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CIRCUIT COURT
FOR MULTNOMAH COUNTY

ENTERED
FEB 14 2008
IN REGISTER KH

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

SHARON FEHRS, individually and on behalf
of all other persons similarly situated,

Plaintiff,

v.

STUBHUB, INC., a Delaware corporation, and
eBAY INC., a Delaware corporation,

Defendants.

Case No. 0801-00515

**DEFENDANTS EBAY INC.'S AND
STUBHUB, INC.'S RULE 21 MOTIONS**

**Oral Argument Requested
(20 minutes)**

UTCR 5.010

Counsel for Defendants certifies that they conferred with Plaintiff's counsel by telephone on February 12, 2008, but were unable to reach an agreement regarding the matters posed in this motion.

UTCR 5.050

Defendants requests 20 minutes for oral argument and appearance in person. The names and telephone numbers of all parties served with this motion are set forth in the attached Certificate of Service. Official court reporting services will be provided and arranged by Defendants' counsel.

FIRST MOTION

Defendants eBay Inc. ("eBay") and StubHub, Inc. ("StubHub") (collectively, "Defendants")¹ move to dismiss Plaintiff's complaint for lack of standing and failure to state a claim upon which relief may be granted. Defendants' motion to dismiss is supported by the

¹ StubHub is an eBay company. These motions are brought on behalf of both parties.

1 concurrently-filed memorandum in support.

2 **SECOND MOTION**

3 In the event Defendants' first motion is not granted, Defendants move pursuant to
4 ORCP 21D for an order requiring Plaintiff to make more definite and certain:

5 (1) paragraphs 6, 11, and 12 of the complaint to specifically allege the particulars of
6 Defendants' alleged conduct in offering tickets for sale on their Web sites,

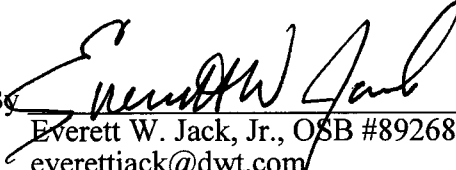
7 (2) paragraph 12 of the complaint by alleging how Defendants' conduct caused Plaintiff
8 harm, and

9 (3) paragraphs 13 and 28 of the complaint regarding the facts that support the claim of
10 tortious interference.

11 Defendants' motion to make more definite and certain is supported by the concurrently-
12 filed memorandum in support and the attached pages of the complaint, marked as required by
13 UTCR 5.020(2).

14 DATED this 13th day of February, 2008.

15 DAVIS WRIGHT TREMAINE LLP

16
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25 StubHub, Inc. and eBay Inc.

26 Trial Attorney: Everett W. Jack, Jr.

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STUBHUB, INC., a Delaware corporation, and
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MEMORANDUM IN SUPPORT OF
DEFENDANTS EBAY INC.'S AND
STUBHUB, INC.'S RULE 21 MOTIONS

Defendants eBay Inc. ("eBay") and StubHub, Inc. ("StubHub") (collectively, "Defendants")¹ submit this memorandum in support of their Motion to Dismiss and Motion to Make More Definite and Certain.

I. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED IN THEIR ENTIRETY

A. INTRODUCTION

Plaintiff asserts two claims in her complaint: public nuisance and tortious interference with prospective advantage. Both of these claims rest on the erroneous theory that *Defendants offer for sale* tickets to events at the Rose Garden at prices above the retail price of the ticket in violation of Portland City Code ("PCC") § 14A.50.060.² Setting aside for a moment that

¹ StubHub is an eBay company. These motions are brought on behalf of both companies.

² PCC § 14A.50.060 provides that "[t]ickets to all events at municipally-owned facilities, including the Memorial Coliseum, PGE Park, and the public plaza at the Rose Quarter, and tickets to all events at the Rose Garden Arena other than season tickets, shall have printed thereon the retail price thereof. It shall be unlawful for any person to sell or offer for sale any ticket for an event at any municipally-owned facility, or for any event at the Rose Garden Arena, at a price greater than the retail price printed thereon or at a price greater than the original retail price. Notwithstanding the above, this Section shall not be construed to prohibit service fees or

1 Plaintiff's theory mischaracterizes Defendants' business model (i.e., Defendants in actuality are a
 2 marketplace where third parties, not Defendants offer for sale tickets), *Plaintiff does not have*
 3 *standing to bring this action* because PCC § 14A.50.060 does not provide for a private right of
 4 action.

