Gary Black, et al v. Google, Inc. Doc. 17

NO. 10-16992

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY BLACK AND HOLLI BEAM-BLACK

Plaintiffs/Appellants,

v.

GOOGLE INC.

Defendant/Appellee.

On Appeal from the United States District Court for the
Northern District of California
Case No. 4:10-cv-02381-CW
The Honorable Claudia Wilken

DEFENDANT-APPELLEE GOOGLE INC.'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Google Inc. respectfully submits this corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1(a).

No parent corporation or publicly held corporation owns 10% or more of the stock of Google Inc.

Dated: May 4, 2011

/s/ David H. Kramer
David H. Kramer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

MISCELLANEOUS

Defendant Google Inc. ("Google") moved to dismiss the Complaint filed by Plaintiffs Gary Black and Holli Beam-Black (the "Blacks"). The district court granted Google's motion, and entered final judgment on August 13, 2010. The Blacks appealed. Google respectfully submits this Answering Brief.

INTRODUCTION

In October 2009, an anonymous user posted a negative review of the Blacks' roofing business to Google Places, Google's online business directory. The reviewer offered the typical grumblings of a dissatisfied customer, asserting that the Blacks' business "did a poor job" with a roofing repair and that the reviewer's roof leaked after the project's completion. The reviewer claims that the Blacks did not fix the leaking-roof problem and raises suspicions about a business-name change from Cal Bay Construction to Castle Roofing. The review concludes that the Blacks' roofing business performed "totally unsatisfactory work" and is not recommended.

The Blacks could have ignored this comment and concluded that a few negative reviews help because they lend credibility to the good ones. They could have found out who posted the review (if they did not already know) and asked that person to remove it. They could have posted a responsive comment online providing their side of the story. Or they could have filed a lawsuit against the reviewer if they thought one was warranted. The Blacks did none of those things.

Instead, they filed a lawsuit against Google because the review was published on Google Places. And they not only filed suit, but filled the docket below with overheated rhetoric and exaggerated claims of harm, culminating in a request—made after Google's motion to dismiss was fully briefed—that the district court enter judgment in their favor for $20,575,000.00.

This case utterly lacks merit. Congress foresaw the potential for this exact type of abuse of the judicial system and addressed it fifteen years ago by enacting Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230. The statute generally immunizes online services from liability for hosting materials created entirely by third parties. Based on the facts alleged in the Complaint, there can be no dispute that the Blacks seek to treat Google as the publisher or speaker of a third-party review of their roofing business. Accordingly, the district court properly dismissed their case with prejudice as barred by the CDA. That result is supported by the plain text of Section 230, the policies underlying it, and a uniform line of cases from this Circuit and beyond. The district court's dismissal order should be affirmed.

SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has subject-matter jurisdiction based on federal questions raised by a claim under the Federal Trade Commission Act ("FTC Act"). 28 U.S.C. § 1331. The Court has supplemental jurisdiction over the state common-law

claims, 28 U.S.C. § 1367(a), and appellate jurisdiction based on a final judgment entered by the district court on August 13, 2010.

COUNTERSTATEMENT OF THE ISSUES

1. Did the district court properly dismiss the Blacks' claims for relief as barred by Section 230 of the Communications Decency Act of 1996 where the sole basis for liability asserted was that a third party used the Google Places service to post an allegedly defamatory review of the Blacks' roofing business?

2. Irrespective of Section 230 immunity, did the Blacks fail to state a claim for "breach of authority," breach of contract, violation of the FTC Act, negligence, misrepresentation, and intentional infliction of emotional distress?

COUNTERSTATEMENT OF FACTS

Google is a Delaware corporation headquartered in Mountain View, California that provides Internet services to the public through its website located at http://www.google.com. ER003:¶6. Among other things, Google operates an online business directory known as Google Places. ER004:¶16. Google Places aims "to help people make more informed decisions about where to go, from restaurants and hotels to dry cleaners and bike shops." *See* http://googleblog.blogspot.com/2010/04/introducing-google-places.html. The service provides contact information for millions of businesses, including hotels, restaurants, and retail stores. ER004-05:¶¶16-18. In addition, Google Places

provides neutral tools that allow users to create and post reviews of those businesses. *Id.*

Gary Black and Holli Beam-Black are California residents who allegedly operate the sole proprietorships Cal Bay Construction and Castle Roofing. ER002:¶4. In October 2009, an anonymous third-party user posted the following review on Google Places:

> Having had my roof re-roofed by Cal Bay Construction which is now Castle Roofing & Construction, and then finding that they did such a poor job and my roof leaked from the beginning of rains in 2008, they still have not repaired my roof and it still leaks after a year and a half. They say they will fix it but changing names from Cal bay Construction to Caslte Roofing & Construction should have tipped me off that I may never get my roof repaired. This company says it will fix my roof but all I get is excuses. After 18 months you would think they would fix it. Cal Bay Construction may no longer exist but the new company Castle Roofing & Construction as the new entity needs to come out and fix my roof. I find this to be totally unsatisfactory work and would not recommend this company (Caslte Roofing & Construction) to anyone. They just do not know how to fix a bad roof job.

