Mattel, Inc.* (2008), 552 U.S. 576, 586, 128 S. Ct. 1396, 1404, 170 L. Ed. 2d 254 (under *ejusdem generis*, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows"). The United States Supreme Court recently explained the sound reasoning behind this canon of construction as follows: "If Congress meant the latter, *i.e.*,

if it meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all." *Begay v. United States* (2008), 553 U.S. 137, 128 S. Ct. 1581, 1584-85, 170 L. Ed. 2d 490.

In subpart (c)(2) of the CDA, "otherwise objectionable" is preceded by the words "obscene, lewd, lascivious, filthy, excessively violent, [and] harassing." 47 U.S.C. § 230(c)(2). Any interpretation of this language that assigns a meaning to the phrase "otherwise objectionable" that is dissimilar to the words before it is contrary to the canon of *ejusdem generis* and should not be favored.

Google defends its position by citing *Langdon v. Google* (D. Del. 2007), 474 F. Supp.2d 622, for the proposition that the phrase "or otherwise objectionable" should be interpreted far more broadly than the adjectives that precede it. In *Langdon*, plaintiff sued Google and other sites for refusing to run advertisements for his websites – one accusing North Carolina governmental officials of fraudulent behavior, and the other alleging atrocities committed by the Chinese government. *Id.* at 626. The Court granted Defendants' motion to dismiss on the grounds that the phrase "or otherwise objectionable" extends immunity beyond the list of adjectives that precedes it in the statute – specifically, "obscene, lewd, lascivious, filthy, excessively violent, harassing."

However, just one year after the decision in *Langdon*, another federal district court recognized that while the *Langdon* opinion reached the right result, it did so on flawed reasoning. In *National Numismatic Certification, LLC v. eBay, Inc.*, 2008 U.S. Dist. LEXIS 109793, the court points out that "[a]lthough the *[Langdon]* opinion contains some broad language concerning 'immunity for . . . editorial decisions' and did not consider the canon of *ejusdem generis* or the policy behind *section 230*, the holding is

entirely consistent with this Court's reasoning to the extent that advocating "against a group" is similar to 'harassment.'" *Id.* Finding that Congress provided guidance on the meaning of the term "objectionable" by offering illustrative examples and a statement of the policy behind the CDA, the Court holds "that 'objectionable' content must, at a minimum, involve or be similar to pornography, graphic violence, obscenity, or harassment." *Id.* at *82. Here, the content offered by myTriggers and excluded by Google was not obscene, violent or harassing in any respect.

The canon of *ejusdem generis* and the express policy behind the CDA lead to two inevitable conclusions – (1) Congress did not intend to preempt Ohio's Valentine Act. and (2) there is no conflict between the two statutory schemes as applied to these facts, much less an irreconcilable one. Google's Motion to Dismiss the Counterclaim of myTriggers on the basis of preemption of the Valentine Act should be denied.

B. The Valentine Act proscribes anticompetitive conduct – both unilateral and collusive

Google argues that the Valentine Act does not prohibit restraints of trade undertaken unilaterally – without collusion with another person or entity.[1] While its Motion to Dismiss cites language from several Ohio appellate courts and federal courts tending to support its position, Google nevertheless advocates a ruling that diametrically opposes more than a hundred years of Ohio Supreme Court precedent, as well as underlying common law principles, on this issue.

[1] The Attorney General will refrain herein from addressing the issue of whether or not myTriggers' Counterclaim pleads agreement in addition to unilateral conduct on the part of Google.

1. Ohio common law condemns monopolies

The Valentine Act, similar to the Sherman Act, speaks in terms of "trusts" and declares them to be unlawful and against public policy. To understand fully the proscription against "trusts" as enacted by the legislature, it is essential to look both to the express definition contained in the statute, and also to the history of competition law jurisprudence leading up to its passage in 1898.

Revised Code Section 1331.01 defines a trust as "a *combination* of capital, skill, *or* acts by two or more persons ..." for any of six enumerated anticompetitive purposes. Ohio Rev. Code §1331.01 (B) (emphasis added). This broad language encompasses a wide array of anticompetitive combinations – everything from a powerful single firm wielding its power to control production and/or prices (*i.e.*, a combination of the "capital" of its shareholders), to collusive agreements among multiple firms in the market (*i.e.*, a combination of "acts" by conspiring firms).

The prohibition of "trusts" enacted as part of the Valentine Act was not a new concept under Ohio law. Rather, it was a codification of well-established common law principles, consistent with those codified by Congress eight years earlier in the federal Sherman Act. *See United States Telephone Co. v. Central Union Telephone Co.* (6th Cir. 1913), 202 F. 66, 70 (common law principles regarding restriction of competition are codified for Ohio in the Valentine Act and for the United States in the Sherman Act). At the heart of those common law principles was the idea that monopolies – concentrations of power in a single entity – are antithetical to the public good and should be prohibited. *See Crawford & Murray v. Hugh B. Wick,* (1868) 18 Ohio St. 190, 206 (voiding a bond that restrains trade because it "tends to a monoply [sic], and is against the public good");

Central Ohio Salt Co. v. Guthrie (1880), 35 Ohio St. 666, 672 (public policy "unquestionably" favors competition and opposes monopolies). Indeed, the statutory chapter created by the Valentine Act is titled "Monopolies," leaving little doubt as to the intended reach of this enactment.