5 Additionally, Section 230 of the Communications Decency Act ("CDA") (47 USC § 230)
 6 ("Section 230") provides complete immunity to all of Plaintiff's claims. Plaintiff alleges that
 7 "Defendants intentionally are now maintaining, and at all relevant times have maintained, Web
 8 sites on which they offer for sale tickets to events. . . ." (Compl., ¶ 11). As noted above,
 9 however, Defendants *do not buy, sell or own* any tickets available on the sites. Nor do they
 10 create the listings which describe the tickets that are for sale on their websites. Rather, StubHub
 11 and eBay are online marketplaces that enable third party users to buy and sell tickets. These
 12 listings are created by third party users who own, buy, and sell tickets using Defendants'
 13 innovative online forums. Under settled law, Section 230 bars claims against website operators
 14 (like Defendants) based on the purported illegal activity undertaken by users of their websites.
 15 Defendants therefore cannot be held liable for the actions of third parties who list for sale and
 16 sell tickets over its website purportedly in violation of PCC § 14A.50.060.

17 For the foregoing reasons, Defendants respectfully requests that this Court dismiss
 18 Plaintiff's action in its entirety, with prejudice.

19 **B. FACTUAL SUMMARY**

20 StubHub operates a website at www.stubhub.com which is a ticket marketplace, enabling
 21 third parties to buy and sell tickets to live entertainment events. (*See* Compl., ¶ 11). eBay
 22 operates an online marketplace (www.ebay.com) where sellers can list items for sale and buyers
 23 can purchase items, including tickets. Defendants do not own or sell the tickets listed on their

24 ///

25 charges imposed or collected by ticket outlets where service fees or charges are specifically
 26 authorized by the management of the facilities."

1 websites. Rather, Defendants provide the underlying technology comprising the online venues at
2 which third parties list for sale, search for, buy, and sell tickets.

3 In any event, Plaintiff does not allege that she ever used Defendants' services to purchase
4 tickets that allegedly violate the Portland City Code. Plaintiff merely alleges that she was unable
5 to purchase tickets to the Bruce Springsteen concert at the Rose Garden in Portland, Oregon, on
6 March 28, 2008, "through the official ticket outlet," and that she simply "noticed" that tickets to
7 the Bruce Springsteen concert were available on Defendants' websites. (*Id.* at ¶¶ 5-6). Plaintiff
8 then makes the attenuated leap that she has been injured by Defendants' actions because "[s]he
9 has been unable to purchase premier tickets as a result of defendants' conduct and will be unable
10 to do so in the future if defendants are permitted to continue their conduct." (*Id.* at ¶ 12).
11 Plaintiff asserts these claims on behalf of a putative class of persons. (*Id.* at ¶ 14).

12 C. ARGUMENT

13 1. Plaintiff's Complaint Must Be Dismissed Because She Has No 14 Standing to Bring A Civil Action Under PCC § 14A.50.060.

15 a. PCC § 14A.50.060 Does Not Provide For a Private Right of 16 Action.

17 Plaintiff's Complaint must be dismissed because PCC § 14A.50.060 does not provide for
18 a private right of action.

19 Under Oregon law, "[t]o support an action for statutory liability" (as Plaintiff attempts to
20 do here), "the ordinance must disclose that a failure to act as mandated was contemplated by the
21 legislature to give rise to a potential liability in tort." *Eduardo v. Clatsop Cmty. Res. Dev. Corp.*,
22 168 Or App 383, 386-87, 4 P3d 83 (2000) (quotation marks omitted). Accordingly, a private
23 civil action is only permitted where "the plaintiff can show that the damages suffered came about
24 as a result of the violation of a statute which the legislature passed *intending to give recourse* to a
25 group of plaintiffs." *Id.* at 389 (quoting *Bellikka v. Green*, 306 Or 630, 762 P2d 997 (1988)
26 (emphasis original) (quotation marks omitted)). "Thus, it is not enough that the City of Astoria
intended to protect persons in plaintiff's position from injury. *It must have intended to provide*

1 *injured parties with a right of action.*” *Id.* at 389 (emphasis added) (upholding trial court’s
2 dismissal of the plaintiff’s statutory liability claim premised on an alleged violation of the
3 Astoria City Ordinance on the grounds that there was no private right of action).

4 In determining if a private right of action exists, “the court’s task is to discern the intent
5 of the legislature. To do that, the court examines both the text and context of the statute.” *PGE*
6 *v. Bureau of Labor and Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993); *see also Eduardo*, 168 Or
7 App at 387 (applying the *PGE* analysis to city Ordinances). In *Eduardo*, the plaintiff brought a
8 statutory liability claim arising out of her falling down a staircase in her apartment building that
9 did not have continuous handrails, allegedly in violation of an Astoria City Ordinance. *Id.* at
10 386. The Court of Appeals affirmed the trial court’s dismissal of the plaintiff’s statutory liability
11 claim after examining the text and context of the Astoria City Ordinance. *Id.* at 389-90.

