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12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 OAKLAND DIVISION

15 GARY BLACK, et al., )

16 Plaintiffs, )

17 v. )

18 GOOGLE INC., )

19 Defendant. )

No. C 10-02381 CW

**DEFENDANT GOOGLE INC.'S  
 REPLY IN SUPPORT OF ITS  
 MOTION TO DISMISS  
 PLAINTIFFS' COMPLAINT**

Hearing Date: August 12, 2010  
 Hearing Time: 2:00 p.m.  
 Courtroom: 2  
 (Hon. Claudia Wilken)

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1 **REPLY MEMORANDUM**

2 **INTRODUCTION**

3 Section 230(c) immunizes Google against plaintiffs' claims. Plaintiffs do not  
4 dispute that Google provides an interactive computer service. Nor do they dispute  
5 that the information at issue in this case comes from "another information content  
6 provider." Instead, they baldly assert that their claims do not seek to treat Google  
7 as the "publisher or speaker" of third-party content. They are mistaken. The  
8 complaint clearly asserts that the basis for this lawsuit is a review written by an  
9 anonymous third party that allegedly can be found using Google's online service  
10 called Google Places. For that reason, all of plaintiffs' claims seek to hold Google  
11 responsible for third-party speech, and all are barred by Section 230(c).

12 Even setting aside Section 230(c), Google's motion to dismiss demonstrates  
13 that plaintiffs have not stated a claim for relief. And plaintiffs' response does not  
14 even attempt to meaningfully defend their claims. The Court should dismiss the  
15 complaint with prejudice for the separate and independent reason that plaintiffs  
16 have failed to state a claim upon which relief can be granted under Rule 12(b)(1)  
17 and Rule 12(b)(6).

18 **BACKGROUND**

19 On July 2, 2010, Google filed a motion to dismiss plaintiffs' complaint.<sup>1</sup>  
20

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21  
22 <sup>1</sup> Google secured from plaintiffs an extension from June 22, 2010 to July 2, 2010  
23 to answer, move, plead or otherwise respond to the complaint. (Docket No. 14).  
24 Plaintiffs now claim that the parties' agreement only contemplated an answer by  
25 Google. (Docket No. 16 at 1-2). That is untrue. *See* Decl. of Bart E. Volkmer In  
26 Supp. of Def.'s Reply Mem. ("Volkmer Decl.") ¶¶ 2-7. A confirming letter from  
27 counsel and the agreed-upon form of the stipulation itself accurately reflect the  
28 parties' agreement. *Id.* If plaintiffs had conditioned granting an extension on  
Google giving up its right to move to dismiss, Google would have sought an  
extension from the Court or would have withdrawn its extension request. But  
Google would not have agreed, under any circumstances, to an extension that  
limited its substantive rights when responding to the complaint.

1 On that same day, plaintiffs filed a declaration from Gary Black. (Docket No. 13).  
2 The declaration sets forth Black’s belief that he was being targeted by third parties  
3 in retaliation for his online writings: (1) two short stories that were “intended to be  
4 for children and funny”; and (2) a letter that Black wrote to all United States  
5 Senators based on his “fear that [he] knew something about the current economic  
6 crisis and wanted to make sure they knew as well.” *Id.* ¶ 10. On July 8, 2010,  
7 plaintiffs filed an opposition to Google’s motion to dismiss along with a cross-motion  
8 for judgment on the pleadings. (Docket No. 15). On July 19, 2010, plaintiffs filed a  
9 document entitled “Plaintiff’s Brief.” (Docket No. 16). Google opposed plaintiffs’  
10 motion for judgment on the pleadings on July 22, 2010. (Docket No. 17). Plaintiffs  
11 filed a reply in support of their motion for judgment on the pleadings on July 28,  
12 2010. (Docket No. 19).

## 13 ARGUMENT

### 14 A. Section 230(c) Bars Plaintiffs’ Claims For Relief.

15 A defendant is immune from suit under Section 230(c) if: (1) it qualifies as a  
16 “provider or user of an interactive computer service”; (2) the information at issue  
17 comes from “another information content provider”; and (3) the claims asserted seek  
18 to treat the defendant as a “publisher or speaker” of the information. 47 U.S.C. §  
19 230(c)(1). Plaintiffs do not dispute that Google is a provider of “an interactive  
20 computer service.” Nor do plaintiffs contend that Google played any role in  
21 authoring the review of their business that is referenced in the complaint. *See*  
22 *Compl.* ¶¶ 3, 19. The only remaining issue is whether plaintiffs’ claims seek to treat  
23 Google as the “publisher or speaker” of third-party content. They plainly do.  
24 Accordingly, the Court should dismiss plaintiffs’ complaint with prejudice.