There is no clearer indication that the Ohio common law which formed the foundation of the Valentine Act prohibited monopolistic anticompetitive practices than the Ohio Supreme Court's opinion in *State v. Standard Oil Co.*, decided in 1892 – just six years prior to passage of the Valentine Act and two years after passage of the Sherman Act by Congress. Ohio Attorney General David K. Watson brought suit against The Standard Oil Company, alleging that the company was an unlawful trust – a combination of interests that controlled the price of oil to the detriment of the public. *State v. Standard Oil Co.* (1892), 49 Ohio St. 137. The State prevailed. The Court found The Standard Oil Company to be a combination "whereby many separate interests being united under one management, form a virtual monopoly through the power acquired of so controlling the production and price of petroleum and its products, as to destroy competition." *Id.* at 183. The Court ordered the dissolution of the monopolist, asserting that "[m]onopolies have always been regarded as contrary to the spirit and policy of the common law." *Id.* at 186.

2. The Valentine Act condemns all unreasonable restraints of trade

The passage of the Valentine Act in 1898 solidified the common law concept that unreasonable concentrations of market power are unlawful and injurious to the public good, and added criminal as well as civil penalties for violators. In 1905, the Ohio Supreme Court considered the appeal of Perley W. Gage from his criminal conviction

under the State's new antitrust law for participating in The Delaware Coal Exchange, "an association of persons organized for the purpose of preventing competition in the sale, and to maintain a uniform and graduated figure for the sale of coal...." *State of Ohio v. Gage* (1905), 72 Ohio St. 210. In affirming Gage's Valentine Act conviction, the Court said: "The Delaware Coal Exchange, as its purpose is defined in the indictment, is a trust within both the third and fourth subdivisions of the first section of the act, and that section defines the combinations which the act prohibits." *Id.* at 229.

The Court further refined the judicial interpretation of the Valentine Act in *List v. Burley Tobacco Growers' Co-operative Assn* (1926), 114 Ohio St. 361. In the course of adopting a reasonableness standard for the application of the state's antitrust statute, this seminal decision points out that "[i]f the Valentine Act should be construed literally and strictly, *no partnership could be formed, no corporation could be organized,* no vendor could agree to a reasonable limitation upon his future business,...." *Id.* at 377 (emphasis added). *List,* therefore, acknowledges that the proscriptions of the Valentine Act apply not only to multiple business entities engaged in collusive agreements, but also to single business entities that restrain trade. If the acts of any such entity or entities restrain trade in an unreasonable manner, they are unlawful under the laws of Ohio.

If the Supreme Court had held that the Standard Oil Company, the Central Ohio Salt Company, the Delaware Coal Exchange or the Burley Tobacco Growers' Co-operative Association was immune from liability for restraining trade in its respective Ohio market simply because the company originated from a combination that took a corporate form, it would have elevated form over substance contrary to longstanding

public policy considerations. Google advocates a similarly unacceptable form over substance ruling in the case at bar.

While early judicial decisions offer invaluable guidance with respect to the Valentine Act's meaning and the legislative intent behind it, the Ohio Supreme Court has confirmed unequivocally, as recently as 2005, that the foregoing interpretation remains good law. In *Johnson v. Microsoft Corporation*, the Plaintiff sued Microsoft under the Valentine Act, alleging that its unilateral practices had monopolized the market for computer operating systems, causing computer prices to increase for consumers. *Johnson v. Microsoft Corp.* (2005), 106 Ohio St. 3d 278, 279. In rejecting Plaintiff's attempts to state a supplementary cause of action against Microsoft for its monopolistic pricing practices under Ohio's Consumer Sales Practices Act ("CSPA"), the Court ruled: "the Valentine Act, not the CSPA, provides the exclusive remedy for engaging in monopolistic pricing practices in Ohio...." *Id.* at 288-89. The Court's pronouncement in *Johnson* leaves no room for debate – unilateral anticompetitive conduct is actionable under Ohio's Valentine Act.

Google relies on three Ohio appellate court decisions and two federal court decisions in support of its position on this issue. *See* Motion to Dismiss at 4, 18-19. Each of these cases is either distinguishable, or otherwise of limited precedential value. In *Daily Monument Co. v. Crown Hill Cemetery Assn* (1961), 114 Ohio App. 143 (9th Dist. App.), the Court's dismissal of a complaint for failing to allege that there were multiple parties to the conspiracy must be viewed in light of the nature of the claim that was before the Court. The complaint alleged "that the conspiracy existed between the defendant corporation, its president, Calvin, its sales manager, Kelly, and its officers,

employees, representatives and agents who have been actively engaged in the management, direction and control of the affairs and business of defendant." *Id.* at 153. The Court went on to add: "This is certainly a unique group of conspirators." *Id.* Thus, *Daily Monument* stands for the proposition that if a plaintiff chooses to plead conspiracy under the Valentine Act, it cannot successfully do so by naming only officers and employees of a single corporation as conspirators. It does *not* address the question of whether monopolization is a cognizable cause of action under the Act. Moreover, the federal court opinion in *Volvo GM Heavy Truck Corporation v. Key GMC Truck Sales, Inc.* (S.D. Ohio 1991), 773 F. Supp. 1033, also relied upon by Google, cites *Daily Monument* as its sole support for this proposition.[2]

