

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

AMERIGAS PROPANE, L.P.,

Plaintiff,

v.

**OPINION CORP. d/b/a
PISSDCONSUMER.COM,**

Defendant.

**: CIVIL ACTION
: NO. 12 cv 00713 (RB)
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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED PURSUANT TO FED. R. CIV. P. 12(B)(6)**

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PRELIMINARY STATEMENT

Defendant Opinion Corp. is, as set forth in the Complaint, the corporate owner of an Internet website called PissedConsumer.com. That website is an indelicately but accurately named “gripe site” – a consumer forum that permits third parties to log on and post criticism or praise of businesses. Plaintiff AmeriGas Brands, LLC (“AmeriGas”) is a propane gas distributor – the nation’s largest – and certain unknown third parties have posted unflattering comments about AmeriGas on PissedConsumer.com. AmeriGas is not suing those parties. Instead, it is suing Opinion Corp., claiming trademark infringement, unfair competition and other related torts of competition. No legal basis exists for AmeriGas to do so, however.

There is no unfair competition here, because AmeriGas and PissedConsumer.com are not competitors. At root, AmeriGas has made out a claim for defamation, without using the word “defamation” or suing the alleged defamer. Instead, it has dressed its defamation claim up as a federal trademark lawsuit to avoid the sting of guaranteed dismissal under Section 230 of the Communications Decency Act (47 U.S.C. § 230), even while including state law claims which this Court has no discretion but to dismiss under that statute. AmeriGas has done this because it deems it easier to convince this Court to silence criticism of it under a spurious unfair competition theory than to address its critics on their merits, either on PissedConsumer.com or elsewhere.

AmeriGas’s complaint is premised on the negation of fundamental constitutional principles and controlling law regarding prior restraint of free speech. The Complaint has nothing at all to do with consumer confusion, the touchstone of a trademark infringement claim, in the use of AmeriGas’s trademark – its name – in descriptive content, descriptive titles or as part of PissedConsumer.com sub-domains. Nor should the Court place any stock in the kitchen-sink full of random torts of competition, under state and federal law, thrown into AmeriGas’s

pleading as ballast. AmeriGas’s attempt to use the law of tort as a proxy for censorship, and to both ignore and bypass an explicit federal statute meant to protect publishers of third-party criticism from tort claims, should be rejected.

STATEMENT OF FACTS AS ALLEGED IN COMPLAINT

AmeriGas is in the propane distribution business and owns a registration for its AMERIGAS trademark. (Compl. ¶10). Defendants, as alleged in the Complaint, own, operate and maintain the website PissedConsumer.com, which invites consumers, via extensive online and mobile marketing, to post public complaints from their personal computers and mobile phones. (Compl. ¶¶ 13-14) The complaint alleges as well that “Opinion Corp. has published numerous press releases claiming that it is an unbiased ‘premier consumer advocacy group’” that allows consumers to “make better choices” and provides consumers an “empowering” and “unbiased” view of companies and products. (Compl. ¶¶ 16-17). Moreover, according to the Complaint, Opinion Corp. “encourages” the posting of negative reviews at the PissedConsumer.com website, ensures that negative reviews are prominently displayed at PissedConsumer.com, and optimizes content of negative reviews to increase their visibility to search engines. (Compl. ¶ 20)

These allegations paint a picture of a conspicuously unpleasant, negative and nasty online environment for a trademark, a place where “pissed consumers” can expel their gall regarding the companies concerned. Yet the Complaint alleges that, despite this conspicuously unfriendly context, defendant’s use of AmeriGas’s name, including in a sub-domain labeled <http://AmeriGas.pissedconsumer.com/>, is likely to cause confusion among consumers as to whether AmeriGas is sponsoring, has authorized or is somehow affiliated with the services and products advertised by Opinion Corp. and other, similar – and equally preposterous – allegations of consumer confusion and deception. (Compl. ¶ 59)

The gravamen of AmeriGas's complaint is the "use" made by Opinion Corp. of AmeriGas's name, which is also a trademark, a word which is impossible not to use while describing AmeriGas. This trademark "use," ultimately, amounts to identifying – for consumers and Internet search engines alike – those web pages on which "pissed consumers" may upload or read complaints against the company, just as an index, title or label identifies the topic of a library stack, filing cabinet or book.

According to the Complaint, Opinion Corp. "makes no attempt to discern whether reviews are legitimate and which are false." (Compl. ¶ 23). It further alleges that "if the victims of the complaints pay PissedConsumer money, PissedConsumer will remove, recategorize, hide and filter existing and new complaints submitted by third parties for publication on its website. PissedConsumer offers to act as a 'gatekeeper' for these companies, ensuring that new negative complaints are not posted by consumers and existing negative complaints on its website are hidden, removed, or turned into positive testimonials." (Compl. ¶ 21.) This allegation is made solely upon information and belief. No examples are set forth in the Complaint of any negative review ever to have been removed or "turned into" a positive testimonial, nor of "new negative complaints" prevented from being published. Nor is it alleged that Opinion Corp. ever offered such a "deal with the devil" to AmeriGas.

Ironically, AmeriGas also complains that the PissedConsumer.com website accurately describes AmeriGas's products and services. (Compl. ¶ 32.) Its purported concern is that it does so while exposing consumers to advertisements from AmeriGas's competitors. (Compl. ¶ 33.) Despite the fact that there is no allegation that these advertisements themselves are misleading, AmeriGas insists that consumers will think, when they click on them, that even though they are clearly the websites of other propane distribution companies, a given competitor

of AmeriGas – propane Pepsi to AmeriGas’s propane Coca-Cola – is actually “a company affiliated with, endorsed by, sponsored by, or authorized by AmeriGas.” (Compl. ¶ 35.)

Next, AmeriGas complains that Opinion Corp. uses search engine optimization (SEO), a body of techniques to maximize the chance that a consumer searching for a topic on the Internet will find a given website in online search engine results. (Compl. ¶¶ 38-41.) AmeriGas describes what it ominously calls “black hat” SEO techniques used by Opinion Corp. which, it claims, are too effective at generating high search rankings for the Opinion Corp. website pages discussing AmeriGas. (Compl. ¶¶ 41-42).