Id. ¶3.

The Blacks allege that they complained to Google about the review's accuracy. ER005:¶19. Google, however, made no promises to take it down. Instead, the Blacks allege that they have "essentially been ignored by the Defendant; not even a return e-mail." *Id.*; *see also* ER006-07:¶ 20 (alleging a "policy of ignoring the content and nature of the negative anonymous review at issue"), ¶22 (alleging that Google "has refused on multiple occasions throughout

the past six months to remove, mediate, or even acknowledge" the review), ¶23 (alleging that Google "ignored" the Blacks' "requests for a fair or reasonable dispute/resolution process").

On May 28, 2010, the Blacks filed suit against Google for "breach of authority/violation of law," breach of contract, violation of the FTC Act, negligence, misrepresentation, and intentional infliction of emotional distress. They say that their case "arises from an online comment posted upon the Google web site located at http://www.google.com," (ER001:¶1), and repeatedly allege that an anonymous user posted the review. ER002-21:¶¶3, 19, 20, 21, 24, 28, 47. The Blacks' lawsuit names only Google as a defendant. The Blacks never attempted to join the third-party reviewer, and never sought to uncover that person's identity in discovery. Instead, they challenged Google's general practice of running an online review website, asserting that any service "which allows for consumer generated content is illegal and inappropriate" because no service like that "would ever be capable of adjudicating the entire business complaint community." ER018:¶34.

On July 2, 2010, Google moved to dismiss the Complaint for two reasons. Dkt. No. 10. First, Google argued that Section 230(c) barred the Blacks' claims because they sought to hold the provider of an "interactive computer service" (Google) liable for information provided by another "information content

provider" (the anonymous reviewer). Second, Google argued that even without regard to Section 230(c), the Complaint failed to state a claim upon which relief can be granted under Rule 12(b)(6) and Rule 12(b)(1). On August 5, 2010, after the parties completed the briefing on Google's motion, the Blacks filed a ten-page, sworn "Declaration for Damages," which asked the district court to enter judgment in their favor for $20,575,000.00 (*twenty million dollars* of which they attribute to emotional distress). ER026-36.

On August 13, 2010, Judge Claudia Wilken of the United States District Court for the Northern District of California granted Google's motion to dismiss with prejudice.[1] ER037. Judge Wilken found that a "fair reading" of the Complaint makes clear that the Blacks "seek to impose liability on Defendant for content created by an anonymous third party." ER041. Accordingly, Google "is immune from their suit" under Section 230(c). *Id*.

The district court easily dispatched with the Blacks' arguments opposing Google's motion. *First*, the Blacks claimed that their suit was based on Google's "programming," not the review itself. Judge Wilken rejected that theory because

[1] Judge Wilken also denied as moot a motion for judgment on the pleadings that the Blacks filed with their opposition to Google's motion to dismiss. ER043. That motion failed on the merits, and was procedurally flawed. A judgment on the pleadings motion may only be filed "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). The pleadings were open when the Blacks filed their motion.

online services do not lose Section 230(c) protection merely because third parties use their tools to create original content. ER042. *Second*, the Blacks' assertion that Google "sponsored" or "endorsed" the review was unpersuasive because the Complaint's allegations do not support that claim, and because liability based on "sponsoring" or "endorsing" content seeks to treat the defendant as the publisher or speaker of it in contravention of Section 230(c). *Third*, the district court rejected any notion that the CDA obligates online services to provide a "dispute resolution" system to resolve disagreements between reviewers and businesses. ER042-43.

In light of her finding that Google is immune from suit based on Section 230(c), Judge Wilken did not address Google's argument that the Blacks' Complaint failed to state a claim without regard to the CDA.

On August 25, 2010, the Blacks filed an "Objection" to Judge Wilken's dismissal order. Dkt. No. 28. Judge Wilken treated the "Objection" as a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure and denied it. ER050-54. On September 10, 2010, the Blacks filed a Notice of Appeal. ER048-49.