12 First, the court found that the express language of the Astoria City Ordinance did not
13 provide an explicit private right of action. *Id.* at 387, 389 (noting that the court “begin[s] with
14 the text as the best evidence of a legislative body’s intent,” and finding “no express liability
15 provision” in the Ordinance). Second, the court looked for “contextual clues indicating the
16 legislative body’s intent to provide a civil right of action” (*id.* at 389), and found that the City
17 Ordinance gave enforcement authority to the City Building Inspector, and violations were
18 punishable as misdemeanors by fine, imprisonment, or both—but not by civil remedy. *Id.* at 390
19 n.5. Because the Ordinance did not provide an express private right of action, and enforcement
20 of the provision was expressly delegated to the City Building Inspector, the Court found that
21 “nothing in the text or context of the ordinance . . . demonstrate[d] that the City of Astoria
22 intended to provide plaintiff with a statutory cause of action.” *Id.* at 389-90. Accordingly, the
23 court affirmed the dismissal of the plaintiff’s statutory liability claim on the grounds that there is
24 no private right of action. *Id.* at 390.

25 The court’s reasoning and analysis in *Eduardo* applies with equal force here. As in
26 *Eduardo*, the text of PCC § 14A.50.060 does not state that injured parties have a private right of

1 action. This is the “best evidence” that the drafters of PCC § 14A.20.060 did not intend to
2 provide a private right of action. *PGE*, 317 Or at 610 (“[T]he text of the statutory provision itself
3 is ... the best evidence of the legislature’s intent.”); *see also* ORS 174.010 (“[i]n the construction
4 of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in
5 substance, contained therein, not to insert what has been omitted...”).

6 The “context” of the Portland City Code also does not support an *implied* private right of
7 action. Chapter 14 of the PCC provides that violations of the Chapter’s provisions are subject to
8 the following penalties: “Unless a different penalty is specifically provided, any violation of any
9 provision of this Title shall upon conviction be punished by a fine of not more than \$500, or by
10 imprisonment of not more than 6 months, or by both.” PCC § 14A.20.060. Furthermore,
11 Portland City Code § 1.01.140, which Plaintiff cites as the authority for her nuisance Claim,
12 expressly states that a public nuisance “may be summarily abated *by the City* as authorized by
13 this Code.” PCC § 1.01.140 (emphasis added). The “context” of the Code therefore supports the
14 conclusion that there is *no* private right of action.

15 That there is no private right of action here is further evidenced by the fact that another
16 provision of the Portland City Code *does* expressly provide for a private right of action.
17 Chapter 23 of the Portland City Code prohibits discrimination in employment, housing, and
18 public accommodations (PCC §§ 23.01.050-23.01.070), and expressly provides a private right of
19 action for its violation: “Any person claiming to be aggrieved by an unlawful discriminatory act
20 under the provisions of this code shall have a cause of action in any court of competent
21 jurisdiction for damages and such other remedies as may be appropriate.” PCC § 23.01.080E. In
22 “consider[ing] the context of the statutory provision at issue,” the court generally considers
23 “other provisions of the same statute and other related statutes,” and an important “rule[] of
24 construction” is that “use of a term in one section and not in another section of the same statute
25 indicates a purposeful omission.” *PGE*, 317 Or at 611. Thus, had the drafters intended for a
26 private right of action for violations of PCC § 14A.50.060, they would (and could) have

1 explicitly provided for such a right in Chapter 14 of the PCC by using the language found in
2 Chapter 23.

3 Additionally, a holding that PCC § 14A.50.060 does not provide for a private right of
4 action comports with Oregon Revised Statute § 221.315(1) which provides that the
5 “[p]rosecution of violations of the charter or ordinances of a city in circuit or justice court *shall*
6 *be by the city attorney* and in the name of such city.” ORS § 221.315(1) (2005) (emphasis
7 added).

8 Both the text and the context of the City Code support the conclusion that there is no
9 express or implied private right of action to enforce a purported violation of PCC § 14A.50.060,
10 requiring dismissal of Plaintiff’s Complaint. *See e.g., Eduardo*, 168 Or App at 389-90 (affirming
11 dismissal of the plaintiff’s statutory liability claim where “nothing in the text or context” of a
12 City of Astoria Ordinance provided for a private cause of action).

