

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NO. 10-16992

RECEIVED
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MAY 10 2011

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

FILED
DOCKETED

DATE

INITIAL

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

**"INFORMAL"
APPELLANTS REBUTTAL TO
DEFENDANT - APPELLEE GOOGLE INC.'S
ANSWERING BRIEF**

GARY BLACK AND HOLLI BEAM-BLACK

101 Auld Court

Green Valley Falls, California 94534

(707) 373-2960

Plaintiffs are acting: *"In Propria Persona"*

1 NO. 10-16992

2
3 **UNITED STATES COURT OF APPEALS**
4 **FOR THE NINTH DISTRICT**

5 GARY BLACK AND HOLLI BEAM — BLACK

6 *Plaintiffs/Appellants,*

7
8 V.

9 GOOGLE, INC.

10 *Defendant/Appellee.*

11
12 On Appeal from the United States District Court for the
13 Northern District of California
14 Case No. 4:10-cv-02381-CW
15 The Honorable Claudia Wilken

16 **"INFORMAL"**
17 **APPELLANTS REBUTTAL TO**
18 **DEFENDANT - APPELLEE GOOGLE INC.'S**
19 **ANSWERING BRIEF**

20
21 GARY BLACK AND HOLLI BEAM-BLACK

22 101 Auld Court

23 Green Valley Falls, California 94534

24 (707) 373-2960

25 Plaintiffs are acting: *"In Propria Persona"*

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. Opening Rebuttal Statement Of Issues 1

II. Google Does Not Qualify For Immunity Under The CDA 1

III. As A Matter Of Strict Liability Google Is In Fact The Party Defaming Plaintiff's Businesses 4

IV. Google's Response To Appellant's Brief Cites Confusion Over Plaintiffs Trade Names 5

V. Google Caused The District Court Errors 6

VI. Google Advises That Plaintiffs Had Other Remedies At Law 7

VII. Plaintiff's Case Is unimpeachable Against Defendants On The Merits 9

 Misrepresentation 10

 Breach of Contract 11

 Unfair Business Practices/False Advertising 13

 Negligence 14

 Violations of Law 15

 Intentional Infliction Of Emotional distress 16

VIII. Defendants Defense Is Fatally Flawed And In Violation Of Law 17

IX. Conclusion 18

TABLE OF CASES AND AUTHORITIES

None are cited in rebuttal please see Appellant's Brief for cases and authorities

I. Opening Rebuttal Statement of Issues

1.

At trial in district court plaintiffs asked for and received judicial review of the matter and request for "Judgment on the Pleadings" which followed a "Motion To Dismiss" by Google, Inc.. While Google engaged the causes of action within the complaint, Google never actually answered the individual allegations and assertions. Similarly, Google never directly responds to Appellant's Brief on file concerning plaintiffs legal argument that Google is not immune under the Communications Decency Act and in fact is in violation of the actual intent of the CDA legislation. Google instead asserts a long unbroken line of cases involving immunity rulings under the Communications Decency Act (CDA) and ignores the causes of action in 'strict liability' against Google by alleging a third party. Those cases are not of like kind, and Google does not draw similarities to this case or cite facts from those cases in similarity to the facts of this case. This case centers upon unfair business practices, illegal conduct by Google in the sale of advertisements, Google in '*strict liability*' defaming plaintiffs businesses and **not** the defamation of plaintiffs by third parties. Plaintiffs complaint focuses on Google's stalking, algorithmic defamation directed at plaintiffs, and Googles destruction of plaintiffs businesses while Google is engaged in unfair business practices, misrepresentation, breach of contract, and violation of law. Google's case analysis and arguments are again off point and attempt to cloud the issues as plaintiff did state in district court. Google's argument for immunity extrapolates a third party defamation cause of action from a few lines of text taken out of context from the complaint while the complaint has no basis for a defamation cause of action or cause against a third party. The defenses Google only repeats before the Ninth Circuit effectually misled the district court. The district court as a result erred in dismissing the case rather than granting plaintiffs judgment on the pleadings (papers).

II. Google Does Not Qualify For Immunity Under The CDA

2.

Appellant's Brief shows the defendants do not qualify for the immunity under the CDA because in this instance, the genius of Google's programming at Google Maps and Places bars the statutory immunity as that immunity is qualified and mundane immunity and not an absolute. Google's defense, in fact, challenges the **separability** of the immunity statute because the '*strict meaning*' and the U. S.

1 Congresses 'statutory intent' is to prevent trafficking (without permission), stalking (unwanted
2 attention), and the harassment of others online. Google's argument and the district court orders at
3 hand attempt to rewrite U. S. law from the bench.

4 **3.**

5 Google sells plaintiff's trade names as search key words to plaintiff's local competition giving those
6 competitors exposure and access to plaintiff's hard daily prospecting efforts when plaintiff's prospects
7 inquire online following plaintiff's door-to-door prospecting. (trafficking by definition because it is done
8 without plaintiff's permission as defined in Appellant's Brief) Plaintiff goes door-to-door each day in search of
9 homes with questionable roofs. Plaintiff ferrets out prospects who presently are not thinking about a
10 roof, but perhaps needed help when designing their homes. Generally speaking plaintiff sells more
11 roofs in one month than most roofers do in an entire year. Simply put, plaintiff is envied, not
12 understood, and not well liked by the competition as it's very rare that plaintiff sells a roof to a party
13 that's actively engaged or in the market for a roof. Plaintiff's sales prospects are 'developed' by
14 plaintiff's hard work and expense, called 'sales lead generation,' and as alleged in complaint, plaintiff
15 does not do retail commercial advertising but rather relies upon only word-of-mouth. Plaintiff caught
16 Google stealing plaintiff's sales lead generation when online defamations were brought to plaintiff's
17 attention by consumers as plaintiff prospected for sales. That attention by consumers caused
18 plaintiff to suffer humiliation, embarrassment, and lost sales as Google Maps and Places sells
19 plaintiff's name to others for placement next to plaintiff in Google's advertisements. Google thereafter
20 gives exposure to plaintiff's competitors to access plaintiff's daily door-to-door lead generation as
21 plaintiff's prospects inquire online as to the identity of plaintiff. Google according to proof before the
22 court, then defames plaintiff's businesses to increase their take from plaintiff's door-to-door daily
23 canvassing efforts. Google's acts are alleged as not only unfair but also illegal in complaint because it
24 is just as if Google were sitting in the plaintiff's phone room taking away plaintiff's sales leads to sell on
25 the street. Google rather than answering the allegations continues ducking under a false argument for
26 immunity. The plaintiff pointed out in Appellant's Brief that the district court erred in not shifting the
27 burden of proof towards the defendant when plaintiff's complaint accused Google of being the
28 author/publisher/sponsor of those defamations and Google still has not responded to those allegations