STANDARD OF REVIEW

The district court's grant of Google's motion to dismiss for failure to state a claim is subject to plenary review. *Uhm v. Humana, Inc.*, 620 F.3d 1134, 1139 (9th Cir. 2010). When considering the sufficiency of a complaint, this Court takes

a "plaintiff's allegations in the complaint as true, but [is] not required to indulge unwarranted inferences." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

This Court recently had occasion to "plumb the depths of the immunity provided by section 230." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc). This case, however, requires no underwater exploration. It instead calls for straightforward application of Section 230(c) immunity. Someone posted a review of the Blacks' roofing business on Google's website. The Blacks disagree with the review, claim to have been harmed by it, and want to hold Google responsible. But Google is immune: the Blacks' suit seeks to treat Google as the publisher or speaker of commentary that Google played no role in creating. It does not matter that the Blacks assert various legal theories or employ a host of different verbs when describing Google's alleged conduct. The import of their case is clear: they claim that the review was damaging and assert that Google—instead of the person who wrote the review—should answer for it. That is exactly the type of case that Section 230(c) prohibits. Accordingly, the district court's dismissal order should be affirmed.

In addition, the Blacks' six claims for relief fail to state a claim upon which relief can be granted. They assert violations of the FTC Act and a criminal statute, but lack standing as private citizens to pursue those claims. They claim breach of contract, but fail to identify *any* contract between Google and the Blacks, let alone one that Google supposedly breached. They assert a negligence claim, but Google does not owe the Blacks a duty to ensure that third-party speech is truthful. They claim fraud, but have not identified a single statement that Google made to the Blacks that is allegedly false. Finally, they claim intentional infliction of emotional distress, but do not come close to pleading facts that would demonstrate "extreme and outrageous" conduct by anyone. Even without regard to the CDA then, the Blacks' Complaint is properly dismissed with prejudice.

ARGUMENT

A. Background Of Section 230(c) Immunity

In 1996, Congress enacted Section 230 the Communications Decency Act. Pub. L. 104-104, Title I, § 509 (1996). Section 230(c) accords immunity for Internet service providers, websites, and other online services that host or transmit content created by third parties. The statute is simple and direct: "[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." 47 U.S.C. § 230(c)(1). A defendant is immune from suit if: (1) it qualifies as a "provider or

user of an interactive computer service"; (2) the information at issue is provided by "another information content provider"; and (3) the asserted claims seek to "treat the defendant as a publisher or speaker" of materials created by third parties. Courts "have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'" *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

The Fourth Circuit's seminal *Zeran* decision explains Congress's intent when passing the statute:

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997). Numerous Circuit courts have adopted *Zeran*'s expansive interpretation of Section 230(c) and held that online services are immune from suit for claims that seek to treat them as the publisher or speaker of content created entirely by third parties. *See, e.g., Roommates*, 521 F.3d at 1174; *Carafano*, 339 F.3d at 1122-23 (9th Cir. 2003); *Johnson v. Arden*, 614 F.3d 785, 790-91 (8th Cir. 2010); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418-19 (5th Cir. 2008); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478

F.3d 413, 419 (1st Cir. 2007); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000); *but see Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (disagreeing with the "immunity" nomenclature).

Websites that provide message boards allowing users to post online comments are the precise services that Congress sought to protect from liability when enacting Section 230(c). In 1995, a New York state court ruled that the online service Prodigy could be held liable as a publisher for an anonymous, allegedly defamatory comment posted to one of its message boards. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, Trial IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Congress overturned that result when enacting Section 230(c). *See* H.R. Rep. No. 104-458 at 194. Not surprisingly, after Section 230's passage, courts have uniformly found message-board operators and consumer review websites immune from suits that seek to treat them as the publisher or speaker of third-party commentary. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 251-60 (4th Cir. 2009) ("website that allows consumers to comment on the quality of businesses, goods, and services" immune from suit); *Lycos, Inc.*, 478 F.3d at 422 (message-board operator immune from suit); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 40 (2006) (operator of "Internet discussion group" immune from suit); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961,

969 (N.D. Ill. 2009) (classified advertising website entitled to immunity under Section 230(c)); *Eckert v. Microsoft Corp.*, No. 06-11888, 2007 WL 496692, *3 (E.D. Mich. 2007) (Microsoft immune from suit for comments posted to its message board).

B. The District Court Properly Dismissed The Blacks' Complaint With Prejudice Based On Section 230(c) Immunity.

An unambiguous statute and an unbroken line of cases confirm that online services like Google cannot be held liable for hosting online comments created by third parties. That is why the district court properly dismissed the Blacks' Complaint with prejudice. Section 230(c) of the CDA provides that "[n]o provider . . . 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). This provision "grants[s] most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano*, 339 F.3d at 1122. The immunity's three elements are easily satisfied based on the facts alleged in the Complaint.