25 Plaintiffs themselves allege that their complaint “arises from an online  
26 comment posted upon the Google website.” *Compl.* ¶ 1. And to the extent they can  
27 be understood, plaintiffs’ claims for relief are premised on that online comment or  
28 the fact that it could be found using Google Places. *See, e.g., Compl.* ¶¶ 3, 18, 19,

1 20, 21, 24, 33, 34, 39, 44, 47, 50, 52, 54, 58. Indeed, if third-party material is  
2 disregarded when analyzing the complaint, there are no allegations that Google did  
3 anything except run a service that allows users to post business reviews online.  
4 That is not tortious by any measure.

5 To try to avoid Section 230(c) immunity, plaintiffs appear to make two  
6 arguments: (1) they claim that Google should be liable because it “endorsed,  
7 sponsored, or allowed” third-party speech; and (2) they insist that upon receiving  
8 notice that third-party content is allegedly defamatory, Google should evaluate the  
9 complaint and remove offending material. These makeweight arguments find no  
10 support in the text of Section 230(c), have been uniformly rejected by other courts,  
11 and would undermine the purpose of the immunity if accepted.

12 **1. Plaintiffs’ Allegation That Google “Sponsored” Or**  
13 **“Endorsed” Third-Party Content Does Not Alter Google’s**  
**Entitlement To Section 230(c) Immunity.**

14 Plaintiffs argue that Section 230(c) “does not provide protection for on line  
15 services that actually sponsor-endorse” third-party Internet posts. (Docket No. 16  
16 at 7-8 (emphasis removed)). Plaintiffs contend, without any authority, that by  
17 providing a forum that allows users to post reviews about businesses, Google  
18 “sponsors” third-party content posted to Google Places and therefore falls outside of  
19 the protections of Section 230(c). That argument founders on the statute itself. An  
20 online service is immune from suit if the claims for relief seek to treat the defendant  
21 as the “publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1). That is  
22 precisely what a claim seeking to hold Google liable as an “endorser” or “sponsor” of  
23 third-party speech does. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No.  
24 07-956-PHX-FJM, 2007 WL 2949002, at \*3 (D. Ariz. Oct. 10, 2007) (rejecting  
25 argument that online service fell outside of Section 230(c) because it “adopted”  
26 third-party statements). And it does not matter that the plaintiff might choose to  
27 affix labels other than “publisher” or “speaker” when describing the defendant’s  
28 connection with third-party material. *See Universal Commc'ns Sys., Inc. v. Lycos,*

1 *Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (“Congress intended that, within broad limits,  
2 message board operators would not be held responsible for the postings made by  
3 others on that board. No amount of artful pleading can avoid that result.”); *Doe v.*  
4 *MySpace, Inc.*, 528 F. 3d 413, 419 (5th Cir. 2008) (claims for relief sought to treat an  
5 online service as the “publisher or speaker” of third-party information even where  
6 plaintiffs characterized their claims as attacking the defendant’s “failure to  
7 implement basic safety measures to protect minors”); *Ben Ezra, Weinstein, & Co. v.*  
8 *America Online Inc.*, 206 F. 3d 980, 986 (10th Cir. 2000) (“Imposing liability on  
9 Defendant for the allegedly inaccurate stock information provided by [a third party]  
10 would ‘treat’ Defendant as the ‘publisher or speaker,’ a result § 230 specifically  
11 proscribes.”).

12 Plaintiffs’ attempt to cast Google as a “sponsor” or “endorser” of third-party  
13 content does not affect Google’s entitlement to Section 230(c) immunity. A contrary  
14 result would render Section 230(c) meaningless because a plaintiff would always  
15 contend that by providing a forum for third-party content, or by failing to remove  
16 such content, a defendant was sponsoring or endorsing it. Congress did not pass a  
17 statute with such an enormous loophole and there is no basis to read one in. *See,*  
18 *e.g., Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d  
19 1157, 1175 (9th Cir. 2008) (en banc) (“section 230 must be interpreted to protect  
20 websites not merely from ultimate liability, but from having to fight costly and  
21 protracted legal battles.”). Indeed, courts routinely accord the immunity wide berth  
22 given its purpose to promote the development of online services and foster free  
23 speech online. *See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.  
24 3d 250, 254 (4th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003);  
25 *Carafano v. Metrosplash.com. Inc.*, 339 F. 3d 1119, 1122-23 (9th Cir. 2003); *Zeran v.*  
26 *America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).



1                                   **2.     Google Is Entitled to Section 230(c) Protection**  
2                                   **Regardless Of Plaintiffs’ Allegations Of Notice.**

3             Plaintiffs also argue, again without authority, that Google is not entitled to  
4 Section 230(c) protection because plaintiffs provided Google with notice of the  
5 allegedly offending material and that Google failed to respond. In plaintiffs’ view,  
6 when someone complains about the content of third-party speech, an online service  
7 must “enter the arena of dispute resolution” and investigate the allegation on pain  
8 of losing Section 230(c) immunity. (Docket No. 16 at 8 (emphasis removed)). They  
9 could not be more wrong.

