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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Lance M. Benedict,

10 Plaintiff,

11 v.

12 Google LLC, *et al.*,

13 Defendants.
14

No. CV-23-02392-PHX-JJT

ORDER

15 At issue is Defendant Google LLC's Motion to Dismiss the First Amended
16 Complaint Pursuant to Rule 12(b)(6) (Doc. 20, MTD), to which *pro se* Plaintiff Lance
17 Benedict filed a Response (Doc. 23, Resp.) and Defendant filed a Reply (Doc. 25, Reply).¹
18 The Court has reviewed the parties' briefs and finds this matter appropriate for decision
19 without oral argument. *See* LRCiv 7.2(f). For the reasons set forth below, the Court grants
20 Defendant's Motion to Dismiss.

21 **I. BACKGROUND**

22 In the Amended Complaint (Doc. 18, Am. Compl.), Plaintiff alleges the following
23 facts. Plaintiff is a professional musician with releases available on online streaming
24 services. (Am. Compl. at 7.) Plaintiff registered a trademark on his name, "Lance
25 Benedict," for entertainment, marketing, and management services. (Am. Compl. at 7 &
26 Ex. A.) On an unspecified date, an unnamed "online stalker and convicted felon" published

27
28 ¹ Local Rule 7.2(e)(1) limits the length of a brief to 17 pages. Plaintiff filed a 28-
page Response without leave of Court. The Court will consider the brief in this instance,
but would strike any further overlength briefs filed without leave of Court in this case.

1 two doctored photos of Plaintiff on a website referred to as “All That Shreds.” (Am. Compl.
2 at 11–12 & Ex. F.) One photo depicted Plaintiff behind bars, and the second photo depicted
3 Plaintiff and his wife with a caption that read, “IT’S NOT EASY BEING AN
4 INTERNATIONAL THIEF!” (Am. Compl. at 12 & Exs. D, F.) Text attached to the first
5 photo read that Plaintiff was fined and ordered to pay restitution. (Am. Compl. Ex. F.) The
6 post that included the second photo stated that Plaintiff and his wife are under investigation
7 by both state and federal law enforcement agencies. (Am. Compl. at 18.) Neither Plaintiff
8 nor Plaintiff’s wife are “[i]nternational felon[s]” or have ever been convicted of a felony.
9 (Am. Compl. 12.)

10 Plaintiff provides an apparent screenshot showing that when his name, “Lance
11 Benedict,” was typed into the Google search bar, the links to defamatory pictures would
12 appear along with search results for Plaintiff’s music. (Am. Compl. at 11–12 & Ex. C.) In
13 2019, Plaintiff informed Defendant about these defamatory articles and photos, and
14 Defendant “ignored” Plaintiff and allowed the published materials to continue appearing
15 at the “top of Google search engine results.” (Am. Compl. at 11.) Additionally, Plaintiff
16 claims Defendant “knows this information to be false,” yet denied all requests by Plaintiff
17 to remove the defamatory posts from its search engine results (SERs). (Am. Compl. at 12.)
18 Defendant continued to “broadcast” the posts “24/7, [w]orldwide.” (Am. Compl. at 13.)

19 Due to these defamatory posts, Plaintiff has “lost his once thriving business, his
20 home, his cars, his credit, his associates, his reputation, and ... his family.” (Am. Compl.
21 at 12.) He also filed for bankruptcy. (Am. Compl. at 12.) He claims the defamatory posts
22 have dissuaded potential customers from purchasing his music. (Am. Compl. at 7.) Plaintiff
23 also attributes his and his wife’s separation to the defamatory posts appearing on
24 Defendant’s SERs. (Am. Compl. at 12.) Moreover, he has received death threats and has
25 been “harassed beyond belief via text messages, emails, phone calls, [and] social media
26 posts.” (Am. Compl. at 15.)

27 Plaintiff has brought suit raising eight “claims”: (1) violation of the Lanham Act,
28 (2) unlawful use of intellectual property, (3) defamation and broadcasting of false

1 information, (4) harassment, (5) pain and suffering, (6) intentional infliction of emotional
2 distress, (7) loss of consortium, and (8) loss of income and ability to obtain employment.
3 (Am. Compl. at 15–23.) Defendant now moves to dismiss pursuant to Rule 12(b)(6) of the
4 Federal Rule of Civil Procedure. (Resp. at 1.)

