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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARNAA, LLC,

Plaintiff,

No. C 15-03221 WHA

v.

GOOGLE INC. and YOUTUBE, LLC,

Defendants.

**ORDER DENYING MOTION  
TO ALTER THE JUDGMENT**

**INTRODUCTION**

In this action claiming breach of the implied covenant of good faith and fair dealing, judgment has been entered against plaintiff. Plaintiff now moves to alter the judgment pursuant to FRCP 59(e). For the reasons stated below, the motion is **DENIED**.

**STATEMENT**

The facts of this case have been set forth in a prior order and need not be repeated in detail herein (Dkt. No. 79). Briefly, this action involves a dispute about a music video that plaintiff Darnaa, LLC, posted on defendant YouTube, LLC's website and promoted on various platforms such as Internet, print, and radio ads, all in March 2014. Defendant Google Inc. is Darnaa's parent company. Defendants removed the video later that month due to alleged violations of its terms-of-service agreement to which Darnaa indicated its assent upon creating an account with YouTube. Specifically, defendants removed the video because Darnaa allegedly violated the prohibition on using automated systems to artificially inflate video view counts on the YouTube website.

1           After an order dismissed Darnaa’s initial action in Los Angeles County Superior Court  
2 pursuant to a forum-selection clause in the terms-of-service agreement, Darnaa filed the instant  
3 action against Google in federal court in San Jose, where it was assigned to Judge Ronald  
4 Whyte. Judge Whyte twice dismissed Darnaa’s complaint, each time with leave to amend (Dkt.  
5 No. 56; Dkt. No. 26). The first amended complaint added YouTube as a defendant (Dkt. No.  
6 29).

7           In November 2016, upon Judge Whyte’s retirement, the action was reassigned to the  
8 undersigned. Less than two weeks later, Darnaa moved for partial reconsideration of  
9 Judge Whyte’s decision (both initially and upon a prior request for reconsideration) that various  
10 provisions in the YouTube terms-of-service agreement could be enforced (Dkt. No. 59).  
11 (Darnaa contended those provisions were unconscionable.) An order denied Darnaa’s request  
12 for leave to move for partial reconsideration of the ruling “twice stated by Judge Whyte” (Dkt.  
13 No. 60).

14           Shortly thereafter, Darnaa filed its second amended complaint, asserting a single claim  
15 for breach of the covenant of good faith and fair dealing (Dkt. No. 62). Defendants moved to  
16 dismiss, contending, *inter alia*, that a limitation-of-liability clause in the terms-of-service  
17 agreement precluded Darnaa’s sole surviving claim. The provision at issue stated, in pertinent  
18 part “in no event shall YouTube . . . be liable to [Darnaa] for any direct, indirect, incidental,  
19 special, punitive, or consequential damages resulting from . . . any interruption or cessation of  
20 transmission to or from [YouTube’s] services” (Second Amd. Compl., Exh. 1 § 10) (original in  
21 all caps).

22           Darnaa contended that limitation-of-liability provision could not be enforced under  
23 California Civil Code Section 1668, which provides “all contracts which have for their  
24 objective, directly or indirectly, to exempt anyone from responsibility for his own fraud, or  
25 willful injury to the person or property of another, or violation of law, whether willful or  
26 negligent, are against the policy of the law” and unenforceable.

27           After full briefing and oral argument, an order dismissed the complaint on that theory,  
28 without leave to amend (Dkt. No. 79). Judgment followed (Dkt. No. 80).

1 Darnaa now moves to alter the judgment pursuant to FRCP 59(e). This order follows  
2 full briefing and oral argument.

3 **ANALYSIS**

4 Pursuant to FRCP 59(e), a motion to alter the judgment can only be granted if the  
5 district court is presented with newly discovered evidence, the district court committed clear  
6 error, or if there is an intervening change of law. *Ybarra v. McDaniel*, 656 F.3d 984, 998  
7 (9th Cir. 2011). The court of appeals will find clear error only upon “a definite and firm  
8 conviction that a mistake has been committed.” *United States v. Ruiz-Gaxiola*, 623 F.3d 684,  
9 693 (9th Cir. 2010). If a court “got the law right” and “did not clearly err in its factual  
10 determinations,” then clear error was not committed — even if another reasonable judicial body  
11 “would have arrived at a different result.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d  
12 1127, 1331 (9th Cir. 2011). Here, Darnaa claims the order dismissing its second amended  
13 complaint erroneously declined to apply Section 1668 to its claim for breach of the implied  
14 covenant of good faith and fair dealing.

15 The order dismissing Darnaa’s claims cited binding and persuasive California law in  
16 holding (1) that a breach of the implied covenant of good faith and fair dealing is “nothing  
17 more than a cause of action for breach of contract” and (2) that Section 1668, by its own terms,  
18 only applies to a contract claim when the contract in question is unconscionable or insulates the  
19 contractor from its own fraud. *Food Safety Net Services v. Eco Safe Sys. USA, Inc.*, 209 Cal.  
20 App. 4th 1118, 1126 (2012); *Habitat Trust Wildfire, Inc. v. City of Rancho Cucamonga*, 175  
21 Cal. App. 4th 1306, 1344 (2009).