Finally, AmeriGas describes its attempt to resolve its dispute with Opinion Corp. (Compl. ¶¶ 43-53.) Significantly, while AmeriGas does repeat its vague and unsourced allegations about defendant’s business, it does not allege – in what one would expect to be the climax of a narrative redolent with non-specific references to extortion and demands for money – that defendant ever told AmeriGas it would (a) “remove, recategorize, hide and filter existing and new complaints submitted by third parties for publication on its website,” (b) “act as a ‘gatekeeper’” for AmeriGas, or (c) “ensur[e] that new negative complaints are not posted by consumers and existing negative complaints on its website are hidden, removed, or turned into positive testimonials” – all of which it alleges were at the heart of defendant’s fundamental business model (Compl. ¶ 21.).

Upon information and belief, AmeriGas’s allegations about Opinion Corp. and PissedConsumer.com are nothing more than cut-and-paste phrases lifted from other lawsuits against Opinion Corp., none of which has been found meritorious – and particularly from an almost identical suit filed in the Eastern District of New York and described in an opinion denying the plaintiffs’ motion for a preliminary injunction. *Ascentive, LLC v. Opinion Corp.*, 10 CIV. 4433 ILG SMG, 2011 WL 6181452 (E.D.N.Y. Dec. 13, 2011). See pages 11-12, *infra*. In

that opinion Senior U.S. District Judge I. Leo Glasser found that the plaintiffs had failed to demonstrate a likelihood of success on the merits of their various claims, including claims that are essentially identical (in some cases, word-for-word) to those filed by AmeriGas.

LEGAL ARGUMENT

I. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

A. Motion To Dismiss Standard

The standard for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is well known. The court must accept all allegations in the complaint as true, view them in the light most favorable to the plaintiff, and determine whether a plaintiff “is entitled to offer evidence to support the claims.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n. 8 (2007). The Third Circuit has established a two-part analysis in deciding a motion to dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, a district court “must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions.” *Id.* at 210–11. Second, the Court must “determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a ‘plausible claim for relief.’” *Id.* at 211, *quoting Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The heightened pleading standards under *Twombly* and *Iqbal* “apply to all aspects of the Court’s threshold analysis of a complaint’s legal sufficiency.” *Walker v. Elliott*, 4:10-CV-467, 2010 WL 4916714 (M.D. Pa. Oct. 15, 2010). The Court, therefore, should apply the “plausibility” level of scrutiny “both when assessing the adequacy of the factual assertions set forth in the complaint, and when examining whether a complaint states a viable cause of action.” *Id.*

As demonstrated below, plaintiff cannot meet the standard for pleading a plausible cause of action for trademark infringement or unfair competition here, regardless of how styled. Nor

do its other claims meet the standard necessary to defeat a motion to dismiss under Fed. R. Civ.

P. 12(b)(6). The Complaint should be dismissed.

B. Plaintiff's Counts I, II, III, IV And VII, Sounding In Trademark Infringement And Unfair Competition, Fail To State A Claim For Which Relief Can Be Granted

The predominant “claim” in this action, though packaged differently in the Complaint’s various counts, is unfair competition, and specifically trademark infringement. Count I alleges trademark infringement, unfair competition and false designation of origin in violation of the Lanham Act, 15 U.S.C. § 1114 and 1125(a). Count II is a claim for common law trademark infringement, unfair competition, and false designation of origin which should be dismissed under 47 U.S.C. § 230 and which would also fail as a matter of law for the reasons explained in this section. Count III claims that defendant has violated section 43(c) of the Lanham Act, 15 U.S.C. § 1125, by causing dilution of AmeriGas’s supposedly famous trademark. Under Count IV, plaintiff claims that Opinion Corp. has violated the UTPCPL, also an unfair competition or anti-deception law and another state-law claim that must be dismissed under § 230.¹ Count VII makes the facially preposterous claim of trademark counterfeiting.

As demonstrated below, all these claims fail as a matter of law because they seek to bar permissible fair use of plaintiff’s trademark, are based on a patently implausible claim of a likelihood of confusion, and are premised on the dubious doctrine of “initial interest confusion” – a now-discredited concept never contemplated by the Lanham Act through which parties sought to penalize any unauthorized appearance of a trademark on the Internet and which required proof neither of a likelihood of confusion nor of any injury cognizable in law or equity.

¹ Counts V and VI, which are non-trademark-related state-law torts barred by Section 230 of the CDA, are addressed at pages 20-23 below.

1. Plaintiff Has Not Alleged The Use By Defendant Of AMERIGAS As A Trademark

As the District of New Jersey explained in *Cellco P'ship v. Commc'n Workers of Am.*, CIV.A.02-5542 (MLC), 2003 WL 25888375 (D.N.J. Dec. 11, 2003), claims such as those made by AmeriGas here cannot amount to a well-pled allegation of trademark infringement because the message complained of is merely critical speech utilizing a trademark to accurately describe the trademark owner's produce or service. It is not the offering of a competing good or service. In *Cellco*, referring to flyers that utilized the plaintiff's trademark – for all practical purposes, the name of the company, as here – distributed by a union during a labor dispute, the court wrote that not only was confusion unlikely. It held that such use did not even constitute “a use in commerce” of the trademark because “the slogan here is readily identifiable as being used within the pro-labor commentary against a company associated with it, Verizon, as part of the union's labor dispute with that same company.” *Id.* at *6. Talking about a company and referring to it by the trademark it uses is never trademark infringement.

Similarly, in *Howard Johnson Int'l, Inc. v. Vraj Brig, LLC*, CIV. 08-1466, 2010 WL 215381 (D.N.J. Jan. 14, 2010), *reconsideration denied*, CIV. 08-1466, 2010 WL 936294 (D.N.J. Mar. 8, 2010), Judge Thompson explained as follows:

The mere fact that confusion exists with respect to the affiliation between a protected mark and a defendant's goods or services is insufficient grounds to hold the defendant liable. Rather, the defendant must take some affirmative action to create or enhance the confusion in order to violate the Lanham Act.