First, Google qualifies as a provider of an interactive computer service. It runs a website that allows users to post and find online reviews of local businesses. *Second*, an anonymous third party—not Google—created and posted the review of the Blacks' business that is at the heart of this lawsuit. *Third*, the Blacks' claims for relief all seek to treat Google as the publisher or speaker of third-party content.

Indeed, the first sentence of the Blacks' Complaint states that their case "arises from" an anonymous third party's review of their roofing business.

The district court's order dismissing the Blacks' Complaint with prejudice followed the statute and the cases, and faithfully applied this Court's instruction that "Section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Roommates*, 521 F.3d at 1175. The order should be affirmed.

1. Google Provides an "Interactive Computer Service."

Section 230(c) provides immunity to "interactive computer services." 47 U.S.C. § 230(c). The statute broadly defines that term as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]" 47 U.S.C. § 230(f)(2). Google satisfies this definition. It provides a public website—Google Places—that allows users to find and post information about local businesses. *See Roommates*, 521 F.3d at 1162 ("Today, the most common interactive computer services are websites"); *Barnes*, 570 F.3d at 1101 ("no trouble" concluding that Yahoo! is an "interactive computer service").

Indeed, Courts repeatedly have held that Google qualifies as an "interactive computer service." *See Parker v. Google, Inc.*, No. 06-3074, 2007 WL 1989660, at *4 (3d Cir. July 10, 2007) ("there is no doubt that Google qualifies as an

'interactive computer service.'"); *Goddard v. Google, Inc.*, Case No. 08-cv-2738, 2008 WL 5245490, at *2 n.2 (N.D. Cal. Dec. 17, 2008) ("courts already have determined that Google is an interactive computer service provider[.]"); *Jurin v. Google Inc.*, 696 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (Google "meets the definition of a protected interactive computer service"). As the district court found, and the Blacks did not dispute, that is the proper result here as well.

2. "Another Information Content Provider" Created and Posted the Business Review at the Heart of this Case.

The Blacks also premise their claims for relief on information provided by "another information content provider." 47 U.S.C. § 230(c)(1). The CDA grants online services immunity for hosting "any information provided by another information content provider." *Id*. Section 230 defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Information is provided by another "information content provider" whenever the defendant did not "creat[e] or develo[p] the particular information at issue." *Carafano*, 339 F.3d at 1125. "[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id*. at 1124.

The Blacks do not allege that Google—or anyone affiliated with Google—wrote the review that they claim to find so distressing. Instead, they plead that an anonymous user posted it. *See* ER002:¶3 (the review was posted to Google's website "anonymously on or about October 20, 2009"), ER005:¶19 ("the defamatory business review of Plaintiff's business . . . is anonymous and unverifiable as to [its] accuracy"), ER007:¶21 ("a visitor did in this case post an anonymous defamatory comment against the [Plaintiffs'] businesses"). Because Google played no role in creating the review that is central to the Blacks' claims, the information was provided by "another information content provider" for purposes of the CDA. *See Roommates, LLC*, 521 F.3d at 1174 (online service "is not responsible, in whole or in part, for the development of . . . content, which comes entirely from subscribers and is passively displayed").[2]

While it is difficult to understand the basis for a claim that Google is an "information content provider" for an anonymous third party's review of a

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[2] *See also Nemet Chevrolet*, 591 F.3d at 258 (complaints posted by third parties to Consumeraffairs.com were provided by "another information content provider"); *Lycos*, 478 F.3d at 415, 421 (1st Cir. 2007) (same for "defamatory postings made under pseudonymous screen names on an Internet message board"); *Parker*, 422 F. Supp. 2d at 501 (same for message board postings archived by Google); *Carafano*, 339 F.3d at 1125 (same for unauthorized profile on Internet dating website); *Zeran*, 129 F.3d at 330 n.2 (same for "offensive messages" posted on America Online).

contractor's roofing work, we understand the Blacks to argue that Google played a role in the review's creation by:

- providing an online forum that allows users to post comments about local businesses;
- not removing the comment in response to the Blacks' complaints; and
- "sponsoring" or "endorsing" the review based on the general operation of the Google Places service.

See Appellants' Br. at 17-18; ER001-12:¶¶1, 16-19, 23, 27. Even if these allegations were true and properly pled, they would not convert Google into an "information content provider" under the CDA.