5 **II. LEGAL STANDARD**

6 Rule 12(b)(6) is designed to “test[] the legal sufficiency of a claim.” *Navarro v.*
7 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). A dismissal under Rule 12(b)(6) for failure to
8 state a claim can be based on either: (1) the lack of a cognizable legal theory; or (2) the
9 absence of sufficient factual allegations to support a cognizable legal theory. *Balistreri v.*
10 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When analyzing a complaint for
11 failure to state a claim, the well-pled factual allegations are taken as true and construed in
12 the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067
13 (9th Cir. 2009).

14 A plaintiff must allege “enough facts to state a claim to relief that is plausible on its
15 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility
16 when the plaintiff pleads factual content that allows the court to draw the reasonable
17 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
18 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is
19 not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
20 defendant has acted unlawfully.” *Id.* “While a complaint attacked by a Rule 12(b)(6)
21 motion does not need detailed factual allegations, a plaintiff’s obligation to provide the
22 grounds of his entitlement to relief requires more than labels and conclusions, and a
23 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.
24 at 555 (cleaned up). Legal conclusions couched as factual allegations are not entitled to the
25 assumption of truth and therefore are insufficient to defeat a motion to dismiss for failure
26 to state a claim. *Iqbal*, 556 U.S. at 679–80. However, “a well-pleaded complaint may
27 proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and
28

1 that ‘recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556 (quoting *Scheuer*
2 *v. Rhodes*, 416 U.S. 232, 236 (1974)).

3 **III. ANALYSIS**

4 **A. Trademark Infringement**

5 Defendant contends that each of Plaintiff’s three theories of trademark infringement
6 lacks merit, namely, that Defendant directly violated the Lanham Act; Defendant is
7 vicariously or secondarily liable for a violation of the Lanham Act; and Defendant diluted
8 Plaintiff’s trademark by its actions. (MTD at 6–12.)

9 To state a valid claim for direct trademark infringement under the Lanham Act, a
10 plaintiff must plead sufficient facts from which a court can plausibly infer that the
11 defendant “used” the plaintiff’s mark “in connection with the sale, offering for sale,
12 distribution or advertising of any goods or services on or in connection with which such
13 use is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1)(a).
14 A defendant does not “use” a plaintiff’s mark to these ends when the defendant merely
15 provides a search engine service that allows third parties to search using the plaintiff’s
16 mark. *Perfect 10, Inc. v. Giganews, Inc.*, No. CV11-07098, AHM SHX, 2013 WL 2109963
17 at *14 (C.D. Cal. Mar. 8, 2013), *aff’d*, 847 F.3d 657 (9th Cir. 2017) (“[I]t is insufficient for
18 direct infringement purposes to allege that a defendant allows third parties to use the
19 mark.”). A defendant also does not “use” the mark under the Lanham Act if it merely
20 produces search results that contain the plaintiff’s mark. *See id.*

21 Here, Plaintiff has not alleged that Defendant did anything more than provide a
22 search engine service that allows third parties to search using Plaintiff’s mark. Plaintiff
23 alleges that Defendant’s search engine allowed for defamatory statements and photos to
24 appear next to Plaintiff’s trademark, but Plaintiff’s allegations are insufficient to show that
25 Defendant “used” the trademark in connection with the sale, offering for sale, distribution,
26 or advertising of goods or services, as the Lanham Act requires.

27 Similar to the direct trademark infringement argument, Defendant posits that
28 Plaintiff does not allege any facts to show Defendant “used” Plaintiff’s trademark as

1 described in 15 U.S.C. § 1125(1) for purposes of dilution. (MTD at 6–7.) With regard to
2 dilution, § 1125 provides, in relevant part:

3
4 (1) Any person who, on or in connection with any goods or services, or any
5 container for goods, *uses* in commerce any word, term, name, symbol, or
6 device, or any combination thereof, or any false designation of origin, false
7 or misleading description of fact, or false or misleading representation of
8 fact, which--

9 (A) is likely to cause confusion, or to cause mistake, or to deceive as
10 to the affiliation, connection, or association of such person with another
11 person, or as to the origin, sponsorship, or approval of his or her goods,
12 services, or commercial activities by another person