22 Each and every argument that Darnaa now raises could have been raised in response to  
23 Google’s prior motion to dismiss, and most *were* so raised. Darnaa’s motion could be denied  
24 for that reason alone. Nevertheless, this order considers Darnaa’s primary argument on the  
25 merits and reaffirms holding of the previous order.\*

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27 \* This order does not address several of Darnaa’s weakest arguments. This order declines Darnaa’s  
28 *fourth* invitation to reconsider the rejection of the argument that the limitation-of-liability clause is  
unconscionable or its dispute with clear and binding California case law — discussed in the prior order and on  
the briefing on the prior motion — interpreting Section 1668 as applying to contract claims only where the

1 Darnaa argues that Section 1668 should apply to preserve its complaint notwithstanding  
2 that the sole claim is for breach of the implied covenant — a contract theory — because its  
3 complaint includes “all allegations necessary to establish a claim for intentional interference  
4 with prospective economic advantage,” though it does not expressly plead that claim. Thus,  
5 Darnaa argues, to preclude this claim on the basis of the limitation-of-liability claim would  
6 insulate defendants from liability their own intentional torts, which Darnaa contends is  
7 equivalent to insulating it from fraud.

8 Darnaa’s characterization of its complaint as containing an unpled intentional tort claim  
9 is disingenuous. The complaint formerly *included* such a claim, but Judge Whyte held it was  
10 precluded by Section 230(c)(1) of the Communications Decency Act because it sought “to hold  
11 defendants liable for ‘an action that is quintessentially that of a publisher,’ regardless of  
12 defendants’ alleged motive” (Dkt. No. 56 at 13) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096,  
13 1003 (9th Cir. 2009), as amended (Sept. 28, 2009)). Indeed, Judge Whyte allowed Darnaa to  
14 replead its claim for breach of the implied covenant because “the source of defendants’ alleged  
15 liability [was] different” from that of their intentional tort claim inasmuch as it addressed their  
16 *contractual* obligation.

17 Darnaa now seeks to analogize our case to *NavCom Tech., Inc. v. Oki Electric Indus.*  
18 *Co., Ltd.*, No. 12-04175, 2014 WL 991102 (N.D. Cal. Mar. 11, 2014) (Judge Edward Davila),  
19 and *Civic Ctr. Drive Apartments Ltd. Partn. v. S.W. Bell Video Services*, 295 F. Supp. 2d 1091,  
20 1106 (N.D. Cal. 2003) (Judge Joseph Spero) — two decisions it failed to address in its  
21 opposition to Google’s motion, but which were addressed and distinguished in the order  
22 dismissing the second amended complaint. Darnaa’s arguments fall flat.

23 *Civic Center* involved allegations that the defendant fraudulently concealed its failure to  
24 perform its duties under the contract (not merely *that* it failed to adequately perform) and held  
25 that the resulting contract claim warranted the protection of Section 1668. *NavCom* involved

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27 clause is unconscionable or exempts the contracting party from liability from its own fraud. *See Food Safety*  
28 *Net*, 209 Cal. App. 4th at 1126. Additionally, Darnaa is simply incorrect in its assertion that a breach of  
contract constitutes a violation of statutory law warranting application of Section 1668. *Smith v. Wells Fargo*  
*Bank, N.A.*, 135 Cal. App. 4th 1463, 1484 (2005).

1 allegations of fraudulent inducement of the underlying contract, though Section 1668 did *not*  
2 apply because the plaintiffs continued to perform under the contract even after discovering the  
3 fraud, thereby waiving any claim based thereon.

4 Here, Darnaa's damages, if any, stemmed purely from defendants' performance under  
5 the contract, whether or not defendants intended any failure of performance. Indeed, Darnaa  
6 specifically limits its theory of recovery to contract damages. (As stated, Darnaa's contract  
7 claim *only* survived before Judge Whyte because Darnaa disclaimed any characterization of that  
8 claim as sounding in tort.) This allegation of a simple breach of contract, even if intentional, is  
9 simply not the kind of fraudulent conduct that Section 1668 precludes from insulation.

10 Plaintiffs fail to point to any persuasive authority in support of their position, much less  
11 authority demonstrating the manifest error necessary to support their motion at this posture.  
12 Perhaps regrettably, plaintiff has found itself caught between the rock of the limitations-of-  
13 liability clause in defendants' terms-of-service agreement and the hard place of the  
14 Communications Decency Act; but that risk was apparent when Darnaa elected to rely on a *free*  
15 video-hosting platform as the foundation for its extensive promotional campaign.

16 This case is ready for the court of appeals.

17 **CONCLUSION**

18 For the foregoing reasons, plaintiff's motion is **DENIED**. On appeal, please be candid  
19 about what points were made after judgment.

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21 **IT IS SO ORDERED.**

22 Dated: May 16, 2017.

23   
24 WILLIAM ALSUP  
25 UNITED STATES DISTRICT JUDGE

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