First, an online service does not become a "creator" of user-submitted comments merely by providing a forum for them. The opposite is true. The CDA extends immunity to providers of online forums; it does not categorically disqualify those providers from the statute's protections. *See* 47 U.S.C. § 230(f)(2) (broadly defining eligible "interactive computer services"). In *Roommates*, this Court held that an online service was not an "information content provider" for comments that users typed into a "blank text box" during the website registration process. *Roommates*, 521 F.3d at 1173. The service in that case published user comments as they were written, did not provide "specific guidance" about what the comments should contain, and did not encourage users to post unlawful messages. *Id*. 1173-74. Those factors control here. There are no allegations that Google

altered the text of the user-submitted review, directed what the review should say, or ever encouraged users to post false or defamatory business reviews. In fact, the allegations in the Complaint say the opposite. *See* ER021:¶44 (users agree that they "will not violate . . . the legal rights of others" when using the service). As was the case in *Roommates*, "[t]his is precisely the kind of situation for which section 230 was designed to provide immunity." *Roommates*, 521 F. 3d at 1174.

Second, an online service retains Section 230(c) immunity even if it does not take down reviews upon receiving a removal request. That result is compelled by the text of the statute and the policies animating it. Section 230(c) states that "[n]o provider . . . 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). This plain language grants immunity irrespective of whether the service has been notified of an allegation that user-submitted content is unlawful. *See Lycos*, 478 F.3d at 420 ("It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech.").

Moreover, imposing notice-based liability would disturb the statute's purposes. If the immunity's availability depended on lack of notice, online services would be reluctant to create forums for free expression in the first place, have a disincentive to police their services and delete offensive material, and err on

the side of removing even truthful speech when faced with complaints concerning user-generated content. That is not at all what Congress intended when passing the statute. *See* 47 U.S.C. § 230(b)(1) (Section 230(c) immunity reflects a policy to "promote the continued development of the Internet and other interactive computer services and other interactive media"); H.R. Rep. No. 104-458 at 194 (1996) ("One of the specific purposes of this section is to overrule . . . decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."); *Zeran*, 129 F.3d at 333 ("Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA."); *Barrett*, 40 Cal. 4th at 54-55 (notice liability "would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech").

For these reasons, the Blacks' allegation that Google has refused to "remove, mediate, or even acknowledge" their objections to the review, ER007:¶22, is entirely beside the point.[3]

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[3] The rule that notice does not vitiate CDA immunity is particularly apt given the facts here. The anonymous reviewer complained about the quality of the Blacks' roofing work. But the review is not offensive or patently untruthful. Indeed, the Blacks only call it "unverifiable as to [its] accuracy." ER003:¶5. Under a notice-based liability regime, Google would be forced to remove a review like this one upon receiving a complaint even if the review were accurate. That would stifle legitimate speech, make online review services less useful, and vest those who complain the most and the loudest with broad censorship rights. (continued...)

Third, the Blacks' apparent assertion that Google is not entitled to CDA immunity because it "sponsored" or "endorsed" the review is unsupported by the complaint, runs contrary to the statute, and reflects yet another attempt to circumvent the CDA's purposes. As the district court noted, the Blacks did not make any factual allegations suggesting that Google "sponsored" or "endorsed" the review at issue. ER042. Regardless, the statute itself provides immunity for claims that seek to treat a defendant as the publisher or speaker of third-party content, despite any sponsorship or endorsement claims. The district court correctly diagnosed the Blacks' argument as a "ploy" that "if countenanced, would eviscerate the immunity granted under § 230." *Id*. That is exactly right. If some vague notion of "sponsorship" were enough to stave off a motion to dismiss, plaintiffs seeking to plead around Section 230(c) would always be able point to content-neutral website functionalities to support a "sponsorship" allegation. And that would render nugatory one of Section 230(c)'s greatest virtues: weeding out frivolous cases on the pleadings.

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Nothing in the text, purpose or legislative history of the CDA suggests such an unpalatable result.

The second element of Section 230(c)—that the challenged information must come from "another information content provider"—is satisfied because the review at issue was created and posted by an anonymous third party, not Google.

3. The Blacks' Claims For Relief Seek to Treat Google as The "Publisher or Speaker" of Third-Party Content.

It is equally clear that the Blacks' lawsuit seeks to treat Google as a "publisher or speaker" of the anonymous third-party review. *See* 47 U.S.C. § 230(c). Although Congress's use of the phrase "publisher or speaker" most obviously bars defamation claims, Section 230(c)'s expansive immunity forbids *any claim* that would hold an online service liable for hosting content created by a third party.[4] That is what this lawsuit tries to do. The Court need look no further

[4] *See* 47 U.S.C. § 230(e)(3) ("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."); *Barnes*, 570 F.3d at 1101-02 ("what matters is not the name of the cause of action-defamation versus negligence versus intentional infliction of emotional distress-what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another."); *Carafano*, 339 F.3d at 1123 ("reviewing courts have treated § 230(c) immunity as quite robust"); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009) ("we have interpreted § 230 immunity to cover business torts"); *Green*, 318 F.3d at 471 (Section 230(c) applied where plaintiff attempted "to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network – actions quintessentially related to a publisher's role"); *Lycos*, 478 F.3d at 419 ("Section 230 immunity should be broadly construed . . . immunity extends beyond publisher liability in defamation law").

than the very first sentence of the Blacks' Complaint says that their case "arises from an online comment posted upon the Google web site . . . ." ER001:¶1.