13
14 *Id.* (emphasis added)

15 To prove a dilution claim, a plaintiff must show that: “(1) the mark is famous and
16 distinctive; (2) the defendant is making use of the mark in commerce; (3) the defendant’s
17 use began after the mark became famous; and (4) the defendant’s use of the mark is likely
18 to cause dilution by blurring or dilution by tarnishment.” *Jada Toys, Inc. v. Mattel, Inc.*,
19 518 F.3d 628, 634 (9th Cir. 2008). Merely alleging that the defendant has provided access
20 to files and images created by third parties that degrades the mark is insufficient to show
21 that the defendant “used” the mark for purposes of 15 U.S.C. § 1125. *Perfect 10, Inc.*, 2013
22 WL 2109963, at *15. Here, as with his infringement claim, Plaintiff has not alleged
23 Defendant has done anything more than provide users access to the alleged disparaging
24 photos and articles. Moreover, Plaintiff has alleged no facts from which the Court can
25 plausibly infer that his mark has the requisite famousness and distinctiveness. *See*
26 *PetConnect Rescue, Inc. v. Salinas*, 656 F. Supp. 3d 1131, 1163 (S.D. Cal. 2023) (“The
27 standard for satisfying the famousness element of protection is a high one.”) (*citing*
28 *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 870 (9th Cir. 2020)).²

² In the Amended Complaint, Plaintiff cites a case called “*Target Spectrum, Inc v. Jones.*” Plaintiff’s citation to the Federal Reporter does not lead to any such case, the provided justia.com link leads nowhere, and a search reveals that no case with those party names exists in any district. (Am. Compl. at 16.)

1 Plaintiff’s argument in his Response that providing access to his trademark deceives
2 potential customers—drives them away from his music—and is therefore trademark
3 dilution also lacks merit. (Resp. at 4.) The statute imputes liability on defendants whose
4 acts are “likely to cause confusion... as to the *affiliation*” of the misleading statement.
5 15 U.S.C § 1125 (emphasis added). Plaintiff fails to allege any facts that would suggest
6 that his mark appearing next to a disparaging article about him would deceive consumers
7 as to whether the individual posting the article was affiliated with him, and in any case,
8 nowhere does he allege facts showing that defamatory content was *written* or *published* by
9 Defendant.³

10 Lastly, regarding secondary or vicarious liability for trademark infringement or
11 dilution, Defendant argues that Plaintiff failed to allege sufficient facts to establish an
12 adequate relationship between Defendant and the infringing party to impose vicarious or
13 secondary liability upon Defendant. (MTD at 10–12.) The Court agrees. Vicarious liability
14 under the Lanham Act requires that the defendant and the infringer have an apparent or
15 actual partnership, have authority to bind one another in transactions with third parties or
16 exercise joint ownership or control over the infringing product. *Routt v. Amazon.com, Inc.*,
17 584 F. App’x 713, 716 (9th Cir. 2014) (citing *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494
18 F.3d 788, 807 (9th Cir. 2007)). A financial or contractual relationship, without more, is not
19 enough to satisfy “control” in the vicarious liability test. *See Perfect 10, Inc.* 494 F.3d at
20 808.

21 In *Visa International Service*, the court held that there was not a controlling
22 relationship between the defendant and the infringer when the defendant processed
23 payments to the infringing websites and collected the usual processing fees. *Id.* Here,
24 Plaintiff alleges less than the plaintiff in *Visa International Service* to try to establish a
25 controlling relationship between Defendant and the alleged infringer who posted the
26 disparaging photos and articles. According to the allegations, Defendant simply allows

27 ³ Plaintiff’s argument in his Response that “Google Ads” provide a link to
28 Defendant is also meritless, because he does not allege facts showing a Google Ad led
users to the disparaging photos or articles. (Resp. at 14–16.)