13 **b. Plaintiff Makes No Connection Between Defendants’**
14 **Purported Conduct and Plaintiff’s Alleged Injury, and**
15 **Without Such Causation, Plaintiff Cannot Maintain a Claim**
16 **Under PCC § 14A.50.060.**

17 Even if the Court were to find that PCC § 14A.50.060 provides a private right of action,
18 Plaintiff does not allege that she used Defendants’ services to buy tickets that purportedly violate
19 PCC § 14A.50.060. Rather, Plaintiff merely alleges that she “noticed” that tickets to the concert
20 she wanted to attend were available on Defendants’ websites. (Compl., ¶ 6). Plaintiff then
21 makes the attenuated leap that she has been injured by Defendants’ actions because “[s]he has
22 been unable to purchase premier tickets as a result of defendants’ conduct and will be unable to
23 do so in the future if defendants are permitted to continue their conduct alleged herein.” (*Id.* at
24 ¶ 12). Without any explanation as to how Defendants’ purported conduct prevented her from
25 buying tickets, Plaintiff simply cannot maintain a claim under PCC § 14A.50.060.

26 **2. Plaintiff’s Tortious Interference with Plaintiff’s Prospective**
Advantage Claim Must Also Be Dismissed.

Plaintiff’s second Claim for tortious interference with prospective advantage is based on

1 Defendants' purported violation of PCC § 14A.50.060. (*See, e.g.*, Compl., ¶ 27 (incorporating
2 the prior allegations of the Complaint, including Defendants' purported violations of PCC
3 § 14A.50.060)). As such, it is subject to dismissal for the same reasons stated above. To the
4 extent that Plaintiff argues that this cause of action is separate and distinct from the PCC
5 § 14A.50.060 claim, it is deficiently pled and also subject to dismissal.

6 The "tort of tortious interference with prospective business advantage does not depend on
7 the existence of a contract, but arises when a Defendant induces a third person not to enter into
8 or not to continue a business relationship with the plaintiff." *Dial Temporary Help Serv., Inc. v.*
9 *Shrock*, 946 F Supp 847, 855 (D Or 1996). To state a claim for intentional interference with
10 economic relations, Plaintiff must allege: (1) the existence of a professional or business
11 relationship; (2) intentional interference with that relationship; (3) by defendants;
12 (4) accomplished through improper means or for an improper purpose; (5) a causal effect
13 between the interference and damage to the economic relations; and (6) damages. *Northwest*
14 *Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or 487, 497, 982 P2d 1117 (1999).

15 Plaintiff's Complaint is missing a number of necessary allegations to support this Claim.
16 First, the Complaint does not identify the "business relationship" that Defendants purportedly
17 interfered with. Similarly, the Complaint does not identify the "third person" Defendants
18 purportedly "induced" not to enter into a "business relationship" with Plaintiff. Second, the
19 Complaint does not allege how Defendants purportedly interfered with this unidentified
20 relationship (i.e., how Defendants "induced" this unknown third person to forego a business
21 relationship with Plaintiff).

22 Third, to sustain an interference with prospective business advantage claim, Plaintiff
23 must prove that as a result of the interference, Plaintiff was "damaged beyond the fact of
24 interference itself." *Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.*, 130 Or App
25 487, 498, 882 P2d 637 (1995). Plaintiff fails to do that here. Instead, Plaintiff alleges that she
26 has "suffered injury" because Defendants "facilitate[] the deprivation of plaintiff's equal ability

1 to purchase premier tickets.” (Compl., ¶ 13). But Plaintiff simply describes her “injury” as
 2 Defendants’ purported interference with her ability to buy tickets (without ever saying what
 3 Defendants did to prevent her from obtaining tickets for the event). Thus, Plaintiff fails to meet
 4 her burden that she allege damages “beyond the fact of interference itself.”³

5 For the foregoing reasons, Plaintiff’s interference claim should be dismissed with
 6 prejudice.

7 **3. Alternatively, The Complaint Must Be Dismissed Because Section 230**
 8 **of the CDA Broadly Immunizes Defendants From State Law Claims**
 9 **Arising From Third-Parties Selling Tickets Over Their Websites.**

10 **a. Section 230 of the CDA Immunizes Website Operators From**
 11 **Claims (Like Plaintiff’s) That Seek to Hold Defendants Liable**
 12 **For the Alleged Illegal Activity Undertaken By Users of Their**
 13 **Websites.**