Case law also supports the proposition that infringing use is only illegal if it is done in connection with the defendant's offer or provision of goods or services. In cases in multiple circuits, courts have held that individuals who use protected marks in the course of merely criticizing the trademark holders' goods or services do not violate the Lanham Act. *See Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 677-680 (9th Cir. 2005) (comparing and discussing cases). Courts have identified multiple reasons for holding that the Act does not apply in this situation, the most important of which for the case at bar is that such speech does not fall within the purview of the act because it bears no connection to the provision of goods or services. For example, in the *Bosley* case cited above, the Ninth Circuit held that a person who created a website,

“www.BosleyMedical.com,” and used the website to post criticism of the Bosley Medical Institute did not violate the Lanham Act. *Id.* The appeals court reasoned that the Act did not apply to persons who use protected marks without any intent to compete with the mark’s owner or free ride on the goodwill associated with the mark. *Id.* As the court explained, “[T]rademark infringement protects only against mistaken **purchasing decisions** and not against confusion generally.” *Id.* at 677 (emphasis in original) (citing *Lang v. Ret. Living Publ’g Co., Inc.*, 949 F.2d 576, 582-83 (2d Cir.1991)). . . .

In sum, the Lanham Act only prohibits the affirmative use of a protected mark, and only when that use is in connection with the defendant’s offer or provision of goods or services.

Id. at *6-*7. This language, including the example from *Bosley* involving the integration of a trademark into a domain name for a critical website – even one which, unlike that alleged here, does not include clear signals (such as “Pissed Consumer”) of non-affiliation – applies precisely to the allegations here. The facts alleged here simply do not amount to a valid claim for trademark infringement, regardless of how styled, and all the trademark- and unfair-competition–related claims should be dismissed on this ground alone.

2. This Case Involves Nominative Fair Use; Because The Parties Are Not Competitors, Likelihood Of Confusion Is Analyzed Under A Modified Test Focusing On Pricing, Actual Confusion And Intent

A related but slightly different ground for dismissal is that even if the Complaint here could be said to make out a prima facie trademark claim – and it cannot – plaintiff has failed to state a claim for which relief can be granted because the defense of nominative fair use is obvious from the facts alleged. Fair use is established where, as here, a trademark is used as “a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party.” 15 U.S.C. § 1115(b)(4).

Where, as here, it is obvious from the Complaint that the two companies here are not competitors, the messages complained of constitute nominative fair use – the simple description by one company of another’s company’s goods or services utilizing the trademark owner’s own name for those goods or services. In such cases, the usual analysis for likelihood of confusion

under *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir.1983) is not employed. “In the context of a nominative use of a mark . . . certain *Lapp* factors are either unworkable or not suited or helpful as indicators of confusion in this context. That is because, by definition, nominative use involves the use of **another's** trademark in order to describe the trademark owner's **own** product.” *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 224 (3rd Cir. 2005) (emphasis in original).

In *Century 21*, the Third Circuit taught that, in nominative fair use cases, the following four factors are the main ones for a District Court to consider when analyzing a likelihood of confusion claim: “(1) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase; (2) the length of time the defendant has used the mark without evidence of actual confusion; (3) the intent of the defendant in adopting the mark; and (4) the evidence of actual confusion.” *Id.* at 225-26. “Since the burden of proving likelihood of confusion rests with the plaintiff, and the fair use defendant has no free-standing need to show confusion unlikely, it follows . . . that some possibility of consumer confusion must be compatible with fair use, and so it is.” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111,121-22 (2004). As demonstrated in the following section, the Complaint does not plausibly meet that standard.

3. The Complaint Does Not Allege A Plausible Claim Of A Likelihood Of Confusion

A likelihood of confusion is the *sine qua non* of trademark infringement and unfair competition. Applying the *Century 21* factors for likelihood of confusion in a nominative fair use case, here there is no allegation in the Complaint concerning “the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase.” The burden of properly pleading its case being on plaintiff, this is at best a neutral factor and arguably one that favors defendant. Regarding “the intent of the defendant in

adopting the mark,” the Complaint does contain – on information and belief – allegations of intent that are not only conclusory but also vague and generalized. However, with respect to any interaction or intention concerning the defendant and this actual plaintiff, however, there is no plausible or specific allegation of fact bearing on wrongful intent by the defendant, which indeed has never “adopted” the mark at all, merely used it to describe plaintiff and its business.

Moreover, the fourth and second *Century 21* factors, “the evidence of actual confusion” and “the length of time the defendant has used the mark without evidence of actual confusion” also favor defendant here, because (a) there is no allegation whatsoever of actual confusion, and (b) the Complaint alleges that defendant made attempts to contact defendant prior to January 2011 (Compl. ¶ 46) – meaning that the alleged use by defendant of plaintiff’s AmeriGas trademark has gone on for over a year, and even “upon information and belief,” no one has actually been confused.

This is hardly surprising. As the District of New Jersey noted in *Cellco P’ship v. Commc’n Workers of Am.*, *supra*, claims such as those made by AmeriGas here cannot amount to a well-pleaded allegation of a likelihood of confusion because it would be obvious to any prospective customer that the trademark use could not be originating with or approved by the claimant. *Id.* at *6. See page 7, *supra*.

Judge Glasser’s opinion denying a preliminary injunction in the case brought against this same defendant by Ascentive, LLC is also highly instructive. In that decision, the court meticulously walked through the respective claims, including most of those found in this Complaint, and found – even after the granting of expedited discovery to the two plaintiffs (a second case was consolidated with the *Ascentive* action) and two evidentiary hearings – that the pleadings and submissions had failed to establish a likelihood of success on the merits on a single one. As to the trademark claims, the court noted the implausibility of a confusion claim

based on facts identical to those alleged by AmeriGas, applying the full panoply of “likelihood of confusion” factors set out in *Polaroid Corp. v. Polarad Elec. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961), which provides the relevant Second Circuit standards – which are in essence the same as our Circuit’s *Lapp* factors²:

Plaintiffs claim that PissedConsumer's use of their trademarks in PissedConsumer's subdomains (e.g., <http://ascentive.pissedconsumer.com>), metadata (also referred to as metatags), and in the text of its website, in connection with advertising for plaintiffs' competitors' products and services allows PissedConsumer to profit from consumer confusion in violation of the Lanham Act. Plaintiffs contend, moreover, that the doctrine of “initial interest confusion” applies here . . .

