VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JEFFERY R. VOLLOY	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2012-17762**
	)	
CARY WIEDEMANN	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF HIS MOTION TO SET ASIDE DEFAULT JUDGMENT

Lee E. Berlik (VSB# 39609)
BERLIKLAW, LLC
1818 Library Street, Suite 500
Reston, Virginia 20190
Tel: (703) 722-0588
Fax: (888) 772-0161
LBerlik@berliklaw.com

Defendant Cary Wiedemann, by counsel, pursuant to Va. Sup. Ct. Rules 1:9 and 3:19(d), respectfully requests that the Court set aside the default judgment entered against him and permit him to file pleadings in response to the Complaint.

Facts[1]

The Defendant, Mr. Wiedemann, is a 28-year-old network engineer who operates www.fairfaxunderground.com (the "Website") in his spare time. The Website is a popular online forum that receives over one million unique visitors each month. Despite its popularity, Mr. Wiedemann derives no income from the Website, as it does not contain any paid advertising.

Like other online forums, the Website contains its fair share of content that many would find insulting, offensive, or otherwise in bad taste. Consequently, Mr. Wiedemann is accustomed to receiving frequent demands for the removal of various content. Due to the protections of Section 230(c)(1) of the Communications Decency Act,[2] however, Mr. Wiedemann knows that most of these demands are frivolous and that he need not concern himself with them. Therefore, and in consideration of his relatively low income, he generally does not retain counsel when faced with such requests.

Fairfax County publishes to its website a list of all individuals who have been arrested, updating the list frequently. (See www.fairfaxcounty.gov/police/crime/arrest.txt). One of the services offered by Mr. Wiedemann's Website is to republish the information on this list for the general interest and information of the general public. (See www.fairfaxunderground.com/arrests). According to information published by Fairfax County on its site, Plaintiff has an extensive history of trouble with the law, including arrests for possession of marijuana,

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[1] *See* Declaration of Cary Wiedemann, attached as Exhibit A.

[2] *See* 47 U.S.C. § 230(c) ("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.") This federal law is often applied as a bar to defamation claims against hosts of Internet forums.

possession of other drug paraphenalia, driving while intoxicated, refusing blood and breath tests, and multiple driving infractions.

All of these arrests were republished on the Website, and Plaintiff has no apparent objection to that. What he does object to is the announcement by Fairfax County during the week of October 21, 2007, that he was also arrested for ***incest***, when in truth (according to him) his arrest that week was for another incident of driving while intoxicated. Mr. Wiedemann republished this information on the Website on October 25, 2007.

On November 30, 2012, years after the arrest list was published and well beyond the expiration of the one-year statute of limitations for defamation claims, Plaintiff sued Mr. Wiedemann for defamation. He served Mr. Wiedemann with the Summons and Complaint on December 26, 2012. Mr. Wiedemann read the Complaint and saw that it concerned material on the Website that the Plaintiff found defamatory. Mr. Wiedemann was not particularly alarmed at having been served with a lawsuit, as he was of the belief that he enjoyed absolute immunity from defamation claims as a mere provider of an interactive computer service.

Still, he did not ignore the lawsuit. He promptly contacted the Plaintiff's lawyer, sending him an email on January 4, 2013 (just nine days after being served) in which he provided a detailed response to the allegations of the Complaint and explained his position that "so long as I am republishing county documents in their exact original form I can in no way be held liable for any claims." (See Email from Cary Wiedemann to Bernard Feord, attached as Exhibit B (settlement offer redacted)).

Having received no response to his email, Mr. Wiedemann sent Plaintiff's counsel a follow-up email on January 21, 2013, in which he stated that before he would consider modifying the charge from "incest" to "DWI," he would need to hear from the Fairfax County

Police to verify that the "incest" designation was indeed erroneous. (*See* Exhibit B). Mr. Widemann received no response to that email, either.

When it became apparent to Mr. Wiedemann that he would be unable to resolve the matter with Plaintiff's lawyer, Mr. Wiedemann went to the Clerk's Office to file an answer. This was on or about February 7, 2013, approximately three weeks after his responsive pleadings were due. When he was informed by the Clerk that a default judgment had already been entered, he decided to approach Plaintiff's counsel to request an extension. Mr. Wiedemann met with Plaintiff's counsel (Mr. Feord) in Mr. Feord's office and presented him with a proposed order to allow a late answer. (Copy attached as Exhibit C). Mr. Feord responded that there was "no way" he would agree to allow a late response.

At a Calendar Control hearing on March 12, 2013, Mr. Wiedemann learned that a jury was to consider the amount of damages to award to Plaintiff on May 29, 2013. Realizing the seriousness of the situation, he saved as much money as he could to pay for legal fees, and retained the undersigned counsel on Sunday, May 12, 2013.