1 which entitles plaintiffs to judgment on the pleadings and record as a matter of law. Plaintiffs herein are
2 asking the Ninth Circuit for that judgment.

3 **4.**

4 Google's defense of immunity while Google takes the property and efforts of plaintiff's daily work,
5 violates FTC regulations, U. S. advertising law, the Communications Decency Act, and the Business
6 and Professions Codes pertaining to fair trade and was alleged as such in complaint. Google now
7 attempts to mislead the Ninth Circuit into thinking it is not Google but the acts of others which
8 irreparably damage plaintiffs. Googles arguments as well as their testaments are simply not true.

9 **5.**

10 A blindfolded public, many courts, and consumers generally believe Google Maps is very cool and that
11 they simply consist of competitive advertisements, while not being aware of the thievery taking place,
12 the fact that Google has stolen those business identities, or that Google committed acts of piracy to
13 bring those business advertisements to the public. Google accomplishes this elaborate conspiracy, as
14 the complaint alleges, by use of illicit market force intervention and special relationships that Google
15 has built with paid advertisers and separately with the public at large. (See: ¶ 16 below or ¶'s 1-3 of the
16 complaint)

17 **6.**

18 Millions of small businesses rely upon word-of-mouth goodwill and free commercial speech in
19 prospecting sales; Google presently by force, without permission, engages plaintiffs and many others
20 by taking their identities and business information for publication online. Google then sells plaintiffs
21 very costly lead generation and hard work to his competitors for pennies. Those sales leads
22 competitors get by advertising alongside Google's business review of plaintiff's businesses are stolen
23 from plaintiffs by Google Maps and Places. It is no different than if Google were taking them from
24 plaintiff's phone room by tapping plaintiffs telephones. In this instance plaintiffs go door-to-door each
25 day and are being followed (stalked by unwanted attention and harassed) by Google Maps and Places;
26 Uncontroverted facts alleged in this case include assertions that plaintiffs are harmed financially and
27 emotionally because of Google's market strength intervention (stalking - unwanted attention) into
28 plaintiff's businesses and bidding of contracts, the market force popularity of Google's intervention with
directory style advertising, and the resulting consumer inquiry online following a contact plaintiff has

1 made with a consumer. The monumental efforts plaintiffs make each day are thereafter intervened by
2 Google Maps and Places and Google sells off plaintiff's work via consumer inquiries to plaintiffs
3 competitors. Google as shown by proof, may then defame plaintiffs freely and anonymously, as may
4 their marketing people on commissions to increase their take of plaintiffs efforts all at plaintiff's
5 expense.

6 **III. As A Matter Of Strict Liability**
7 **Google Is In Fact The Party Defaming Plaintiff's Businesses**

8 **7.**

9 The complaint which is excerpted within Appellants Brief, alleges Google as the author and publisher
10 of defamations that devastate plaintiff's businesses thereby damaging plaintiffs financially and
11 emotionally. This is in fact according to proof, not a speculation or conjecture. **First:** Within the
12 complaint and 'Declaration of G. Black' the plaintiff documented with photo and copy Google Maps
13 immediately following a threatening letter to Google's legal dept., the plaintiffs were defamed on
14 Google Maps and Places within a few days of Google receiving the notice. Plaintiffs estimated the
15 odds at 10,000,000 : 1 that it was Google doing the defamation as the defamatory content was along
16 the line of a police power investigative type defamation rather than that which might be crafted by a
17 consumer. Google has not addressed that. **Second:** Within Appellants Brief, plaintiffs provided the
18 Ninth Circuit with a copy of Google Maps using as a search term the plaintiffs' wife's business name
19 "Castle Roofing". The Ninth Circuit may find this important search attached to page 2 of "Appellant's
20 Informal Brief". It's located beneath page 2 of the '*Informal Brief Form*'. It shows a photograph of a
21 button labeled "Search Maps" at Google's web site using "Castle Roofing" as a search term. The
22 defamations, at Google Maps, are shown and were originally posted alongside Google's advertised
23 listing of Cal Bay Construction owned by plaintiff (G. Black). Google marketing employees or Google's
24 local search algorithms, not a third party, thereafter published those defamations of Cal Bay
25 Construction against the business review of Castle Roofing on Google Maps owned by another plaintiff
26 (H. Beam - Black). While plaintiffs are husband and wife their businesses and CSLB licensing are not
27 associated and Google, not a third party, defamed Castle Roofing. Google is in a strict manner the
28 defaming third party the district court orders grant immunity to. Therefore the district court orders are