Similarly, *Thaxton v. Medina City Board of Education* (9th Dist. App.), 1984 Ohio App. LEXIS 12209, involved a complaint which alleged a conspiracy between a photography studio and a board of education. The Court ruled that the board of education was a governmental entity and, as such, was not a "person" with whom the studio could conspire under the Valentine Act. Thus, the allegation of conspiracy failed. *Id.* It is in this context that the Court cites *Daily Monument* for the proposition that multiple conspiring parties are necessary for a Valentine Act claim. The issue of whether a unilateral conduct claim could be brought under the Valentine Act was not before the Court, and is not addressed in the opinion.

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[2] *Daily Monument* also serves as supporting authority for Ohio Attorney General Opinion 91-051, not cited by Google, but addressed here for sake of completeness. The Opinion expressly follows *Daily Monument*, 1991 Ohio Op. Atty Gen. 260, 1991 Ohio AG LEXIS 74, *24, but it is distinguishable here for similar reasons as *Daily Monument* is distinguishable. It finds that there are no facts either supporting a conspiracy *or* suggesting a monopoly. *Id.* at *16-17. It further finds that the participant in the activity under analysis – a county sheriff – is not a competitor in the relevant product market (vehicle towing). *Id.* at *22. As such, the facts presented could not support *any* antitrust claim, whether under federal or state law, and whether alleging unilateral or collusive conduct. The Opinion is, therefore, neither controlling nor instructive in the instant case.

Google also seeks to bolster its argument by quoting dicta found in a footnote within the opinion in *In re Microsoft Antitrust Litigation* (D. Md. 2001), 127 F. Supp. 2d 702, 722 n. 22, in which the Court ultimately side-steps a decision on the unilateral conduct issue because it is "irrelevant." Far more instructive, however, is the District of Columbia District Court's Conclusions of Law in *United States v. Microsoft Corporation* (D.C. Dist. 2000), 87 F. Supp. 2d 30, to which the State of Ohio was a party. Citing Sections 1331.01 and 1331.02 of Ohio's Valentine Act among other state antitrust statutes, the Court concludes: "The facts proving that Microsoft unlawfully maintained its monopoly power in violation of *§ 2* of the Sherman Act are sufficient to meet analogous elements of causes of action arising under the laws of each plaintiff state." *Id.* at 54.

Finally, Google directs the Court's attention to a portion of the Sixth District Court of Appeals decision in *Island Express Boat Lines v. Put-in-Bay Boat Line Co.* (6th Dist. 2007), 2007-Ohio-1041, for the proposition that proof of agreement under the Valentine Act requires proof of involvement of multiple parties on terms that would violate Section 1 of the Sherman Act. *See* Motion to Dismiss at 4. While it is accurate to say that proof of conspiracy under the Valentine Act is similar in most material respects to proof of conspiracy under the Sherman Act, such a statement does not address whether or not monopolization is a viable Valentine Act claim. Importantly, a further reading of *Island Express* reveals that the plaintiff brought both a conspiracy claim and a monopolization claim. The Court dismissed the monopolization claim, *not* because it was not cognizable under the Valentine Act, but because plaintiff had failed to show an issue of material fact as to defendant's ability to acquire illegal monopoly power in the

relevant market. *Id.* at *P89-90. Such a holding would be strange indeed if no cause of action for monopolization existed under the Valentine Act.

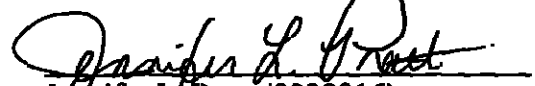
Consistent with the Ohio Supreme Court's unequivocal pronouncements on this issue, Google's assertion that Ohio's Valentine Act does not prohibit anticompetitive unilateral conduct is without merit.

III. Conclusion

The State of Ohio respectfully requests that the Court reject Plaintiff and Counterclaim Defendant Google's arguments with respect to (a) preemption of the Valentine Act by 47 U.S.C. §230, and (b) the inapplicability of the Valentine Act to unilateral anticompetitive conduct.

RESPECTFULLY SUBMITTED this 26th day of April, 2010.

RICHARD A. CORDRAY
ATTORNEY GENERAL OF OHIO



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Motion of Ohio Attorney General Richard A. Cordray for Leave to File Amicus Curiae Brief and the appended Brief of Ohio Attorney General as Amicus Curiae Supporting Defendant and Counterclaim Plaintiff myTriggers.com, Inc. were served this 26th day of April 2010, by regular U.S. mail, upon the following:

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