While the Blacks' Complaint and Opening Brief take many confusing detours, their overarching theory is no mystery: they claim Google should be liable for hosting an allegedly harmful review authored by an anonymous third party. *See, e.g.*, ER002:¶3 (an "anonymous comment appeared on Google's 411 directory"); *id*. ("an on line comment upon the Defendant's website effectually devastates the Plaintiffs[']s income producing businesses and [their] reputation"); ER006:¶20 ("the customer is swayed away from the Plaintiff by false statements and misrepresentations by way of consumer generated content on [Google's] website"); *see also* ER006-24:¶¶21, 24, 33, 34, 39, 44, 47, 50, 52, 54, 58. Accordingly, Section 230(c) bars this case despite the various labels that the Blacks' invoke:

- **Breach of Contract**: The Blacks allege that Google violated its Terms of Use by allowing the anonymous review to be found on Google Places. ER020-21:¶¶43-45. Those terms state that consumers agree to use Google's services "only for purposes that are legal, proper and in accordance with the Terms." *Id*. at ¶44. In essence, the Blacks allege that Google should have reviewed all of the comments on Google Places and removed offending ones that were posted without Google's knowledge and against its wishes. That theory, if

adopted, would saddle online services with impractical, and in many cases impossible, screening obligations. *See Carafano,* 339 F.3d at 1124 (9th Cir. 2003) ("It would be impossible for service providers to screen each of their millions of postings for possible problems.") (citing *Zeran*, 129 F.3d at 330-31). But even more fundamentally, it seeks to impose the very publisher-style liability that Section 230(c) abrogates. The CDA bars liability for "any activity that can be boiled down to deciding whether to exclude material third parties seek to post online." *Roommates*, 521 F.3d at 1171. The Blacks' breach of contract claim seeks to hold Google liable for failing to exclude a third party's review and therefore cannot survive Section 230(c). *See Green v. Am. Online*, 318 F.3d 465, 470 (3d Cir. 2003) (CDA bars breach of contract claim alleging that AOL failed to enforce its Terms of Use concerning allegedly harmful online messages created by third parties); *Goddard*, 2008 WL 5245490 at *5 (CDA bars breach of contract claim alleging that Google failed to enforce its content policy to protect the plaintiff from third-party content); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465 (2001) (holding that breach of contract claim asserted against Amazon was barred by the CDA because Section 230 "does not limit its grant of immunity to tort claims").

- **Negligence:** The Blacks claim that Google was negligent in allowing the review to be posted in the first place or for failing to remove it upon receiving

notice that it could be found on Google Places. ER023:¶¶53-55. The label "negligence," however, does not change the fact that the Blacks are seeking to hold Google liable for someone else's speech. *See Barnes*, 570 F.3d at 1102 ("a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence."). Indeed, a negligence claim based on allowing third-party content to appear on a website necessarily implicates "actions quintessentially related to a publisher's role" like monitoring, screening and deleting material. *Green*, 318 F.3d at 469-72. Accordingly, courts uniformly reject attempts by plaintiffs to evade the "publisher or speaker" element of Section 230(c) by asserting negligence instead of defamation. *See Carafano*, 339 F.3d at 1124 (Section 230(c) bars a negligence claim brought against an Internet dating service for hosting a false and injurious profile); *MySpace, Inc.,* 528 F.3d 413 (negligence claim barred by Section 230(c)); *Parker,* 2007 WL 1989660, at *4 (same); *Green*, 318 F.3d at 469-72 (3d Cir. 2003) (same); *Ben Ezra*, 206 F.3d at 986 (same); *Zeran, Inc.*, 129 F.3d 327 (same). That is the proper result here as well.

- **Misrepresentation**: The Blacks allege that Google misrepresented to the public that their "roofing projects leak." ER024:¶56. But Google did not make that comment. An anonymous third-party reviewer did. Accordingly, this claim seeks to treat Google as the publisher of third-party content, and is barred. *See,*

e.g., Jurin, 695 F. Supp. 2d at 1123 (dismissing fraud claim based on Section 230(c)); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 626 (D. Del. 2007) (same).