1 third parties to access the articles when third parties type in Plaintiff’s trademark to
2 Defendant’s search engine. Plaintiff does not allege a financial or contractual relationship
3 between Defendant and the alleged infringer at all.⁴ That is, Plaintiff fails to allege facts
4 establishing any relationship between Defendant and the alleged infringer that would
5 impose vicarious liability for the claim. For all these reasons, the Court will dismiss
6 Plaintiff’s claims of trademark infringement and dilution.⁵

7 **B. Defamation and Broadcasting of False Information**

8 As for Plaintiff’s defamation claim, Defendant argues it is barred by the statute of
9 limitations. (MTD at 13–14.) Under Arizona law, the statute of limitations for a defamation
10 claim is one year after the defamation action accrues. *Larue v. Brown*, 333 P.3d 767, 770
11 (Ariz. Ct. App. 2014). A defamation action accrues, and the limitation period begins to run,
12 upon publication of the defamatory statement. *Breeser v. Menta Grp., Inc., NFP*, 934 F.
13 Supp. 2d 1150, 1161 (D. Ariz. 2013) (citing *Boatman v. Samaritan Health Servs., Inc.*, 812
14 P.2d 1025, 1031 (Ariz. Ct. App. 1990), *aff’d sub nom., Breeser v. Menta Grp., Inc.*, 622 F.
15 App’x 649 (9th Cir. 2015)). Plaintiff alleges that he informed Defendant of the defamatory
16 information in 2019. (Am. Compl. at 11.) Plaintiff does not include any dates showing the
17 alleged articles were published at a later time. Based on the allegations, the defamatory
18 statements were published at some point in or before 2019, and Plaintiff commenced this
19 action on September 13, 2023. (Doc 1-3 at 5.) Because Plaintiff filed his Complaint over a
20 year after the action accrued, the Court will dismiss the defamation claim as time barred.

21 **C. Harassment**

22 Regarding Plaintiff’s claim for harassment, Defendant argues that it is immune to
23 such a claim pursuant to Section 230 of the Communications Decency Act (CDA), 47
24 U.S.C. § 230(c). (MTD at 14–15.) Section 230 “immunizes providers of interactive
25 computer services against liability arising from content created by third parties.” *Kimzey*

26 ⁴ Plaintiff’s argument that Defendant earns royalties every time someone conducts
27 a search also lacks merit because it is insufficient to show the specific relationship required
to establish vicarious liability. (Resp. at 14–15.)

28 ⁵ Plaintiff’s claim of “unlawful use of intellectual property” fails for the same
reasons.

1 v. *Yelp! Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016) (quoting *Fair Hous. Council of San*
2 *Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc))
3 (internal quotations omitted). This immunity applies to interactive computer service
4 providers, not information content providers. *Fair Hous. Council*, 521 F.3d at 1162. An
5 information content provider is a website responsible in whole or in part for the creation or
6 development of the offending content. *Id.* “If a website passively displays content that is
7 created entirely by third parties, then it is only a service provider with respect to that
8 content.” *Id.*

9 Here, Defendant is immunized from the harassment claim pursuant to Section 230
10 of the CDA. Plaintiff failed to allege any facts that suggest Defendant did any more than
11 passively display content created by third parties. Defendant thus is an interactive computer
12 service provider in this context and has immunity from suit arising out from content created
13 by third parties. Accordingly, the Court will dismiss the claim of harassment.

14 **D. Intentional Infliction of Emotional Distress**

15 Defendant next argues Plaintiff did not sufficiently plead a claim of intentional
16 infliction of emotional distress, calling it a “passing reference.” (MTD at 16.) The Court
17 agrees.

18 Where plaintiffs are *pro se*, courts must construe the pleadings liberally and afford
19 the plaintiff the benefit of the doubt. *Lopez v. Dep’t of Health Servs.*, 939 F.2d 881, 882
20 (9th Cir. 1991) (citing *Karim–Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th
21 Cir.1988)). However, the Federal Rules of Civil Procedure still apply. *See id.* A claim for
22 relief must contain a “short and plain statement of the claim showing that the pleader is
23 entitled to relief” such that the complaint gives the defendant “fair notice of what the
24 plaintiff’s claim is and the grounds upon which it rests.” *Lehman v. Nelson*, 862 F.3d 1203,
25 1211 (9th Cir. 2017) (quoting *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th
26 Cir. 2006)).