1 erred procedurally and erroneous for failing to shift the burden of proof to the defendants at trial as
2 stated in Appellant's Brief and failing to acknowledge that plaintiff alleged that Google was the
3 author/sponsor/publisher of the content or at least negligent in republication of the defamations against
4 the wrong party. **Third:** Google additionally publishes defamations against both plaintiff's businesses
5 by pages 'cached' on Google Maps and Places with defamatory content from Yahoo's web site as
6 cited in complaint and within Appellant's brief and unanswered by Google's response to the brief. This
7 defamatory act, also by Google, is after Google was informed that Yahoo had removed the
8 defamation. Specifically stated within the complaint for damages and unanswered by Google, is
9 Yahoo's response at removal of the defamation and plaintiffs letter to Google's legal dept. threatening
10 this suit. Appellants Brief details these acts by excerpts from the district court proceedings to illustrate
11 how Google defames plaintiff's businesses for the purpose of selling advertising and enriches
12 themselves in spite of the financial and emotional damages caused to plaintiffs. Plaintiff stated in
13 district court that the matter was one of '*strict liability*' and there is no mention of a third party within the
14 complaint; all the allegations and causes of action were against Google, Inc.. The district court erred
15 when ordering that plaintiffs were seeking to hold Google liable for the conduct of third parties as
16 plaintiff's complaint only seeks to hold Google liable for Googles' injuries to plaintiffs. It's important that
17 plaintiffs prosecute this complaint against Google because it is near next to impossible for plaintiffs to
18 sell home improvements or roofing with Google's irremovable policies and unwillingness to
19 communicate with plaintiffs. Googles acts are simply unconscionable and should not be codified or
20 condoned by the Northern District Court or any other court.

21 **IV. Google's Response To Appellant's Brief**
22 **Cites Confusion Over Plaintiffs Trade Names**

23 **8.**

24 Plaintiff's complaint does not contain a cause of action for defamation because plaintiffs businesses
25 were attacked online not only at Google but also Yahoo, the BBB, and on the ground at the CSLB.
26 Prior to Oct. 20th when the defamation started at Google Maps, the plaintiffs had to answer to the
27 California State Contractors License Board (CSLB). Consumer roofing complaints, from as far away
28 as Los Angeles, Ca., had been lodged against Cal Bay Construction at the CSLB. Plaintiff's

1 businesses are both based in the S. F. Bay area and plaintiffs had never been to Los Angeles or ever
2 worked there. Parties other than plaintiffs were using Cal Bay Construction's business name, location,
3 and license numbers but not Cal Bay's telephone numbers. The name and license numbers had been
4 stolen by others to sell roofing to consumers. The CSLB communicated with plaintiffs and presumably
5 apprehended the bad guys. Plaintiffs were absolutely astonished at how quickly and efficiently the
6 CSLB cleared plaintiff's names. The plaintiff then changed the name on the license at the CSLB from
7 Cal Bay Construction to Castle Roofing and Construction. Shortly thereafter, defamations on line
8 began against Cal Bay Construction but plaintiff again succeeded in getting the web sites to remove
9 those defamations at Yahoo and the BBB. However, the plaintiffs were ruthlessly blindsided and
10 ambushed, as stated in complaint, by Googles unwillingness to even communicate with plaintiffs.
11 Google not only proceeded to devastate plaintiff's livelihoods but carried forth the defamations to
12 plaintiffs' wife's business at "Castle Roofing". Plaintiff therefore paid large fees to inactivate his builders
13 license at the CSLB, as the license became useless in commerce against Googles continuous
14 broadcasting of defamation on a 24/7 basis; contract cancellations, humiliations, grief, and lost bids
15 ensued and continue irreparably as outlined within the plaintiffs "Declaration of Damages." Google's
16 exercise of illicit police powers at Google Maps and Places within their new 411 directory assistance
17 ad scheme actually revoked Mr. Blacks builders license under Cal Bay Construction by rendering it
18 inoperable on a door-to-door word of mouth basis. Plaintiffs rights to free commercial speech were
19 impinged upon and taken away by Google. Thereafter, the Plaintiff has pushed at Google hard in
20 argument as Google misapplied those Cal Bay Construction defamations to Mrs. Blacks "Castle
21 Roofing", presumably in retaliation (malice). Immediately after filing suit against Google, Googles'
22 counsel had threatened to investigate plaintiffs online writings which is well documented in the
23 proceedings (Declaration of G. Black.). For months plaintiff believed Google was attacking plaintiffs for
24 his writings, following a conversation with Google's legal dept. after filing the complaint. Plaintiff is a
25 new writer and may have overreacted in ignorance, frustration, or the stress of that moment in time.
26

27 V. Google Caused The District Court Errors

28 9.

1 The complaint and papers extensively document how plaintiffs tried for months and bent over
2 backwards trying to communicate with Google to save their businesses, home, and livelihood; but
3 Google simply ignored plaintiffs for the sake of their own profiteering. The first defamation against Cal
4 Bay Construction may be in part true by a consumer but wrongfully posted against plaintiffs rather than
5 identity thieves. Google thereafter posted *wrongfully* the defamations from "Cal Bay Construction"
6 against "Castle Roofing" a separate and distinct party to this action; Castle Roofing is separately
7 licensed in Ca. and not similar in name style to Cal Bay Construction. Google again ignored plaintiffs
8 inquiry to correct this as alleged. From plaintiff's experience, the CSLB, the BBB, and Yahoo all
9 communicate with businesses and professionals as a matter of obedience to law — but not Google;
10 Google apparently believes it is beyond the law, because of their enormous popularity and size. The
11 plaintiff argued in district court that much larger U.S. entities, such as banks, deal with billions of
12 sensitive data transactions daily but are still held responsible and accountable if a wrongful act is
13 brought to their attention by a business or patron. Plaintiffs believe the district court erroneously
14 dismissed plaintiffs complaint which alleged numerous violations of law. Before the district court,
15 Google put forth a misleading challenge to the Communications Decency Act by taking a few lines
16 from the complaint out of text; accordingly, defense misdirected the courts attention to believing the
17 complaint was a third party cause of action against Google. The fact is the complaint does not have a
18 cause of action for defamation and never mentions a third party. The district court orders should
19 therefore be adjudicated as erroneous or against law. The plaintiffs were entitled to judgment on the
20 pleadings against Google at trial, not a dismissal of the matter. The plaintiffs are asking the Ninth
21 Circuit to reverse that district court error and grant judgment for plaintiffs.