14 Defendants are immune from liability for exactly the type of Claims brought by Plaintiff
 15 here pursuant to safe harbor provision of Section 230 of the CDA, which states: “[n]o provider or
 16 user of an interactive computer service shall be treated as the publisher or speaker of any
 17 information provided by another information content provider.” 47 USC § 230(c)(1). Congress
 18 created Section 230 specifically to immunize website operators⁴ like eBay and StubHub from
 19 claims seeking to hold them liable for the actions of third parties who use their websites. *See,*
 20 *e.g., Barnes v. Yahoo!, Inc.*, No. Civ. 05-926, 2005 WL 3005602, *2 (D Or Nov. 8, 2005)
 21 (dismissing plaintiff’s claims based on Yahoo!’s failure to remove harassing messages about the
 22 plaintiff posted on its website by a third party because “[s]ection 230 generally bars claims that
 23 seek to hold the provider of an interactive computer service liable for tortious or unlawful

24 ³ As an aside, an article in *The Oregonian* states that Plaintiff’s husband was able to purchase
 25 tickets to the Bruce Springsteen concert *at face value*.

26 ⁴ Courts have universally held that website operators such as eBay and StubHub qualify as “interactive
 computer services” under Section 230. *See, e.g., Batzel v. Smith*, 333 F3d 1018, 1030 n 16 (9th Cir 2003)
 (holding that under Section 230, “a website is an ‘interactive computer service’”); *see also Gentry v. eBay*
Inc., 99 Cal App 4th 816, 831 n 7 (Cal Ct App 2002) (holding that eBay is an interactive computer service
 because it enables users to “conduct sales transactions”). As the Complaint notes, both StubHub and
 eBay operate websites. (Compl., ¶ 13).

1 information that someone else disseminates using that service.”).⁵ Section 230 expressly and
 2 expansively preempts any inconsistent state or local law that would seek to hold a website
 3 operator such as StubHub or eBay liable for the actions of third parties who use their website.
 4 *Id.* at § 230(e)(3).⁶

5 StubHub is a ticket marketplace, enabling third parties to buy and sell tickets to live
 6 entertainment events. (*See* Compl., ¶ 11). eBay is likewise an online marketplace
 7 (www.ebay.com) where sellers can list items for sale and buyers can purchase items, including
 8 tickets. Defendants do not own or sell the tickets listed on their websites. Rather, Defendants
 9 provide the underlying technology comprising the online venues at which third parties list for
 10 sale, search for, buy, and sell tickets.⁷ Plaintiff seeks to hold Defendants liable for “aiding and
 11 abetting” third party ticket sellers who purportedly violate PCC § 14A.50.060 by selling tickets
 12 through Defendants’ websites. (Compl., ¶ 11). But Plaintiff’s allegations are in direct
 13

14 ⁵ The court’s decision in *Barnes* is consistent with the decisions of at least five United States Courts of
 15 Appeals opinions. *See, e.g., Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F3d 413 (1st Cir 2007)
 16 (Section 230 immunized a website operator for its “conduct in operating [its] . . . website”); *see also*
 17 *Carafano v. Metrosplash.com*, 339, F3d 1119, 1123 (9th Cir 2003) (Section 230 “provides broad
 18 immunity for publishing content provided primarily by third parties”); *see also Green v. Am. Online, Inc.*,
 19 318 F3d 465, 470-71 (3d Cir 2003) (Section 230 immunized AOL from liability for its “alleged negligent
 20 failure to properly police its network for content transmitted by its users”) (quotation marks omitted); *see*
 21 *also Ben Ezra, Weinstein, and Co v. Am. Online, Inc.*, 206 F3d 980, 986 (10th Cir 2000) (Section 230
 22 immunized AOL from claims based on inaccurate information posted on AOL’s website by third parties,
 23 even though AOL frequently communicated with the information providers and had occasionally deleted
 24 information posted on its website by third parties in an effort to correct errors); *see also Zeran v. America*
 25 *Online, Inc.*, 129 F3d 327, 330 (4th Cir 1997) (Section 230 “creates a federal immunity to any cause of
 26 action that would make service providers liable for information originating with a third party user of the
 service. . . . Thus, 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—are
 barred.”).

6 “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 USC § 230(e)(3).

7 Plaintiff’s vague pleading aside, the Complaint must be based on the allegation that third parties list the
 tickets for sale on the Defendants’ websites and then sell the tickets to the buyers. Were that not the case,
 then Plaintiff would not allege that “Defendants conduct constitutes . . . the act of aiding and abetting a
 violation of the Code.” (Compl., ¶ 11). Were Stubhub and eBay selling the tickets themselves, there
 would be no “aiding and abetting” allegation, since there would be no one to aid or abet.

1 contravention of the broad immunity provided by Section 230, which bars claims against website
2 operators based on the purported illegal activity undertaken by users of their websites.