Argument

Under Rule 3:19(d)(1), the Court has authority to "relieve a defendant of a default judgment after consideration of the extent and causes of the defendant's delay in tendering a responsive pleading, whether service of process and actual notice of the claim were timely provided to the defendant, and the effect of the delay upon the plaintiff." A default judgment may be set aside on grounds of excusable neglect. *Blinder, Robinson & Co. v. State Corp. Com'n*, 227 Va. 24, 28 (1984). Default judgments may also be set aside if based on an invalid claim. *Lancraft Co. v. Kincaid*, 220 Va. 865, 870 (1980).

In this case, the Court should set aside the default judgment because Mr. Wiedemann had an understandable and justifiable belief that he was immune from suit, because he acted

promptly in trying to resolve this matter with the Plaintiff, and because setting aside the default judgment will cause no prejudice to the Plaintiff. In addition, Plaintiff's claim appears to be invalid as Mr. Wiedemann has several meritorious defenses to it, including Section 230 of the Communications Decency Act as well as the passage of the statute of limitations.

I. Although Mr. Wiedemann Did Not File a Timely Answer, He Acted Promptly in Attempting to Resolve the Dispute with Plaintiff.

Mr. Wiedemann quite properly approached Plaintiff's counsel to request his consent to allow him to file a late response to the Complaint. Mr. Wiedemann made the request just days after the responsive pleading came due. Mr. Feord knew that Mr. Wiedemann was trying diligently to resolve the matter, as Mr. Feord had received at least two emails from Mr. Wiedemann attempting to discuss the merits of the claim and Mr. Wiedemann's defenses thereto. Had Mr. Wiedemann been represented by counsel at the time, Mr. Feord surely would have granted the request. But Mr. Wiedemann was not represented by counsel and did not fully understand or appreciate his rights. Therefore, when Mr. Feord responded to the request with "no way," Mr. Wiedemann assumed there was nothing further he could do.

II. Mr. Wiedemann's Neglect Is Excusable Due to the High Number of Frivolous Demand Letters He Receives.

Most people are not threatened with litigation on a near-daily basis. Mr. Wiedemann, however, is an exception. It's not because he is a bad actor himself, but because he provides an online forum where anyone with an Internet connection can post whatever they want, which is often material that others find offensive. While the Summons issued in this case does contain an explicit warning regarding the consequences of failing to file a timely response, Mr. Wiedemann did not treat it with the same level of urgency as he should have due to his justified belief that he cannot be held liable for content on the Website that originated with others. Mr. Wiedemann has a full time job and the Website is just a hobby. He does not have time to respond to every

demand he receives to remove offensive content, nor does he have an obligation to edit or remove offensive material written by others. He merely hosts the site.

In this case, Mr. Wiedemann knew that it was the County of Fairfax that had published this information originally—not him—and that the report in question was merely republished verbatim on the Website without endorsement or comment from Mr. Wiedemann. It is therefore understandable that Mr. Wiedemann would consider himself immune from defamation liability under Section 230[3] and/or Virginia common law.

III. Setting Aside the Default Judgment Will Cause No Prejudice to Plaintiff.

Permitting Mr. Wiedemann to assert his defenses to this action will serve the interests of justice and will cause no prejudice to the Plaintiff. Mr. Wiedemann has several meritorious defenses to this action, including the passage of the statute of limitations and the immunity provided by Section 230. Plaintiff should not be permitted to take advantage of Mr. Wiedemann's excusable mistake and recover a windfall he would not otherwise be entitled to under the law.

Conclusion

Although Mr. Wiedemann is at fault for allowing a default judgment to be taken against him, the Court should excuse his failure because Plaintiff's claim is time-barred, because Mr. Wiedemann cannot be held liable for simply repeating the statements of Fairfax County, and because Mr. Wiedemann has acted with reasonable diligence under his unique circumstances as the operator of the Website. The Court should set aside the default judgment and permit Mr. Wiedemann an opportunity to file a late responsive pleading.

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[3] If Mr. Wiedemann is permitted to file responsive pleadings in this case, Section 230 immunity will be further researched and evaluated and, if appropriate, presented as the basis for a plea in bar and/or demurrer.

CARY WIEDEMANN
By Counsel

Lee E. Berlik (VSB# 39609)
BERLIKLAW, LLC
1818 Library Street
Suite 500
Reston, Virginia 20190
Tel: (703) 722-0588
Fax: (888) 772-0161
LBerlik@berliklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2013, a true and correct copy of the foregoing Motion to Set Aside Default Judgment was served by hand on:

Bernard G. Feord, Jr.
Fredericks & Stephens, P.C.
10521 Judicial Drive
Suite 303
Fairfax, Virginia 22030
Phone: 703.691.7575
Fax: 703.691.7505

Lee E. Berlik