22 **VI. Google Advises That Plaintiffs** 23 **Had Other Remedies At Law**

24 **10.**

25 Google suggest plaintiffs could counter the negative business reviews with positive comments, but that
26 very simply is bad advice and not true. Suggesting that businesses post positive reviews to counter
27 negative reviews would be a deceptive business practice if done by plaintiffs or even orchestrated by
28 plaintiffs. Additionally the negative reviews at issue are not answerable in any meaningful manner as

1 they *assassinate* plaintiffs businesses and character. Plaintiff alleged in complaint and rebuts
2 heretofore that whether those so called reviews are '*pro or con*', they are still advertising content
3 solicited from the public at large by Google and subject to the advertising laws within the U. S.
4 because they're used in conjunction with paid advertisement that are uneven and unfair to the
5 plaintiffs. The advertising scheme at Google Maps, as demonstrated in Appellant's Brief in detail, are
6 without any reasonable doubt, not even or fair competition. That fact of this case is uncontroverted by
7 Google as the fact is clearing not impeachable and very relevant to the plaintiffs causes of action.

8 **11.**

9 Google has developed special relationships with the public for directory style advertising to facilitate
10 the sale (theft) of plaintiffs daily sales and door-to-door prospecting efforts to others. Google's sells
11 plaintiffs trade name to plaintiffs local competitors which enables those competitor's and paid
12 advertisers an exposure to plaintiffs daily inquiries from consumers via Google's home page. This in
13 plaintiffs opinion is not the function of an Internet information provider but rather that of a product
14 Google is selling and promoting as a profiteer; it's not an act by a third party. Those acts by Google are
15 done while Google in the same maneuver causes great harm to plaintiffs by way of solicited *pro or con*
16 advertising content from the public at large to accompany the advertisements in an uneven and unfair
17 manner towards the plaintiff's businesses. These acts by Google brainlessly intervene upon the
18 substantive rights of plaintiffs in commerce. As the plaintiff goes door-to-door he is essentially tracked
19 by Google Maps and Places via consumer inquiry and only so that Google may sell plaintiff's goodwill
20 and word of mouth advertising efforts to others not to be helpful in informing consumers as unqualified
21 speech may actually cause harm as consumers may be redirected from A+ rated companies towards
22 those who believe buying plaintiff's trade name from Google is ethical. Additionally, most any content
23 accompanying the plaintiffs business information is an intervention and defamation because even an
24 intervening party suggesting a buyer get another bid at the same time plaintiff is physically writing up
25 a contract, is defamatory to a salesman. For that reason plaintiffs believe the court should order
26 Google Maps to be silent, or at least be surgically correct and in proper order when advertising the
27 businesses and professions of others without their permission. It's actually the intention of most all law
28 in commerce and the plaintiffs believe the court must restrain Google in that respect. Short of that, the

1 matter should be adjudicated as an unfair business practice and/or false advertising as alleged in
2 complaint. For many many years, it's been a tradition in the U. S. to allow free commercial speech,
3 word-of-mouth marketing, and sales prospecting without disturbance or unfair intervention by large
4 corporate market forces and business such as Google, Inc..

5 **12.**

6 Google suggested plaintiffs could sue third parties if plaintiffs believe the reviews are false. In this case
7 that is not an option for plaintiffs. As stated in Appellant's Brief and in complaint, Google Maps causes
8 enormous financial damages very quickly because of Google's market force penetration, strength, and
9 popularity of their 411 directory style publication, as alleged. A person or consumer with a web site
10 defaming plaintiff's businesses would cause little, if any, damage and merely go unnoticed. The
11 plaintiffs damages are caused directly by Google, Inc.'s power and their intervention as alleged in
12 complaint. The damage to plaintiffs is Googles silencing of plaintiff's substantive rights to commercial
13 speech. Googles intervention not only interrupts plaintiff sales presentation but also takes away
14 plaintiffs hard efforts of prospecting as Google sells his sales leads to others illicitly. Google's
15 argument that plaintiffs may sue consumers lacks merit because those damages and emotional
16 distress are not recoverable from those persons. If as Google suggest the plaintiff sued a consumer for
17 advertising commentary a respectable court of law would never condone granting a home
18 improvement contractor a consumers life savings to pay such sizeable damages, instead they'd point
19 directly at Google and those risk alleged in plaintiffs complaint at ¶'s 1-3. The damages as properly
20 alleged are caused by Google's conduct and illicit acts of power, not those of the public at large.
21 Google does in fact *entice* the public for ad content thereby placing those persons into harms way
22 when businesses and professions are damaged.

23 **13.**

24 Furthermore, plaintiffs have not received inquiry or any reports from consumers concerning a defective
25 roofing project and as plaintiffs show proof that Google defamed plaintiff's businesses there should be
26 no need for plaintiffs to go searching for obscure potential third parties in relief. Plaintiffs both enjoy
27 perfect reputations with A and A+ business ratings at the BBB and licensing agencies.

28 **VII. Plaintiff's Case Is unimpeachable
Against Defendants On The Merits**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14.

The case before the Ninth Circuit is very meritorious. Most all causes of action within the complaint are admitted to or uncontroverted by defendants with the exception of Violation of Law. Below is a summary of each cause of action in rebuttal to "Defendant-Appellee Google Inc.'s Answering Brief.

Misrepresentation

15.