3 Courts analyzing eBay's business model (the same business model used by StubHub)
4 have consistently held that eBay is protected by Section 230's safe harbor, thereby immunizing
5 Defendants from exactly the type of Claims brought by Plaintiff here. For example, the
6 California Court of Appeals rejected claims against eBay that are remarkably similar to those
7 brought by Plaintiff here. *See, e.g., Gentry v. eBay Inc.*, 99 Cal App 4th 816, 831-35 (Cal Ct App
8 2002) (concluding that eBay was immune under Section 230 from claims based on the sale of
9 items on its website in purported violation of California state law). In *Gentry*, the plaintiffs
10 sought to hold eBay liable for the sale of fake autographed sports memorabilia on eBay's
11 website, in purported violation of California state law. 99 Cal App 4th at 821-22. The plaintiffs
12 alleged that eBay knew that fake autographed sports memorabilia was being sold on its website,
13 but eBay refused to prevent such sales over its website. *Id.* at 822. The California Court of
14 Appeals rejected the plaintiffs' claims, noting:

15 This claim seeks to hold eBay responsible for having notice of illegal activities
16 conducted by others on its web site, and for electing not to take action against
17 those third parties, including by withdrawing or somehow altering the content
18 placed by them. This is the classic kind of claim *Zeran* found to be preempted by
section 230, as one that seeks to hold eBay liable for its exercise of a publisher's
traditional editorial functions. Such claims have been uniformly rejected by the
courts that have considered them.

19 *Id.* at 835 (citing *Zeran*, 129 F3d at 330).

20 Further, Plaintiff's "aiding and abetting" allegations (i.e., that Defendants "aid and abet"
21 violations of PCC § 14A.50.060) mirror claims that were rejected by a California court in *Stoner*
22 *v. eBay Inc.*, No. 305660, 2000 WL 1705637 (Cal. Superior Nov. 1, 2000). In *Stoner*, the
23 plaintiffs sought to hold eBay liable for facilitating the sale of bootleg and other infringing sound
24 recordings on its website, allegedly in violation of California state law. *Id.* at *1.

25 The court rejected these "aiding and abetting" claims, finding that eBay's "provi[sion] of
26 an interactive computer service by which sellers of goods and services describe over the Internet

1 the products they wish to sell” was squarely within the safe harbor of Section 230. *Id.* at *2-*4.
2 Accordingly, the court rejected the plaintiff’s attempt “to hold eBay responsible for informing
3 prospective purchasers that illegal recordings may be purchased-information that originates with
4 the third party sellers who use the computer service.” *Id.* at *2-*3 (“Plaintiff’s attempt to impose
5 responsibility on eBay as the seller of items auctioned over its service is no different from the
6 unsuccessful attempts that have been made to hold computer service providers liable as
7 distributors rather than as publishers of defamatory or pornographic materials.”).

8 As the *Stoner* court observed, “[a] principal objective of the immunity provision is to
9 encourage commerce over the Internet by ensuring that interactive computer service providers
10 are not held responsible for how third parties use their services.” *Id.* Indeed, “Congress intended
11 to remove any legal obligation of interactive computer service providers to attempt to identify or
12 monitor the sale of such [illegal] products.” *Id.* Such immunity was granted, in large part,
13 because “if liability were imposed for the sale of unauthorized recordings in violation of the
14 Penal Code provisions relied on here . . . [t]he burden that such an obligation would place on a
15 service such as eBay likely would force it to cease, or at least significantly restrict, its operations.
16 If such an obligation is to be imposed, it is Congress that must be asked to re-evaluate the
17 immunity conferred by section 230.” *Id.* at *4.

18 Plaintiff’s attempt to hold Defendants liable for “aiding and abetting” the sale of tickets
19 in purported violation of PCC § 14A.50.060 is no different than the claims rejected by the courts
20 in *Gentry* and *Stoner*. Under Section 230, Defendants “are not held responsible for how third
21 parties use their services.” *Stoner*, 2000 WL 1705637, at *3. Accordingly, this court should
22 reject Plaintiff’s attempt to impose liability on Defendants for the purported illegal conduct of its
23 users over its website.