While the factors of the strength of plaintiffs' marks and the degree of similarity between the marks weigh in favor of plaintiffs, a number of the other *Polaroid* factors weigh heavily against them. As an initial matter, there is no “competitive proximity” between the parties' goods and services. This factor “concerns whether and to what extent the two products [or services] compete with each other.” There is no such competition here. Ascentive and [co-plaintiff] Dormia are in the business of selling software and sleep products, respectively; PissedConsumer is in the business of selling its RMS program to businesses and collecting revenue from its advertisers. “When the two users of a mark are operating in completely different areas of commerce, consumers are less likely to assume that their similarly branded products come from the same source.” “[O]rdinarily, little confusion will result when the junior use [of a similar mark] is in an area of commerce that is outside the senior owner's area.” Nor is there a likelihood of “bridging the gap,” a factor closely related to competitive proximity. This factor refers to the interest of the senior users—here, plaintiffs—in preserving avenues of expansion and entering into related fields. Plaintiffs do not contend that they seek to enter PissedConsumer's field. Next, plaintiffs have provided the Court with no evidence of actual confusion in the form of, for example, consumer surveys or an expert report even though they have had ample time to do so. While “actual confusion need not be shown to prevail,” evidence of actual confusion is “highly probative” of the likelihood of confusion.

² The respective Circuits’ standards are, in essence, materially the same. *Bell Pub. Corp. v. Bantam Doubleday Dell Pub. Group, Inc.*, CIV. A. 89-1000, 1990 WL 55102 (E.D. Pa. Apr. 26, 1990) *aff’d sub nom.*, *Bell Pub. Corp. v. Bantam Doubleday Dell Pub. Group Inc.*, 932 F.2d 958 (3d Cir. 1991) and *aff’d sub nom.*, *Bantam Doubleday Dell Pub. Group Inc. v. Kable News Co., Inc.*, 932 F.2d 958 (3d Cir. 1991); citing *Polaroid*. While the rule of *Century 21* reduced the requirement that courts in the Third Circuit exhaustively “check off” the *Lapp* factors in nominative fair use cases, *see supra*, the Second Circuit has no such rule. The outcome, however, of applying the traditional tests should be the same or, if anything, more favorable to a plaintiff.

The factor of bad faith also weighs against plaintiffs. In the trademark context, “[b]ad faith generally refers to an attempt by a junior user of a mark to exploit the good will and reputation of a senior user by adopting the mark with the intent to sow confusion between the two companies' products.” . . . While it may be true that PissedConsumer has engaged in sharp-elbowed and perhaps unethical SEO tactics meant to make its webpages appear more relevant to search engines such as Google or Yahoo! than they actually are, that fact has no bearing on the inquiry here—whether PissedConsumer has attempted to sow confusion as to the source, origin, or affiliation of its products and services with those of plaintiffs. . . .

Where, as here, the domain name of a website itself—Ascentive.PissedConsumer.com or Domia.PissedConsumer.com—makes clear that it is not affiliated with trademarks the domain name incorporates and indeed is critical of the companies that own the marks, the use of the marks does not present a likelihood of confusion. . . . Like the word “sucks,” the word “pissed” has entered the vernacular as a word instinct with criticism and negativity. Thus, no reasonable visitor to Ascentive.PissedConsumer.com or Dormia.PissedConsumer.com would assume the sites to be affiliated with Ascentive or Classic respectively, and PissedConsumer's use of plaintiffs' marks in the various domain names at issue is not likely to cause confusion as to source.

This same conclusion holds true for PissedConsumer's use of the plaintiffs' marks in the content of the PissedConsumer site itself. . .

There is little likelihood that a potential consumer visiting PissedConsumer would be confused about whether it was the source of plaintiffs' goods or whether Ascentive or Classic sponsored or otherwise approved of PissedConsumer's use of their marks. Indeed, the domain names here . . . bespeak negativity concerning plaintiffs' products. So too does PissedConsumer's logo—a frowning red cartoon face with a furrowed brow and a speech bubble containing characters in place of an expletive—and PissedConsumer's tagline: “TELL THE WORLD. BE HEARD.” The comments posted on the site are also decidedly negative. . . . **It strains credulity that an Internet user would believe that plaintiffs would sponsor or otherwise approve of a site that contains such criticisms.** Instead, after a brief inspection of the content of PissedConsumer's website, the user would realize that they were visiting a third-party gripe site for “pissed” consumers.

Ascentive, LLC v. Opinion Corp., 10 CIV. 4433 ILG SMG, 2011 WL 6181452 (E.D.N.Y. Dec. 13, 2011) at *6-*7 (emphasis added; citations omitted). *See also, Bihari v. Gross*, 199 F.Supp.2d 309 (S.D.N.Y. 2000) (“where at most goal of a ‘junior user’s’ alleged adoption of a trademark is to injure the ‘senior user,’ the likelihood of confusion is minimal, because the public is trusted to have common sense”); *Girls Scouts v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228, 1231 (S.D.N.Y. 1969) (“rational analysis” precluded confusion about whether the Girl Scouts were the

source of a poster depicting a pregnant girl in the well-known uniform of the Girl Scouts appearing with the caveat “BE PREPARED”); *Stop the Olympic Prison v. United States Olympic Committee*, 489 F. Supp. 1112, 1123 (S.D.N.Y.1980) (“fleeting glance” that could cause momentary confusion not actionable; “nobody could conceivably retain such a misconception long enough to do any harm”); *Taylor Bldg. Corp. of Am. v. Benfield*, 507 F. Supp. 2d 832 (S.D. Ohio 2007) (because of grossly negative expressions used near trademark on website, “reasonable minds could come to but one conclusion on this issue: that there is no likelihood of confusion”); *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (“domain name is a type of public expression, no different in scope than a billboard or a pulpit”).

For the foregoing reasons, defendant submits that there exists no likelihood of confusion caused by the use of plaintiff’s mark in the instant case, including its use in domain names.

4. The “Initial Interest Confusion” Doctrine, Even If Still Viable Under The Law, Is Entirely Inapplicable Here

The “initial interest confusion” doctrine is a dubious concept under which the Lanham Act supposedly “forbids a competitor from luring potential customers away from a producer by initially passing off its goods as those of the producer’s, even if confusion as to the source of the goods is dispelled by the time any sales are consummated.” *Lamparello v. Falwell*, 420 F.3d 309, 315-16 (4th Cir. 2005) (internal quotations omitted). Under initial interest confusion, traditional tort concepts of harm, or even likelihood of harm, were replaced with virtually *per se* strict liability for use of a trademark on the Internet without permission. After first being rationalized in *Brookfield Communications, Inc. v. West Coast Entmt. Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999), which utilized the analogy of a misleading highway sign that imposes harm by causing consumers to “get off at the wrong exit,” the doctrine of “initial interest” has lost support in the courts. Developed in a traditional sales context, it was meant to be applied only where “a potential purchaser is initially confused [such that] the [senior seller] may be **precluded from**

further consideration.” *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546 (Fed. Cir. 1990) (emphasis added). In other words, it only matters once the user is “off the highway.”