To succeed in a cause for misrepresentation plaintiffs must prove the defendants made material misstatements. **First:** Google Maps published defamatory advertising content intended to defame Cal Bay Construction on Castle Roofing's business advertisement as shown in the plaintiff's Informal Brief, (attached to p. 2 of the informal brief form). Castle Roofing is a separate and distinct business entity with separate distinct ownership and licensing in the State of Ca.. The misrepresentation is Google's republication of said defamtion against the wrong party. Plaintiffs believe it constitutes libel in its' strictest form according to proof and alleges it as an unfair business practice and misrepresentation. **Second:** Google solicits for, allows, promotes, and entices from the public unqualified speech as advertising content for the business and professions at Google Maps and Places. Those advertisements done without permission are referred to within the complaint as '*courtesy advertisements*'. Google purported within their "Motion To Dismiss" that the programs purpose was stated publicly to "*help consumers make more informed choices.*" Plaintiff believes that statement by Google is a public misrepresentation of their product to consumers because unqualified speech used in advertising the business of professions of others is harmful to consumers at Google Maps. This is because consumers may be and are in this case swayed, injured, or interrupted from buying products from well established companies with perfect reputations by unqualified and unmonitored speech in favor of Googles' paid advertisers who believe that purchasing the identity of others is ethical. Those same consumers often find themselves placed in harms way, not only by wrong choices caused by unqualified speech, but also by Google's having enticed a consumer into making a comment which later proves to be brainless or that causes great harm to a business or profession. Google in reply to Appellant's Brief actually suggest plaintiffs could sue those consumers instead of Google. Consumers

1 in general aren't aware of Google's perception of the CDA and the array of illicit behaviors by Google,
2 paid advertisers, and others at Google Maps. For these reasons, plaintiffs believe their cause of action
3 for misrepresentation is very sound. Mischief at Google Maps also prevents amicable dispute
4 resolution between businesses and professionals with consumers; it additionally interrupts and
5 destroys sales, and thereafter kills jobs.

6 **Breach of Contract**

7 **16.**

8 Google by intervention, breaches a contract between the plaintiff's businesses and a contract
9 plaintiffs have with the phone company concerning the plaintiff's White Page listing of their businesses.
10 Plaintiffs stated in declaration that they were not able to find anything in the agreement with White
11 Pages that allows Google to take the White Page listing of plaintiffs businesses and republish them
12 online for the purposes of selling advertising to others. The act of republishing them is prohibited by
13 the legal notices published online by White Pages unless Google owns White Pages which is not the
14 case. The allegation, as well as, most all allegations within the complaint, were uncontroverted by
15 Google as Google relied wholly upon immunity for third parties. The publication of plaintiffs business
16 phone listings is defined within Appellant's Brief as a third party intervening breach of contract
17 pursuant to the U.C.C. Article 2 - Sales under "The Law Of Unconscionable Contracts". The law cites
18 as follows:

19 **U.C.C. Article 2 - Sales** *"Where third party intervention causes unconscionable terms to a contract*
20 *between others the court may limit the application of any unconscionable term as to avoid any*
21 *unconscionable result."*

22 Google admitted within their "Motion to Dismiss" to listing millions of businesses and professions and
23 again never responded to the allegations that those listings were done without permission (trafficking by
24 definition as detailed in Appellant's Brief). Plaintiffs businesses have contracts with White Pages for
25 consumer convenience only. Google breaches that contract by taking plaintiff's name, address, and
26 phone number from the phone listings outside of that context for use at Google Maps and Places.
27 Google's purpose is to uniquely identify plaintiff's businesses and millions of others. Google thereafter
28 creates unconscionable terms and risk for plaintiffs as alleged in this law suit (§§ 1-3 below). Plaintiff

1 stated in declaration, which included exhibits, that he'd placed the CSLB (800) phone number in the
2 Google Maps listing or *courtesy advertisement* of Cal Bay Construction. Google **edited** that (800)
3 number out and changed it back to plaintiff's originally assigned phone number at White Pages.
4 Google is presently still broadcasting the Cal Bay Construction's phone number online as edited by
5 Google. Google seeks to uniquely identify businesses by their assigned phone numbers; as stated in
6 Appellant's Brief there exist hundreds of 'Castle Roofing' businesses within the United States and the
7 telephone numbers are the only unique characteristic. Plaintiffs alleged and exhibited that Google
8 breached plaintiffs phone contract as excerpted from the complaint below and the complaint was
9 accompanied by a White Pages legal disclosure in the "Declaration of G. Black" following the
10 complaint which prohibits the republication of White Pages products by others. Plaintiff stated this fact
11 it in district court at ¶12, p. 7 within the "DECLARATION OF GARY BLACK, with exhibits A through L" and
12 the fact is uncontroverted by Google. Excerpts from district court record are as follows:

13 "12. Still suspicious of the Defendants marriage of public listings, ads by others in competition, and
14 consumer generated content I decided in June 2010 to check the 411 directory i.e. the White
15 and Yellow Pages legal disclosures as it seemed to me they would not want their product
16 used with any product or service that is not theirs. Sure enough I was right. The totality of the
17 411 directory commonly used is derived directly from ones published phone listing in the
18 White Pages. The full legal disclosure of copyright and trade dress published by White Pages
19 is attached hereto as [Exhibit 'K']."

20 Plaintiff additionally stated the claim and alleged special relationships with the public at large within the
21 complaint which were incorporated into all causes of action in complaint as follows:

22 "21.) The Defendant, Google, Inc.'s business review programming list on line for public viewing
23 business names, addresses, and phone numbers... "The Plaintiff contends the Defendant, Google, Inc.,
24 is by force, albeit market force, causing Plaintiff's business to constantly monitor and look over it's
25 shoulder so as not to be ambushed by unknown Internet sources and that the practice of forcing small
26 *land based* businesses to become Internet savvy constitutes an unfair business practice..."

27 "22.) The defendant, Google, Inc., has refused on multiple occasions throughout the
28 past six months to remove, mediate, or even acknowledge damaging advertising directed at
the Plaintiffs businesses."

"23.) ... In short, the defendant Google, Inc. has held itself out by way of it's programming as a deciding
factor in the plaintiff's bidding process and ignored plaintiff's requests for a fair or reasonable
dispute/resolution process while in violation of Federal and State law."