27 To establish a claim for intentional infliction of emotional distress in Arizona,
28 Plaintiff must allege “(1) the defendant’s conduct was extreme and outrageous, (2) the

1 defendant either intended to cause emotional distress or recklessly disregarded the near
2 certainty that such distress would result from his conduct, and (3) the defendant’s actions
3 caused the plaintiff to suffer severe emotional distress.” *Harding v. Sternsher*, No. 1 CA-
4 CV 16-0127, 2017 WL 3138184, *3 (Ariz. Ct. App. July 25, 2017), as amended on
5 reconsideration (Oct. 25, 2017) (citing *Ford v. Revlon, Inc.*, 1734 P.2d 580, 585 (Ariz.
6 1987)).

7 First, Plaintiff did not adequately give Defendant fair notice of a claim against it
8 when Plaintiff passingly mentioned the intentional infliction of emotional distress claim
9 buried in the pain and suffering section of the Amended Complaint. (Am. Compl. at 21.)
10 Second, even if Plaintiff adequately gave notice to Defendant, Plaintiff’s claim fails to
11 allege facts to support that claim. Plaintiff alleges that Defendant “ignored” or denied
12 requests to remove the allegedly defamatory content. (Am. Compl. at 2.) Plaintiff also
13 claims in his Response that “ask[ing] someone to do something that is law-abiding and the
14 right thing to do and they deny the request, that is not only extreme and outrageous, it
15 shows reckless disregard for the Plaintiff.” (Resp. at 22.) The Court disagrees that these
16 actions, even if true, rise to the level of extreme and outrageous conduct or reckless
17 disregard of the near certainty that distress would result from Defendant’s conduct. In other
18 words, Defendant’s failure to comply with Plaintiff’s mistaken belief on the law does not
19 rise to the level of satisfying the intentional infliction of emotional distress pleading
20 standard. As a result, the Court will dismiss Plaintiff’s claim of intentional infliction of
21 emotional distress.

22 **E. Pain and Suffering, Loss of Income and Ability to Obtain Employment**

23 In the Amended Complaint, Plaintiff characterizes a number of requests for
24 damages as “causes of action.” (Am. Compl. at 20–22.) Past and future lost wages are
25 measures of damages under Arizona law. *Brown & Brown Ins. of Ariz., Inc. v. New*, No. 1
26 CA-CV 23-0327, 2024 WL 945687 *5 (Ariz. Ct. App. Mar. 5, 2024). Additionally, a
27 plaintiff may seek damages for the pain and suffering inflicted as a result of certain causes
28 of action. *Wagner v. Maricopa Cnty.*, No. CV 07-00819-PHX-EHC, 2009 WL 10673411

1 *3, *6 (D. Ariz. Feb. 12, 2009). These are remedies, not independent causes of action. The
2 Court must dismiss these “claims” for failing to state a legally cognizable theory.

3 **F. Loss of Consortium**

4 Finally, in the Amended Complaint, Plaintiff raises a claim of loss of consortium,
5 (Am. Compl. at 21–22), which is a derivative claim, meaning that its success is dependent
6 on the success of another claim. *Martin v. Staheli*, 457 P.3d 53, 58 (Ariz. Ct. App. 2019).
7 Because all of Plaintiff’s other claims will be dismissed, the Court must also dismiss the
8 claim of loss of consortium.

9 **G. Leave to Amend**

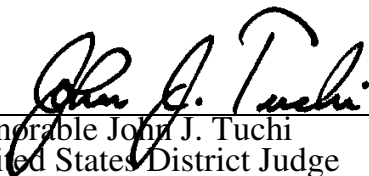
10 Because the Court finds the defects in Plaintiff’s dismissed claims cannot be cured
11 by amendment when considering the context and thoroughness of Plaintiff’s allegations in
12 the Amended Complaint, the Court will dismiss the Amended Complaint without leave to
13 amend. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

14 **IT IS THEREFORE ORDERED** granting Defendant’s Motion to Dismiss the
15 First Amended Complaint Pursuant to Rule 12(b)(6) (Doc. 20).

16 **IT IS FURTHER ORDERED** dismissing Plaintiff’s Amended Complaint with
17 prejudice.

18 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment and
19 close this case.

20 Dated this 16th day of July, 2024.

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22 _____
23 Honorable John J. Tuchi
24 United States District Judge
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