This Court has questioned the application of this concept to the Internet, analyzing the issue as follows in *Strick Corp. v. Strickland*, 162 F. Supp. 2d 372 (E.D. Pa. 2001):

In essence, Plaintiff's arguments of likelihood of consumer confusion boil down to what has become known as “initial interest confusion.” *Chatam[Int’l, Inc. v. Bodum, Inc.*, 157 F. Supp. 2d 549, [557-58] (E.D. Pa. 2001) *aff’d sub nom. Chatam Int’l Inc. v. Bodum, Inc.*, 40 F. App’x 685 (3d Cir. 2002)] (recognizing that “[i]nitial interest confusion ... is the gravamen of this case and of the broader problems presented by the exclusivity of domain names”). However, as *Chatam* observed, “initial interest confusion is of greatest concern when products are in competition with each other.” *Id.* at 558 (citation omitted). “Where companies are non-competitors, initial interest confusion does not have the same consequence.” *Id.* (citation and internal quotations omitted). In this case, any initial confusion that arises from Defendant's use of his strick.com domain site, specifically, “that consumers will realize they are at the wrong site and go to an Internet search engine to find the right one-is not substantial enough to be legally significant.” *Id.* at 558-59 (citing *Hasbro Inc.*, 66 F.Supp.2d at 125). **It is clear that “Internet surfers are inured to the false starts and excursions awaiting them” and are “unlikely to be dissuaded, or unnerved” when, after “tak[ing] a stab at what they think is the most likely domain name for a particular web site” guess wrong and bring up another's webpage.** *Id.* at 559 n. 17 (citing *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 104 F.Supp.2d 427, 462 (D.N.J. 2000) & *The Network Network v. CBS, Inc.*, 54 U.S.P.Q.2d 1150, 1155 (C.D. Cal.2000)). The Court agrees with the reasoning of the district court in *Chatam*, and finds that any confusion that a consumer may have when reaching Defendant's web page rather than Plaintiff's site is **not legally cognizable**.

162 F. Supp. 2d at 377 (emphasis added). Further, the Court recognized in *Tillery v. Leonard & Sciolla, LLP*, 437 F. Supp. 2d 312 (E.D. Pa. 2006), a case in which, unlike here, the plaintiff and defendant were in direct competition, that the “direct competition question” is highly relevant to whether the initial interest confusion doctrine is applicable:

A The Third Circuit Court of Appeals has not decided whether initial interest confusion may be caused by a confusing domain name. . . . Two courts in this District have held that initial interest confusion is less likely to be significant in the context of domain names, because “Internet surfers are inured to the false starts and excursions awaiting them” and will not be dissuaded from simply doing a new search if they initially arrive at the wrong web site. *Chatam Intl., Inc. v. Bodum, Inc.*, 157 F.Supp.2d 549, 559 (E.D. Pa.2001); accord, *Strick Corp.*, 162

F.Supp.2d at 377. **These cases are only somewhat persuasive because the products involved there were not in direct competition.**

437 F. Supp. 2d at 326. Here, of course, the products or services involved are also not in direct competition. See also *Bihari, supra*, 199 F.Supp.2d at 320, n. 15. (“The harm caused by a misleading billboard on the highway is difficult to correct. In contrast, on the information superhighway, resuming one’s search for the correct website is relatively simple.”)

In sum, because there can be neither “initial interest confusion” nor any subsequent confusion between plaintiff’s alleged marks and defendants’ services which are limited to publishing reviews, plaintiff has failed to state a claim for trademark infringement on this ground as well.

5. Plaintiff Has Failed Adequately To Plead A Claim For Secondary Trademark Liability

Plaintiff bases its claims both on the subdomains utilized by defendants and on content, including advertisements and consumer reviews, found on the PissedConsumer.com website in juxtaposition with the trademark. It is as if the owner of a billboard were being charged with infringement committed by an advertiser that rented the space and used it to infringe on a competitor’s trademark – a claim which, as demonstrated below, would never lie absent proof that the billboard owner controlled the content of the advertising. This is the standard for **secondary** trademark liability, though plaintiff has failed to plead them as such. AmeriGas does not, however, suggest (nor is there any basis for doing so) that the consumer reviews on defendant’s site or the allegedly competing third-party websites to which consumers are “diverted” are controlled by defendant. As demonstrated below, even assuming that AmeriGas had a cognizable trademark eligible for protection here, that claim can be no better than an action for secondary trademark infringement liability, which here would fail as a matter of law.

Claims for direct and contributory trademark infringement are legally and factual distinct. See *Steinway, Inc. v. Ashley*, 01 CIV 9703 GEL, 2002 WL 122929 (S.D.N.Y. Jan. 29, 2002)

citing *Inwood Labs., Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 853-54 (1982); *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 64 (2d Cir. 1992). Contributory trademark infringement requires the satisfaction of separate elements in determining liability, namely, that “a defendant either **intentionally induces** a third party to infringe the plaintiff’s mark or supplies a product to a third party with actual or constructive knowledge that the product is being used to infringe that mark.” *Id.* (emphasis added). To find contributory infringement on an Internet website, a plaintiff must prove both that the defendant directly controlled and monitored the activities of the infringing website, and that the defendant had actual or constructive knowledge of the infringement. *Fare Deals, Ltd. v. World Choice Travel.com, Inc.*, 180 F.Supp.2d 678 (D. Md. 2001). Neither element is alleged here.

Moreover, there can be no secondary liability for trademark infringement without at least an allegation of direct trademark infringement by someone. See, *Sony Computer Entertainment America, Inc. v. GameMasters*, 87 F.Supp.2d 976, 986 (N.D. Cal. 1999) (motion for a preliminary injunction based on contributory infringement denied where plaintiff brought “scant evidence and allegations” of direct trademark infringement); *Lockheed Martin Corp. v. Network Solutions, Inc.* 985 F.Supp.949, 964-965 (C.D. Cal. 1997) (“Contributory infringement doctrine has always treated uncertainty of infringement as relevant to the question of an alleged contributory infringer’s knowledge[]”), *aff’d*, 194 F.3d 980 (9th Cir. 1999). Since AmeriGas has alleged no set of facts in its complaint sounding in contributory trademark infringement, including any allegation of trademark infringement by the parties posting reviews or operating the third-party websites to which consumers are allegedly “diverted” via the PissedConsumer.com website, this alone merits dismissal of its claims sounding in “diversion” or based on consumer reviews “associated” with the trademark.