" 1.) ...The Plaintiff alleges that the Defendant, Google, Inc., chose to sponsor consumer-generated
content in conjunction with paid advertisements and on line business reviews in such a matter that it has
established an endorser sponsor relationship with the public at large.

" 2.) The Plaintiff alleges that the Defendant, Google, Inc. in fact allows so called '*courtesy
advertising*' of the Plaintiff's businesses to be placed on it's web site without the Plaintiff's

1 permission while exaggerating the benefits of a free product to the public at large and fails to
2 disclose to businesses a material relationship where one exists between the public at large and
the Plaintiff's business. Plaintiffs herein allege that these acts combine to constitute a violation of law
under Title 15 USC 45 - Sec. 45 (a)(1)(2). and Title 15 USC 53 (a)(b).

3 " 3.) By the Defendant, Google, Inc., employing said means of marketing the '*courtesy advertising*' for
4 the Plaintiff's businesses the Plaintiffs are harmed by assuming a risk of product and services being
misrepresented and the potential liability that accompanies said risk."

5 Google never answered the allegations within the complaint for damages individually, never addressed
6 the alleged risk and damages imposed upon plaintiffs, and ducked every inquiry. Plaintiff believes the
7 third-party intervening breach of contract cause against Google Inc. is meritorious.

8 9 **Unfair Business Practices/False Advertising**

10 **17.**

11 Unfair business practices were alleged as *conspired* by Google in special relationships with others.
12 Following are some of the key words extracted and excerpted from the complaint, they're italicized as
13 follows: Google allegedly '*devastates*' (emotionally and monetarily as alleged) plaintiff's businesses by
14 '*conspiracy*' (collaboration with others) and '*unfair market force intervention*'. Google '*knew*' (scienter
15 knowledge) and Google '*enticed*' (inducement) others to commit wrongful and unethical acts. Plaintiff's
16 alleged a conspiracy by Google consisting of several elements beginning with special relationships in
17 establishing an "*endorser-sponsor relationship with the public at large.*" as cited above. The
18 conspiracy involved a couple special relationships, one with paid advertisers and another with the
19 public by soliciting advertising content for the development of an 411 directory style advertising sales
20 campaign. Within the campaign, developed by Google, the advertisements are uneven and incredibly
21 unfair as Google allows unattended and unqualified advertisements of plaintiffs businesses; the details
22 are discussed fully within the Appellant's Brief where the advertisements are shown to be tilted to favor
23 Googles' paid advertisers rather than the '*courtesy advertisement*' of plaintiff's businesses without
24 permission. By advertising plaintiffs businesses without permission Google is advertising a service
25 plaintiffs can not provide. This is simply because consumers visiting the advertisement would believe
26 that they could call plaintiffs and get an estimate on a new roof which is generally not true - false
27 advertising. Plaintiffs are door-to-door sales people operating in a roaming manner and targeting
28 specific neighborhood areas in about eleven different cities. Distances and travel times within the bay

1 prevent plaintiffs from advertising commercially and plaintiffs do not advertise because the resulting
2 call-ins from consumers are interruptions; In simplified terms the plaintiff tomorrow can not drop seven
3 or eight appointments prescheduled from canvassing in Novato to drive to Pleasanton or Berkley just
4 as an example. Put more simply plaintiff typically does about seven or eight but sometimes as many
5 as twelve roof estimates per day and will not drop five or six appointments to drive those distances for
6 a call-in getting bids from every contractor they find online that's willing. Plaintiffs business is
7 conducted wholly by word of mouth and door-to-door as are many thousands of other small
8 businesses and professions. This is discussed in detail within the complaint, brief, and declaration of
9 G. Black. When one such as Google launches a 'courtesy advertising' program on plaintiffs behalf,
10 such as in this case, it is an unfair business practice, unconscionable, elitist, and rude to not
11 communicate with the business owner (plaintiff). Misrepresentation discussed at ¶ 7 above, combined
12 with a claim for negligence discussed below and the defamation of plaintiffs business done directly by
13 Googles own acts in negligence, combine to make plaintiffs cause of action for unfair business
14 practices and false advertising unimpeachable. Additionally, as well discussed in Appellant's Brief, the
15 method of commentary alongside the Google Maps listings of plaintiff's businesses are only directed at
16 plaintiff's business and not the paid advertisers of plaintiffs competitors advertised on the same web
17 page viewed by consumers. This makes the advertisements incredibly uneven and tilted towards one
18 or the other of the advertisers as detailed in Appellant's Brief. It's lawless as in an elitist, Google,
19 sponsoring a dog fight but instead of dogs it's done with peoples livelihoods giving rise to the essence
20 in slang of dog eat dog. As alleged, plaintiffs and also consumers see the pages at Google Maps as
21 advertising rather business reviews and plaintiffs believe those pages should be subject to the same
22 advertising laws as any other publicly advertised product. Anything short of that should constitute an
23 unfair business practice.

24 **Negligence**

25 **18.**

26 The simple existence of a business review allowing for unqualified, unattended, and brainless
27 commentary alongside advertisements allowing for attacks on plaintiffs businesses and other business
28 and professionals is unconscionable. For Google to ignore the many business inquiries by plaintiffs

1 prior to the filing of the complaint is negligence beyond that which is reasonably expected of much
2 larger businesses than Google. As previous stated in district court, even large banks are held
3 accountable when approached and notified of wrongful acts associated with their relationship or
4 dealings. Those large banks handle billions of transactions daily, meaning that if Google
5 were to continue, it may need to employ thousands of additional people to properly administer the
6 programs they've created at Google Maps and Places. Creating those programs then ignoring the
7 responsibilities that come along with their creations demonstrates an unconscionable rise and
8 arrogance in corporate power over millions of small businesses and professionals as Google makes a
9 mockery of the U. S. Justice System and commerce within the U. S.. Plaintiff is asking the Ninth Circuit
10 for relief in that regard as plaintiffs believe Google Maps as they're presently broadcast are systemic
11 and against the public interest as discussed in Appellant's Brief and in complaint.
12