24 ///

25 ///

26 ///

1 **b. Holding Defendants Liable For the Conduct of Third-Party**
 2 **Sellers That Use Their Websites Would Directly Contravene**
 3 **Section 230's Goal of Fostering the Unregulated Development**
 4 **of E-Commerce Interests on the Internet.**

5 Congress enacted Section 230 to “encourage the unfettered and unregulated development
 6 of free speech on the Internet, and to promote the development of e-commerce.” *Batzel*, 333 F3d
 7 at 1027. In fact, Congress specifically stated in the “Findings” portion of Section 230(a) that
 8 “[t]he Internet and other interactive computer services have flourished, to the benefit of all
 9 Americans, with a minimum of government regulation.” 47 USC § 230(a)(4)-(5). Congress also
 10 stated that the policy underlying Section 230 was “to promote the continued development of the
 11 Internet and other interactive computer services and other interactive media,” and “to preserve
 12 the vibrant and competitive free market that presently exists for the Internet and other interactive
 13 computer services, unfettered by Federal or State regulation.” *Id.* at § 230(b)(1)-(2); *see also*
 14 *Barnes*, 2005 WL 3005602, at *2 (“The legislative history surrounding Congress’s creation of
 15 § 230 represented the desire to protect online intermediaries from liability for unlawful third-
 16 party content. Congress reasoned that any liability would threaten development of the online
 17 industry as a medium for new forms of mass communication. . . .”).

18 Applying Section 230 here promotes these goals. Plaintiff purports to represent a class
 19 that has sought to buy tickets to events at municipally owned venues in Portland. (Compl., ¶¶ 8,
 20 16). If Plaintiff prevails in her lawsuit, Defendants will be forced to scrutinize every ticket sale
 21 to events at municipally owned Portland venues to compare the amount that each ticket is sold
 22 for with the face value of the ticket to determine whether it violates PCC § 14A.50.060.⁸ Such a
 23 task would be cost prohibitive, undermining the expressed purpose in enacting Section 230. *See,*
 24 *e.g., Zeran*, 129 F3d at 331 (“The amount of information communicated via interactive computer

25 ⁸ Assuming Defendants were forced to engage in such screening efforts, the costs of doing so would be
 26 staggering. Defendants would likely be left with no choice but to pass those costs along to its users,
 resulting in higher costs to its users, and causing ticket buyers and sellers in every other city in the United
 States paying higher fees for Defendants’ services because of an individual Portland law. Congress
 enacted Section 230 specifically to avoid such a result.

1 services is . . . staggering. The specter of tort liability in an area of such prolific speech would
2 have an obvious chilling effect. . . . Faced with potential liability for each message republished
3 by their services, interactive computer service providers might choose to severely restrict the
4 number and type of messages posted.”).

5 In sum, Congress enacted Section 230 to prevent exactly the type of lawsuit Plaintiff
6 brings here, by “remov[ing] any legal obligation of interactive computer service providers to
7 attempt to identify or monitor the sale of [illegal] products.” *Stoner*, 2000 WL 1705637, at *3.

8 D. SUMMARY

9 Plaintiff’s claim is based on Defendants’ purported violation of PCC § 14A.50.060.
10 However, PCC § 14A.50.060 does not provide for a private right of action. Accordingly,
11 Plaintiff’s Complaint must be dismissed.

12 Additionally, even if Plaintiff could bring such a lawsuit, it is barred by Section 230,
13 which broadly immunizes website operators such as StubHub and eBay from liability for the
14 underlying illegal activity of its users through their respective websites. Defendants’ services are
15 just two of countless websites on the Internet that allow willing, third-party sellers to list items
16 for sale and interested third-party buyers to buy those items. As other courts have found, Section
17 230’s protection extends to such websites. A contrary finding would have severe consequences
18 for the millions of people who buy and sell items on the Internet, and undermine Congress’
19 expressed goal of fostering e-commerce through its enactment of Section 230.

20 Accordingly, for the foregoing reasons, it is respectfully submitted that the Plaintiff’s
21 Complaint be dismissed in its entirety.

22 **II. IN THE EVENT THIS CASE IS NOT DISMISSED, THIS COURT SHOULD** 23 **REQUIRE PLAINTIFF TO MAKE ITS ALLEGATIONS MORE DEFINITE AND** 24 **CERTAIN**

25 In the event this case is not dismissed, Plaintiff should submit a pleading that is more
26 definite and certain in the manner described below.

A claim for relief must contain “[a] plain and concise statement of the ultimate facts

1 constituting a claim for relief without unnecessary repetition.” ORCP 18A. If a pleading fails to
 2 specify the “precise nature of the charge,” a motion to make more definite and certain is
 3 appropriate. ORCP 21D.

4 Defendants are entitled to a more definite and certain pleading by Plaintiff. As described
 5 below, the complaint fails to provide the “precise nature” of the charges.