Further, separate and apart from 47 U.S.C. § 230, website owners are not liable for merely providing a platform for alleged trademark infringements arising from links to third-party websites. Rather, in a claim for contributory infringement, the focus is always on whether the defendant has direct control and monitoring of the instrumentality used by the third party that is allegedly infringing the plaintiff's mark. Here plaintiff has not alleged that the content of the ads or reviews on the PissedConsumer website are controlled or even materially affected by any action by defendant. It only suggests, by inference, that some reviews which perhaps do not appear may have been affected by defendant's actions. (Compl. ¶¶ 20-21.) But the law does not impose contributory liability on a defendant for actions by third parties even when a defendant has had some effect on the **process** that results in infringement, including merely publishing the purportedly infringing advertisements. This includes plaintiff's ponderous allegations regarding "improper" and "black hat" (but not unlawful) techniques for search engine optimization. "[T]he mere existence of a tool that assists advertisers in optimizing their advertisements does not, in itself, indicate intent to induce infringement." *Rosetta Stone Ltd. v. Google, Inc.*, 730 F.Supp.2d 531, 547-48 (E.D. Va. 2010). It does not matter how much "encouragement" or facilitation defendants engage in as long as there is no control. Thus, in *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010), the court explained:

Defendant does not provide the content of the "Sponsored Link" advertisements. It provides a space and a service and thereafter charges for its service. By suggesting keywords to competing advertisers Defendant merely helps third parties to refine their content. This is tantamount to the editorial process protected by the CDA. Defendant's keyword suggestion tool hardly amounts to the participation necessary to disqualify it of CDA immunity. Rather it is a "neutral tool," that does nothing more than provide options that advertisers could adopt or reject at their discretion, thus entitling the operator to immunity.

Moreover, AmeriGas does not even claim trademark infringement by the third party authors of critical reviews themselves, nor by the third-party websites to which consumers are allegedly "diverted" by the advertisements on the PissedConsumer.com website. As a matter of

law, absent a *prima facie* trademark infringement claim against such third parties, no claim for contributory liability against defendants can lie.³ The Eastern District of New York, considering these exact trademark claims last year, agreed with defendant’s analysis on this point⁴:

Plaintiffs also contend that PissedConsumer has infringed their marks by displaying banner and pop-up advertisements through the Chitika advertising network that contain plaintiffs' marks in the text of the advertisements themselves. PissedConsumer responds that plaintiffs' claims “are based on advertisements by third parties that in turn link to services that compete with Ascentive's” and that at best any claim against PissedConsumer can only sound in contributory infringement, a legal theory not sufficiently alleged in plaintiffs' complaints. The Court agrees.

The parties dispute precisely how Chitika functions but do not dispute that it is Chitika—not PissedConsumer—that ultimately places the advertising containing plaintiffs' marks on PissedConsumer's site and thus would be responsible for any direct infringement of plaintiffs' marks. . . . The implication . . . is that any direct infringement of plaintiffs' trademarks would be the result of Chitika's actions, not those of PissedConsumer, and that PissedConsumer could only be held liable, if at all, for its actions based on a theory of contributory trademark infringement. . . .

District courts applying *Inwood [Labs., Inc. v. Ives Labs., Inc.]*, 456 U.S. 844, 854 (1982)] in the context of service providers have concluded that the key inquiry is “ ‘the extent of control exercised by the defendant [service provider] over the third party's means of infringement’ “ *Nomination Di Antonio E Paolo Gensini S.N.C. v. H.E.R. Accessories Ltd.*, No. 07 Civ. 6959(DAB), 2010 WL 4968072, at *3 (S.D.N.Y. Dec. 6, 2010) (citations omitted); *accord Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.Supp.2d 463, 505 (S.D.N.Y. 2008), *rev'd on other grounds*, 600 F.3d 114; *Gucci Am., Inc. v. Frontline Processing Corp.*, 721 F.Supp.2d 228, 247–48 (S.D.N.Y. 2010).

Put simply, plaintiffs are unlikely to succeed on any contributory infringement claim against PissedConsumer because they do not sufficiently allege, let alone make, such a claim in their complaints. . . .

Plaintiffs' complaints contain allegations regarding third-party advertisements on PissedConsumer's website. . . .

³ Neither can AmeriGas proceed on a theory of vicarious infringement absent an allegation of an agency relationship or a similar level of control by defendants. “Absent an agency relationship, vicarious liability can only be imposed if the defendant and infringer ‘exercise joint ownership or control over the infringing product.’” *Id.* at 549 (E.D. Va. 2010), citing *Perfect 10, Inc. v. Visa Int’l Serv. Assoc.*, 494 F.3d 788, 807 (9th Cir. 2007). See *Designer Skin, LLC v. S & L Vitamins, Inc.*, 560 F. Supp. 2d 811, 826 (D. Ariz. 2008) (failure to make out agency claim as basis for secondary trademark liability).

⁴ The *Ascentive* opinion refers to a specific advertising network that was identified in the proceedings in that case called “Chitika,” but the analysis is entirely consonant with the allegations before the Court in this case, which, referring to the network advertising seen on the PissedConsumer site, assume that they are part of Google’s advertising program. (Compl. ¶¶ 33-36.)

But the complaints contain no allegations, as they must, that pertain to “the extent of control exercised by [PissedConsumer] over the third party's means of infringement” or that PissedConsumer was aware of “specific instances of actual infringement” and continued to supply its service after it knew or should have known that it was being used to infringe plaintiffs' marks. *H.E.R. Accessories Ltd.*, 2010 WL 4968072, at *5–6 (motion to dismiss contributory trademark infringement claim granted where plaintiffs failed to sufficiently allege defendant service provider had knowledge of third-party infringement). Nor do the complaints contain any allegations regarding PissedConsumer's inducement of advertisers such as Chitika to infringe plaintiffs' marks. Indeed, plaintiffs' complaints contain no allegations regarding Chitika or its operation at all. **Because plaintiffs have not alleged a claim of contributory trademark infringement sufficient to withstand a motion to dismiss, plaintiffs are unlikely to succeed on this claim.**

In sum, for all of these reasons, plaintiffs are unlikely to succeed on the merits of their Lanham Act claims. Nor have they demonstrated sufficiently serious questions going to the merits to make them a fair ground for litigation. Additionally . . . their state law claims for trademark infringement, unfair competition, and false designation of origin are also unlikely to succeed or be a fair ground for litigation.