13 **Violations of law**

14 **19.**

15 Nearly all law pertaining to truth in advertising, uniform commercial codes, business and professions
16 codes, and the CDA discussed above are violated by Google Maps and Places as we speak. Google
17 is in fact putting the intent of the CDA to a test before the Ninth Circuit while they're exceeding the
18 boundaries of civil order and obedience to law expected by business and professionals within the
19 community and as practiced by the CSLB, BBB, FTC and others such as Angies List and. Google
20 does not address the intent and meaning of the immunity statute other than to take it out of context to
21 suit a third party defense not alleged within plaintiff's complaint. Plaintiffs believe it's clearly detailed
22 within Appellant's Brief that the '*genius*' of Google's programming bars Googles immunity defense
23 per Congresses' language within the statute itself. Googles defense of immunity joined by their
24 conduct alleged, flies in the face of the Communications Decency Act as Congress intended it. The
25 district court orders are therefore flawed in that they are against the law pursuant to the
26 Communications Decency Act.
27

28 **20.**

Google's forceful market intervention and advertising of shops without a business owners permission,

1 silences that shops speech and violates the substantive rights of the shop owner to free commercial
2 speech and privacy when selling, prospecting, and generating sales prospects as in this case.
3 Plaintiffs are unaware of any law protecting the rights of online speech whereby that speech is used in
4 *advertising schemes*, with malice, by profiteers such as Google to enhance advertising revenues for
5 the profiteer. Google Maps and Places appear to be overwhelmed with false, misleading, illegal, and
6 unqualified speech that injures, harms, and destroys businesses and professions. The harm in part is
7 because of the anonymous and unqualified speech Google permits to accompany advertisements as
8 content but the greater harm is that Google ignores the responsibilities their programs create to
9 communicate with those advertised in the '*courtesy advertisements*'. That makes Google an absolute
10 monster because they're taking advantage of millions of *unsuspecting professions* that simply work
11 and produce jobs. Google enriches themselves at the expense of others by standing on the substantial
12 rights of others, professionals as well as consumers. The unfair practices alleged against Google , in
13 short, are the wholesale taking of millions of peoples business and professional identities, specifically
14 the plaintiffs without permission. The invasion of plaintiffs substantive rights to free expression in
15 sales, unlawful exploitation and theft of plaintiff's sales lead generation on a daily basis, negligent
16 *defamation by Google* against plaintiff's businesses as discussed above combine to constitute an
17 unfair business practice and as a result irreparably harm plaintiffs good name, reputation, and
18 goodwill.

20 **Intentional Infliction of Emotional Distress**

21 **21.**

21 Plaintiffs can not think of a more masterful way of sabotaging the U.S economy than what Google has
22 contrived. Google has only a few thousand employees while the U. S. Dept. of Labor reports the
23 existence of about 10,000,000 small businesses and professional practices. Plaintiffs conservatively
24 estimate that 200 - 300 jobs and/or careers are presently lost every few days within the 10,000,000
25 that exist due to the type of program mismanagement as alleged against Google. Directory style
26 advertising schemes, such as Google Maps, are spreading into every city, county, and state
27 throughout the U.S. quickly and as we speak. Regardless of the pain and suffering to thousands of
28

1 businesses and professions the private side of the economy is *very motivated* by illicit profiteering,
2 especially if they believe they can get by with it. There exist horror stories of businesses lost all over
3 the Internet and even suicides resulting from these online programs and a new business market of
4 reputation defenders is cropping up and advertising daily as businesses and professionals are
5 attacked online. As the losses to employment are rising quickly, it's only a matter of time before these
6 programs explode to a critical state thereby plunging the U.S. economy into chaos or further down the
7 economic ladder. The problem is very real, in fact, in 1943 men were sent to the U.S. on a campaign to
8 sabotage factories as well as "small acts of terrorism" aimed at Jewish-owned shops. At that moment
9 in time, the U. S. sentenced those people to death for sabotaging American businesses. The
10 emotional stress of having ones livelihood taken from them without any recourse by Google's self
11 proclaimed police powers is emotionally devastating. Google essentially revoked plaintiffs State
12 contractors license to build and devastated the wife's Castle Roofing by ignoring their responsibilities
13 in commerce to manage the programs they created. The combined acts alleged and discussed
14 heretofore in plaintiffs opinion are outrageous, far beyond the bounds of an orderly commercial
15 society, and systemic to the U. S. economy as discussed in Appellant's Brief under public interest.

16
17 **VIII. Defendants Defense Is Fatally
Flawed And In Violation Of Law**

18 **22.**

19 Plaintiffs business is and always has been 100% based upon free commercial speech and door-to-
20 door sales. Google destroys plaintiffs good will with negligent defamation and intervention upon those
21 freedoms of commercial speech. Google argues that the law is to allow unfettered speech on the
22 Internet and that Google does not owe the World an obligation to ensure that speech on the Internet is
23 accurate. In this instance Google is very wrong about that, as plaintiffs are not aware of any laws in the
24 U. S. that protect speech used during the commission of an identity theft and advertising scam. The
25 very CDA legislation Google cites was crafted by the U. S. Congress, as a law, to allow web sites to
26 remove harmful content from the Internet without fear of litigation for censoring the speech of site
27 users. The laws intent is clear by definition and precisely intended to prevent and punish trafficking,
28 stalking, and harassing on the Internet. Google is presently engaged in those acts and conduct the

1 CDA is attempting to deter. It is not a conjecture and should not be a matter for discretion for the
2 courts with regard to the statutory intent in this instance. Once seen in the proper light it becomes
3 merely an elementary case of whether Googles' acts are wrongful and not a matter of Google's alleged
4 immunity under the statute. Appellant's Brief breaks out the specificity of the CDA, discusses the
5 separability of statutory clauses, and defines the acts by Google in accordance to the English
6 dictionary definition and law. To put it simply, ignoring plaintiffs that inquire when Google is using their
7 business identities without permission to sell their sales leads and prospecting to others is an
8 unconscionable act of theft and disobedience for the law.