6 **A. Allegations Regarding Alleged Conduct Should be More Definite and**
 7 **Certain.**

8 In paragraphs 6, 11, and 12 of the complaint, Plaintiff makes various allegations
 9 regarding Defendants’ alleged offer of tickets for sale on Defendants’ websites:

10 Para 6: Plaintiff did notice that despite her inability to obtain premier tickets,
 11 defendant StubHub almost immediately offered for sale on its Web site
 12 numerous premier tickets to the Portland performance. Those tickets were
 13 offered at prices greatly exceeding the price at which the tickets were officially
 14 offered for sale through the official on-line ticket purchasing site. At or about
 15 the same time, defendant eBay had similar offerings. (Complaint ¶ 6)

16 Para. 11: Defendants intentionally are not maintaining, and at all relevant times
 17 have maintained, Web sites on which they offer for sale tickets to events at the
 18 Rose Garden at prices in excess of the retail price of the ticket. Defendants’
 19 conduct constitutes, at the least, the act of aiding and abetting a violation of the
 20 Code. (Complaint ¶ 11.)

21 Para 12: Plaintiff has suffered a special injury from defendants’ conduct
 22 (Complaint ¶ 12.)

23 Plaintiff’s complaint insufficiently describes Defendants’ alleged conduct. Allegations to
 24 the effect that Defendants “offered” tickets “for sale on [their] Web site[s]” are impermissibly
 25 vague in that they do not definitively specify whether Plaintiff alleges Defendants actually sold
 26 tickets themselves, or whether Defendants merely provided a marketplace for third parties to sell
 tickets. Presumably, it is the latter—but this distinction is a key aspect in this case, and in the
 event this case is not dismissed, it should be made more definite and certain. The context of the
 complaint provides sufficient information to suggest that Plaintiffs’ allegations are merely that
 Defendants’ objectionable conduct is providing a marketplace for sales by third parties. But if

1 Plaintiff argues otherwise, the complaint should so state. Plaintiff's allegations should not
2 merely *suggest* a certain set of facts; it should definitively articulate them.

3 **B. Plaintiff's Allegations of the Cause of Alleged Harm to Plaintiff Should be**
4 **Made More Definite and Certain.**

5 In paragraph 12, Plaintiff alleges injury as a result of Plaintiff's conduct:

6 Para 12: Plaintiff has suffered a special injury from defendants' conduct. She has
7 been unable to purchase premier tickets as a result of defendants' conduct and
8 will be unable to do so in the future if defendants are permitted to continue their
9 conduct alleged herein. (Complaint ¶ 12.)

10 Plaintiff's complaint provides no information as to how Defendants' alleged conduct
11 (offering tickets for sale) caused Plaintiff to be unable to purchase tickets. In other words,
12 Plaintiff has failed to allege ultimate facts related to causation.

13 **C. Plaintiff's Allegations of Alleged Tortious Interference with Prospective**
14 **Advantage Should be Made More Definite and Certain.**

15 The allegations regarding the claim of tortious interference with Plaintiff's prospective
16 advantage are found in paragraphs 13 and 28 of the Complaint:

17 Para 13: In addition, defendants have intentionally interfered with plaintiff's
18 prospective advantage. Plaintiff has a right to an equal ability to purchase premier
19 tickets for performances at the Rose Garden and other venues. Defendants'
20 maintenance of their Web sites directly and substantially facilitates the
21 deprivation of plaintiff's equal ability to purchase premier tickets. As a result,
22 plaintiff has suffered injury, and defendants have been unjustly enriched.
(Complaint ¶ 13.)

23 Para 28: Defendants have tortiously interfered with plaintiff's prospective
24 advantage and that of the members of the Class and will continue to do so unless
25 enjoined. (Complaint ¶ 28.)

26 As discussed above, *supra* at 7, a claim of tortious interference with economic relations
has six elements. But the complaint does not identify:

- the business relationship or prospective relationship that defendants' are alleged to have interfered with;

- who the “third person[s]” are that were allegedly induced not to enter into a business relationship;
- how defendants allegedly interfered with this relationship, or
- what damages “beyond the fact of the interference itself” Plaintiff allegedly suffered. *Willamette Dental*, 130 Or App at 498.

If Plaintiff’s tortious interference claim is not dismissed for the reasons discussed above, *supra*, it should be re-pled to include ultimate facts to support this claim.⁹

CONCLUSION

For the reasons discussed herein, Defendants request this Court to dismiss Plaintiff’s claims. In the event the Motion to Dismiss is denied, Defendants request this Court to order Plaintiff to make its allegations more definite and certain in the manner specified above.

DATED this 13th day of February, 2008.

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⁹ Plaintiff’s allegation of intent to seek damages “in an amount to be determined at trial,” Complaint ¶ 21, is also insufficient under ORCP 18B. However, because Plaintiff has represented that it intends to amend the complaint to seek damages, Defendants do not move against this allegation at this time.