- **Intentional Infliction of Emotional Distress**: The Blacks assert that Google intentionally inflicted emotional distress upon them by hosting the review. ER024:¶60. That claim is also barred because the emotional distress that the Blacks assert flows exclusively from the third-party review. *See Johnson v. Arden*, 614 F.3d 785, 790 (8th Cir. 2010) (ISP could not be liable for having allegedly "intentionally inflicted emotional distress" by hosting online forum where defamatory comments were posted); *DiMeo v. Max*, 248 Fed. Appx. 280, 282 (3d Cir. 2007) ("intentional infliction of emotional distress claims [against website operator] would be futile in view of § 230"); *Green*, 318 F.3d at 470 (plaintiff's "tort claims [including emotional distress claim] are subject to . . . immunity under 47 U.S.C. § 230(c)(1)"); *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 807 (2006) (Section 230(c) bars intentional infliction of emotional distress claim concerning third-party email messages sent using the defendant's computer system).

- **Unfair Competition/False Advertising**: While the contours of the Blacks' unfair competition and false advertising claims are unclear, the basis for liability is not: Google allegedly hosted a review that the Blacks claim is false and defamatory. ER021-23:¶¶47-52. That theory of liability is properly rejected under

the CDA even if packaged as unfair competition or false advertising. *See Goddard*, 2008 WL 5245490, at *5 (rejecting plaintiff's attempt to avoid Section 230(c) by asserting a hodgepodge of claims under the label of "unfair competition"); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (2002) (unfair competition claim premised on content provided by a third party barred by Section 230(c)).

* * *

The Blacks' claims all seek to hold Google liable for hosting content authored by a third party. A clear statute, an overwhelming collection of cases, and an absence of contrary authorities demonstrate that the district court properly dismissed the Blacks' Complaint with prejudice based on Section 230(c) immunity.

C. The Blacks' Complaint Failed to State a Claim Upon Which Relief Could be Granted Even Without Regard to the CDA.

For the reasons discussed above, the district court correctly held that Section 230(c) bars the Blacks' claims. That is, however, not the only incurable flaw in their case. Their Complaint failed to state a claim upon which relief could be granted under Rule 12(b)(6) and Rule 12(b)(1), even without regard to the CDA.

1. The Blacks Failed to State a Claim For "Breach of Authority."

The Blacks first claim for relief is a hodgepodge entitled "Breach of Authority; Violation of Law." ER019. They seem to contend that Google violated Section 5 of the FTC Act in unspecified ways when running Google Places. *Id.* ¶38. That allegation is misguided on the merits, but fails for an even more basic reason: the Blacks do not have standing to bring claims under the FTC Act. *See Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973) ("The protection against unfair trade practices afforded by the Act vests initial remedial power solely in the Federal Trade Commission."); *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) ("The Act rests initial remedial power solely in the Federal Trade Commission.").[5]

The Blacks also reference 18 U.S.C. § 1365, a federal criminal statute. ER020:¶42. Setting aside the facial inapplicability of this statute given the facts alleged here (the statute prohibits consumer product tampering by those acting

[5] The Blacks invoke an article of California's Business and Professions Code concerning disciplinary proceedings against contractors. ER020:¶41. That regime authorizes the Registrar of Contractors to inform the public about the status of complaints, but the registrar may not disclose ones resolved in the contractor's favor. Cal. Bus. & Prof. Code §§ 7124.6, 7124.6(c). These provisions have no application here. The Blacks have not pled the existence of a complaint that was resolved in their favor and then disclosed by the registrar. And even if they had, their grievance would be with the registrar, not Google.

"with reckless disregard for the risk that another person will be placed in danger of death or bodily injury"), this claim is defective because the Blacks, as private citizens, lack standing to assert criminal laws. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006) ("We affirm the dismissal of Allen's claims under 18 U.S.C. §§ 241 and 242 because these are criminal statutes that do not give rise to civil liability."); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (similar). The Blacks' claim for "Breach of Authority; Violation of Law" is properly dismissed for lack of standing.

2. The Blacks Failed to State a Claim For Breach of Contract.

The Blacks' breach of contract claim fails because it does not allege that Google breached any contract with them. The Blacks instead reference a portion of Google's Terms of Use under which *users* agree that they will not use Google's services to "defame, abuse, harass, stalk, threaten or otherwise violate the legal rights . . . of others." ER021:¶44. The substance of the Blacks' contract claim appears to be that a third-party reviewer breached a contract with Google. If that were proven, Google might have a breach of contract claim against the reviewer. But the Blacks would not have one against Google. Their breach of contract claim is appropriately dismissed. *See F.D.I.C. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998) (contract claim dismissed where plaintiff "was not a party to the contract that created the allegedly breached duty").