9 IX. Conclusion

10 23.

11 Unfettered speech on the Internet is supported by plaintiffs, as is anonymity, and the Communications
12 Decency Act. In this instance and circumstance the plaintiffs are not aware of any U.S. law
13 or first amendment right that protects thievery, racketeering, or the genius of Google Maps and Places
14 as outlined in Appellant's Brief. Googles argument for immunity to allow unfettered speech on
15 the Internet and belief that they can not possibly monitor the inquiries from businesses and
16 professionals to insure accuracy within their programs is disingenuous. Google is simply acting in
17 order to avoid a duty owed to the business or professional community, as in this case.

18 24.

19 Google is selling a product at Google Maps and Places, in this case the product is commercial
20 advertising rather than Google performing the function of simply providing information in a public
21 format. Plaintiffs are unaware of any law, statute, or regulation supporting the proposition that
22 immunity extends to immunizing a company that is selling a product. The district court orders, wholly
23 lack merit and are belied by the foregoing appeal and arguments, as they ignore the public interest.
24 There are an estimated 10 million small businesses and professionals in the U.S. employing millions of
25 people according to the U. S. Dept. of Labor. The ideology of a few thousand Google people taking
26 advantage of millions of peoples livelihoods in a profiteering scheme makes the district court orders
27 unjust and unfair to plaintiffs and the business community at large. Plaintiffs are asking the Ninth
28

1 Circuit to review the proceedings and reverse the lower court by granting a judgment for plaintiffs on
2 the pleadings and records in plaintiffs favor.

3 **25.**

4 Google has not conducted discovery, they've only repeated that plaintiff's damages may be caused by
5 others, and even stated that plaintiffs should not be allowed to speak before the Ninth Circuit. For
6 those reasons plaintiffs believe Google should not be entitled to cost, legal fees, or any other form
7 of relief in this matter.

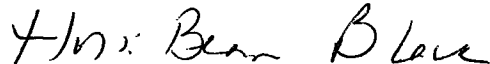
8 **26.**

9 For the most part small businesses and professionals are helpless when destroyed by directory style
10 advertising programs. They do not have registered trademarks, are local in nature, and not wealthy.
11 They're working families with family owned practices. Google's power with regards to Google Maps
12 and Places is the essence of corporate elitism as Google knows those millions of small businesses
13 and professionals can not rebut as Google blocks off all communication from them. Knowing what
14 Google is doing to thousands of businesses and professions and the damage it causes them weighs
15 heavy upon plaintiffs heart as well it should any reasonably minded person. In this instance
16 Google's affirmative defenses are all based and alleged as the conduct of others while at the same
17 time alleging an absolute legislative immunity. As the plaintiff is not an attorney, the case requires
18 careful review by the court and should the Ninth Circuit agree with plaintiffs case on the law the matter
19 could be simple and properly closed because without the immunity Google lacked an affirmative
20 defense at trial. Plaintiffs position on the law requires a reversal of the district court orders and
21 judgment for the plaintiffs on the pleadings and record to simply and properly close the case.

22 Plaintiffs declare under the penalty of perjury under the laws of the United States that the foregoing is
23 true and correct to the best of their knowledge. Executed at Benicia, California 94510 on May 10,
24 2011 and respectfully submitted before the Ninth Circuit Court Of Appeals,

25 
26 GARY BLACK, individually, Cal Bay Construction, plaintiff

May 10, 2011

27 
28 HOLLI BEAM-BLACK, individually, Castle Roofing, plaintiff

May 10, 2011

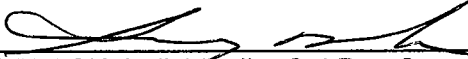
1
2 CERTIFICATE FOR FILING IN PAPER FORMAT

3
4 9th Circuit Case Number 10-16992


5
6 I, Gary Black and Holli Beam - Black, certify that the foregoing:

7
8 "INFORMAL"
9 APPELLANTS REBUTTAL TO
10 DEFENDANT - APPELLEE GOOGLE INC.'S
11 ANSWERING BRIEF

12 is identical to the version submitted electronically and received by the court on May 10, 2011.

13
14 
15 GARY BLACK, individually, Cal Bay Construction, plaintiff

16 Date May 10, 2011

17 
18 HOLLI BEAM-BLACK, individually, Castle Roofing, plaintiff

19 Date May 10, 2011

1
2 CERTIFICATE OF SERVICE BY US MAIL

3 I, Jose G. Torres, declare:

4 I am employed in Solano County. I am over the age of 18 years and not a party to the within
5 action. My business address is: 1440 Military West; suite #104 Benicia, California 94510.

6 I am readily familiar with depositing mail with the United States Postal Service. On this date, I
7 served on each party listed below, a document entitled:
8

9 **"INFORMAL"**
10 **APPELLANTS REBUTTAL TO**
11 **DEFENDANT - APPELLEE GOOGLE INC.'S**
12 **ANSWERING BRIEF**

13 Case no. 10-16992

14 Before

15 UNITED STATES COURT OF APPEALS
16 FOR THE NINTH DISTRICT

17 GARY BLACK AND HOLLI BEAM-BLACK
18 *Plaintiffs/Appellants, V. GOOGLE, INC., Defendant/Appellee.*

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

23 by placing it into an envelope with fully paid postage thereon, sealed the envelope, and
24 delivered the envelope for mailing to the United States Post Office in Benicia, California.

25 Wilson Sonsini Goodrich & Rosati
26 attorneys at law
27 650 Page Mill Road
28 Palo Alto, California 94304-1050
Telephone (650) 493-9300

I declare under the penalty of perjury under the laws of the United States that the foregoing is
true and correct. Executed at Benicia, California 94510 on May 10, 2011.

27 JOSE G TORRES

28 Jose G. Torres