Ascentive, LLC v. Opinion Corp., 2011 WL 6181452 at *14- *16 (emphasis added; internal citations omitted).

For these purposes the only difference between the *Ascentive* case and this one is that *Ascentive* applied New York law with respect to the standards for the respective trademark and unfair competition claims – but here, applying Pennsylvania law, the outcome would be the same. *See Louis Vuitton Malletier & Oakley, Inc. v. Veit*, 211 F. Supp. 2d 567, 582 (E.D. Pa. 2002) (common law cause of action for unfair competition in Pennsylvania mirrors the Lanham Act's section 43(a) cause of action for unfair competition; standard for establishing trademark dilution under Pennsylvania law is the same as under federal law). Here, too, the Court should find that the Complaint fails to claim a valid cause of action on any of the claims sounding in trademark infringement or unfair competition.

C. Plaintiff's State Law Claims, Counts IV, V And VI, Should Be Dismissed Pursuant To Section 230 Of The Communications Decency Act

Section 230 of the CDA (47 U.S.C. § 230) prohibits the imposition of liability under state law on any user or provider of “interactive computer service” for publishing content provided by another. It provides, in pertinent part, that “[n]o 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,” *id.* § 230(c)(1), and that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section,” *id.* § 230(e)(3).

Sites such as PissedConsumer.com fall squarely within the protection of the statute. “[W]hether information disseminated through a website results in a tortious act has no effect on immunity under the CDA.” *Inman v. Technicolor USA, Inc.*, CIV.A. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011). As this Court explained in *Parker v. Google*, 422 F.Supp.2d. 492 (E.D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007), it applies to all state law claims, however styled, so long as the act complained of is the publication of third party content:

In Counts IV, V, and VI, Plaintiff alleges that [Defendant] is liable for the torts of defamation, invasion of privacy, and negligence. Without examining the specific elements of each of these claims, we note that each claim revolves around the tortious acts of a third party for which [Plaintiff] holds [Defendant] accountable We agree with Defendant that Google is immune from such state tort claims under § 230 of the CDA. Section 230 provides that: “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.” 47 U.S.C. § 230(c)(1). In addition, the statute provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3). The intent of this provision is to “‘preclude[] courts from entertaining claims that would place a computer service provider in a publisher's role.’ ” *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir.2 003) (*quoting Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). Through § 230, “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. As a result, Internet publishers are treated differently from corresponding publishers in print, television and radio.” *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

Parker v. Google, Inc., 422 F.Supp.2d at 500-01. Section 230 is fully applicable here, and provides complete and adequate grounds for dismissal of AmeriGas’s claims for contractual interference and unjust enrichment (Claims V and VI) as well as the Pennsylvania analogs to the respective unfair competition causes of action. See, *Jurin v. Google Inc.*, *supra*, 695 F. Supp. at 1123 (dismissing claims for tortious interference and unjust enrichment due to bar of § 230); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 452-53 (E.D.N.Y. 2004) (dismissing, under Fed. R. Civ. P. 12(b)(6) and § 230, tortious interference claim based on defendant’s publication of third-party content on website).

The statute defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” 47 U.S.C. § 230(f)(2). PissedConsumer.com is an “interactive computer service” and qualifies for Section 230 immunity because, (1) it is an internet search engine within the meaning of the statute that allows members of the public to search its directory of webpages and is therefore an “information service ... that provides or enables computer access by multiple users to a computer server”; and (2) the claims against it assert that it is liable for publishing “content” originated by others. For this reason, in *Ascentive*, Judge Glasser had no difficulty finding that PissedConsumer.com was an interactive computer service protected by the statute, and not a non-qualifying “information content provider”:

Ascentive . . . alleges that Pissed Consumer “encourages and creates the most negative postings it can” on its site. Such actions, Ascentive contends, constitute the creation of editorial content by PissedConsumer barring immunity under Section 230(c)(1).

While it is true that “Section 230(c) immunity is not so broad as to extend to an interactive computer service that ... takes an active role in creating or developing the content at issue,” [*MCW, Inc. v.]Badbusinessbureau.com[, L.L.C.*, CIV.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004)] at *8, plaintiffs have [not] even sufficiently alleged that PissedConsumer played such a

role. Asserting or implying the mere possibility that PissedConsumer did so is insufficient to overcome the immunity granted by the CDA. *See, e.g., [Nemet Chevrolet, Ltd. v.]Consumeraffairs.com, Inc., 591 F.3d 250, 259 (4th Cir. 2009) (upholding CDA immunity because “[t]here is nothing but [plaintiff’s] speculation which pleads Consumeraffairs.com’s role as an actual author in the Fabrication Paragraph”); [Levitt v.] Yelp, 2011 WL 5079526 [(N.D. Cal. October 26, 2011)], at *9 (motion to dismiss claims against consumer review site granted where claim that site “created negative reviews” was not supported by factual allegations in the complaint and claim that site “manipulated third party reviews to pressure businesses to advertise” was barred by Section 230 of the CDA).*

Ascentive, LLC v. Opinion Corp., 2011 WL 6181452 at *19 (internal citations omitted). The flat rejection by *Ascentive* and *Nemet Chevrolet* in the excerpt above of the notion that mere speculation that a defendant created the content in question should deprive it of Section 230 protection, is a critical one. Without it, every complaint would survive Rule 12(b)(6) attack merely by including such speculation “on information and belief.”

The *Ascentive* court also rejected the suggestion that PissedConsumer.com became a content provider without Section 230 protection, by “(1) encouraging negative complaints; (2) inviting consumers to post public complaints on its website; (3) displaying those negative postings as prominently as possible absent participation in its RMS; and (4) increasing the prominence of PissedConsumer webpages by various allegedly improper means, including by using plaintiffs’ marks.” *Id.* at *20. As the court explained:

Here, PissedConsumer does invite third-party content providers to submit negative reviews; however, its actions are not unlike the targeted solicitation of editorial material engaged in by a narrow genre of publishers . . . Indeed, there is simply “no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site....