3. The Blacks Failed to State an FTC Act Claim.

The Blacks' third claim for relief is a stand-alone claim alleging violations of Section 5 of the FTC Act. As noted above, the Blacks lack standing to pursue this claim and therefore it is appropriately dismissed. *See* Section C.1, *supra*.

4. The Blacks Failed to State a Negligence Claim.

The Blacks have not stated a negligence claim because Google does not owe them a duty of care. A valid negligence claim requires the plaintiff to plead that: (1) defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach proximately caused plaintiff's injuries; and (4) damages. *See Corales v. Bennett*, 567 F.3d 554, 576 (9th Cir. 2009). These essential elements are nowhere to be found in the Complaint. Given its tenor, however, the Blacks seem to be saying that Google owed them a duty to ensure the accuracy of third-party reviews posted to Google Places. They are mistaken.

"Generally there is no obligation to protect others from the harmful conduct of third parties." *Toomer v. United States*, 615 F.3d 1233, 1236 (9th Cir. 2010). For that reason, courts dismiss negligence claims where the plaintiff contends that the defendant should have prevented harm caused by third parties acting beyond the defendant's control. *Wal-Mart Stores, Inc.*, 572 F.3d at 677 ("Wal-Mart had no duty to monitor the suppliers or to protect Plaintiffs from the intentional acts the suppliers allegedly committed."); *Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557,

1567 (1990) ("The general rule of law is that no duty to control a third party's conduct exists in the absence of some special relationship creating such a duty."). That rule precludes a negligence claim on these facts. Google Places allows users to rate and review over 50 million businesses.[6] Google does not owe a duty to make sure that all of the reviews posted to its system are accurate. Any such duty rests with the myriad reviewers who use the service. The Blacks therefore failed to state a negligence claim.

5. The Blacks Failed to State a Claim For Misrepresentation.

The Blacks' claim for fraudulent misrepresentation fails for a host of reasons. The elements of this claim are: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." *Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (1996). The Blacks contend that Google made misrepresentations to the public about the quality of their roofing work. ER024:¶56. But that allegation does not come close to stating a fraud claim. *First*, the statements at issue were not made by Google, but an anonymous commentator. *See* ER005:¶19 (alleging that the review in question "is anonymous and unverifiable as to [its] accuracy"). *Second*, the Blacks concede that Google does

[6] *See* http://googleblog.blogspot.com/2011/04/hotpot-is-going-places.html.

not have the ability to verify whether the review is accurate or not. *Id*. Therefore, Google could not be charged with making a knowingly false statement even if the speech of an anonymous online poster were somehow attributable to Google. *Third*, there are no allegations that Google made any statement with intent to deceive the Blacks or induce their reliance. *Fourth*, there are no allegations that the Blacks relied on any false statement allegedly made by Google. *Fifth*, the Blacks do not allege that Google's statements caused them injury. The Blacks' fraud claim is properly dismissed.

6. The Blacks Failed to State a Claim For Intentional Infliction of Emotional Distress.

Finally, the Blacks assert a claim for intentional infliction of emotional distress. They claim that Google engaged in "intentional negligence, inattentive business practices, violation of common decency, violation of law and unfair business practices for the purpose of selling advertising rather than the purpose of 'Courtesy Advertising' for businesses and professionals." ER024:¶60. While this allegation is difficult to decipher, it certainly does not state a claim for intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress requires the plaintiff to plead facts showing: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional

distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009) (quotations and citations omitted). Conduct is considered "outrageous" only when it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id*. at 1050-51. Google's provision of an online forum to which users can post business reviews does not come anywhere close to meeting that standard. This claim is flawed beyond repair and is appropriately dismissed. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066-67 (9th Cir. 2004) (alleged conduct by defendant, which was limited to "having conducted building inspections and having sent [plaintiff] several allegedly fraudulent documents," "simply is not objectively outrageous in the sense required for it to sound in intentional infliction of emotional distress."); *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 721 (10th Cir. 2000) ("the commentary of a radio talk show host concerning an offensive advertisement that appeared on the Internet, even if that host failed to first verify that the information contained in the advertisement was accurate[,] does not compare to the kinds of conduct that have sustained IIED claims").

* * *

The Blacks have not stated a claim upon which relief can be granted even without regard to the CDA. For that independent reason, the district court's order dismissing their case with prejudice should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm the Judgment of the District Court.

Dated: May 4, 2011

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STATEMENT OF RELATED CASE

Appellee is not aware of any related case pending before this Court.

Dated: May 4, 2011

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ David H. Kramer
David H. Kramer

CERTIFICATION OF COMPLIANCE TO FED. R. APP. P. 32(a)(7)(C) FOR CASE NO. 10-16992

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 7,403 words.

Dated: May 4, 2011

/s/ David H. Kramer
David H. Kramer