Although there may be circumstances where modification of the display of content on a website constitutes the “development” of information, this did not occur here. The fact that the defendants invite postings and then in certain circumstances alter the way those postings are displayed is not the “development” of information for Section 230 purposes. . . . The same is true with respect to PissedConsumer’s SEO tactics and its use of plaintiffs’ marks to make PissedConsumer’s pages appear higher in search engine results list; these actions too do not render PissedConsumer an information content provider. . . . The Court

thus has no basis on which to find that PissedConsumer is an “information content provider” ineligible for immunity under the CDA.

For all of the foregoing reasons, Ascentive is unlikely to succeed on its claims for violations of Pennsylvania's unfair trade practices and consumer protection law, and both Ascentive and Classic are unlikely to succeed on their state law claims for interference with contractual and prospective contractual relations and unjust enrichment. Likewise, for the same reasons, plaintiffs have failed to establish sufficiently serious questions going to the merits of these claims to make them a fair ground for litigation

Ascentive, LLC v. Opinion Corp., 2011 WL 6181452 at *21 (internal citations omitted).

As demonstrated above, because of the mandate of 47 U.S.C. § 230,⁵ there are no grounds whatsoever on which the plaintiff's state law claims – *i.e.*, Counts IV, V and VI – can survive this motion to dismiss.

⁵ Defendant does not intend to waive argument regarding dismissal of those claims on their respective merits, which would be eminently appropriate; they are all inadequate attempts to charge defendants with the supposed defamation liability of unnamed third parties and moreover to avoid the “complete” defamation defense of the truth of the matter asserted. In the interest of some semblance of brevity, and in light of the entirely dispositive nature of the Section 230 defense, defendants do not include extended analysis of these points in this submission, but do make the following observations:

Regarding the claim for interference with prospective economic advantage (Count V), the elements are “(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct.” *Rantnetwork, Inc. v. Underwood*, 4:11-CV-1283, 2012 WL 1021326 (M.D. Pa. Mar. 26, 2012). Besides no meaningful allegation of damage, there is no allegation here of an identifiable prospective economic opportunity nor of any intent by defendant to prevent that relation from occurring – “merely a statement devoid of any averment of fact, a legal conclusion . . .” that fails to meet the standard of Rule 12(b)(6). *Id.* at *15. The standard for pleading a claim for interference with an existence contract is even more exacting, requiring the allegation of all the same elements as well as the existing of the specific contract interfered with – all absent here. See, *Foster v. UPMC S. Side Hosp.*, 2010 PA Super 143 (Pa. Super. Ct. Aug. 6, 2010) *appeal denied*, 608 Pa. 647 (2010) (claim for interference dismissed “fails to even delineate between which contractual relationships were existing and which were prospective. No dates or specifics are listed regarding existing contracts.”).

As to Count VI, unjust enrichment, there is no coherent allegation whatsoever of any nexus between AmeriGas and some specific “enrichment” enjoyed by defendant. See, *Global Ground Support, LLC v. Glazer Enterprises, Inc.*, 581 F. Supp. 2d 669, 676 (E.D. Pa. 2008) (granting summary judgment on unjust enrichment claim where facts were too attenuated with respect to cause and effect); *Myers-Macomber Engineers v. M. L. W. Const. Corp.*, 271 Pa. Super. 484, 490-91 (1979) (“This equitable doctrine imposes on the recipient an obligation in the nature of quasi contract”). Thus the claim here fails, by its own light, to state a claim for which relief can be granted.

D. Plaintiff Cannot Meet The High Standards Necessary To Justify The Granting Of An Injunction To Restrain Free Speech On Defendants' Website

Plaintiff seeks preliminary and permanent injunctive relief under the Lanham Act “enjoining defendants from using AmeriGas’s marks in connection with the PissedConsumer.com website or AmeriGas.group.pissed.consumer.com websites.” In other words, plaintiff asks this Court to restrain the rights of unnamed third parties not before the Court who post their complaints about AmeriGas on PissedConsumer.com based on specious trademark infringement and unfair competition claims theory. The law is clear that no such relief should issue from this or any Court that answers to the United States Constitution.

It is well established that “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion,” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), and that a preliminary injunction “is one of the most drastic tools in the arsenal of judicial remedies and should not be routinely granted.” *Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp.2d 415, 428 (S.D.N.Y. 2004) (internal quotes omitted). “If any method other than a prior restraint can effectively be employed to further the governmental or private interest threatened here, then the order is invalid.” *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 99 (3d Cir. 1988).

Though it is demanded in the complaint, no application for a preliminary injunction is pending. Yet **all** injunctions implicating protected speech, such as the requested order muting criticisms of AmeriGas’s services on PissedConsumer.com by “merely” forbidding defendants from using the alleged marks, are frowned upon by the law. Nearly forty years ago, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Supreme Court, emphasizing the First Amendment’s virtually absolute ban on prior restraints of speech, struck down as

unconstitutional a state court's order enjoining the distribution of leaflets critical of respondent's business practices:

It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. . . . No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.

Id. at 418-19 (internal citations omitted). It may at this point be described as an ironclad rule that prior restraints on speech are presumptively invalid, even when the potential harm at issue is far greater than any injury to reputation. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (rejecting prior restraint issued to ensure protection of criminal defendants' Sixth Amendment right to a fair trial); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (even during wartime, newspapers not enjoined from publishing papers that government feared could threaten national security); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1124-25 (S.D.N.Y.1980) ("A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech. To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, and to historic principles of equity").

Ultimately, notwithstanding plaintiff's elaborate pleading, it is essentially seeking the same kind of prior restraint refused by courts in the foregoing cases. But this case is far less appropriate than even those cases for the imposition of a prior restraint. While the restraint sought by the government, for example, in the Pentagon Papers case required the Court to weigh life-and-death national security claims against free speech concerns, here plaintiff is asking the Court to get one website to stop publishing complaints concerning a financial services company. This is no balancing consideration here that even approaches those found insufficient, although

weighty, in the earlier cases. This Court could end its inquiry on that basis alone and dismiss the complaint on constitutional grounds.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court dismiss complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

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