10            The law is settled that Section 230(c)’s broad protections are not vitiated when  
11 a website operator is notified of allegedly offending content and fails to remove it.  
12 *See Doe*, 528 F.3d at 419 (“the CDA protects Web-based service providers from  
13 liability even after the provider is notified of objectionable content on its site”);  
14 *Universal*, 478 F.3d at 420 (“It is, by now, well established that notice of the  
15 unlawful nature of the information provided is not enough to make it the service  
16 provider’s own speech.”) (citation omitted); *Zeran*, 129 F.3d at 333 (“Liability upon  
17 notice would defeat the dual purposes advanced by § 230 of the CDA.”); *Barrett v.*  
18 *Rosenthal*, 51 Cal.Rptr.3d 55, 73 (2006) (“the *Zeran* court accurately diagnosed the  
19 problems that would attend notice-based liability for service providers”).<sup>2</sup>  
20 Therefore, “even if a service provider knows that third parties are using [its] tools to  
21 create illegal content, the service provider’s failure to intervene is immunized.”  
22 *Goddard v. Google, Inc.*, No. 08-cv-2738, 2008 WL 5245490, at \*3 (N.D. Cal. Dec. 17,  
23 2008).

24 \_\_\_\_\_  
25            <sup>2</sup> *See also Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007);  
26 *Eckert v. Microsoft Corp.*, No. 06-11888, 2007 WL 496692, at \*3 (E.D. Mich. Feb. 13,  
27 2007); *Global Royalties*, 2007 WL 2949002, at \*3; *Beyond Sys., Inc. v. Keynetics,*  
28 *Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006); *Donato v. Moldow*, 865 A.2d 711, 726  
(N.J. Super. A.D. 2005); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835 (2002);  
*Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).

1           These decisions are well reasoned and should be followed. The text of Section  
2 230(c) itself does not provide any basis for notice-based liability. And the purpose of  
3 the statute would be frustrated if service providers were required to mediate  
4 disputes between online commentators and complaining parties. Plaintiffs cannot  
5 evade the mandates of Section 230(c) by claiming that Google had notice of the  
6 third-party review at issue and failed to act.

7           **B. Plaintiffs' Complaint Fails To State A Claim Upon Which Relief**  
8           **Can Be Granted.**

9           Google's motion to dismiss explains why plaintiffs' complaint fails to state a  
10 claim upon which relief can be granted even without regard to Section 230(c)  
11 immunity. (Docket No. 10 at 9-13). Plaintiffs' opposition submissions do nothing to  
12 rehabilitate their claims.

13           **Breach of Authority/FTC Act Claims:** Google's motion to dismiss noted  
14 that plaintiffs lack standing to bring FTC Act claims and to assert federal criminal  
15 laws. Plaintiffs respond by claiming that they "should have access to the same  
16 U.S.C. as being used by the Defendant." (Docket No. 16 at 10). While unclear,  
17 plaintiffs apparently contend that they should be allowed to assert any federal law  
18 because Google is relying on a defense contained in the United States Code. That is  
19 frivolous. The well developed rules governing the availability of a private right of  
20 action do not turn on the source of the defendant's defenses.

21           **Breach of Contract:** The sum total of plaintiffs' breach of contract  
22 allegations is the unadorned legal conclusion that a contract exists between them  
23 and Google. Plaintiffs do not attach the actual contract, point to the provisions of  
24 the contract that Google allegedly breached or describe the manner in which the  
25 contract was allegedly breached. Instead, plaintiffs reference a provision of Google's  
26 Terms of Use in which Google's *users* agree that they will not use Google's services  
27 for unlawful purposes. Compl. ¶ 44. No matter how liberally they are construed,  
28 those allegations do not state a breach of contract claim against Google. *See, e.g.,*

1 *Morrison v. American Online, Inc.*, 153 F. Supp. 2d 930, 934 (N.D. Ind. 2001)  
2 (rejecting plaintiff's argument that it was a third-party beneficiary of a contract  
3 between AOL and one of its members).

4 **Negligence:** Google demonstrated in its motion to dismiss that plaintiffs  
5 failed to state a claim for negligence because there is no relationship between  
6 Google and the plaintiffs that could have triggered a duty of care. Plaintiffs do not  
7 respond to Google's argument but merely restate the allegations from their  
8 complaint. No amount of repetition can change the fact that Google does not owe a  
9 duty to plaintiffs to ensure that commentary posted on the Internet by anonymous  
10 third parties is accurate. The negligence claim should be dismissed.

11 **Misrepresentation and Intentional Infliction Of Emotional Distress:**  
12 Plaintiffs do not even try to explain how their complaint could be read to support a  
13 claim for fraudulent misrepresentation or intentional infliction of emotional  
14 distress. Accordingly, these claims should also be dismissed.

15 In addition to being barred by Section 230(c), plaintiffs' complaint fails to  
16 state a claim for relief under Rule 12(b)(1) and Rule 12(b)(6).

17 **C. Plaintiffs' Complaint Should Be Dismissed With Prejudice.**

18 Google respectfully submits that plaintiffs' complaint should be dismissed  
19 with prejudice because any amendment would be futile. The only connection that  
20 Google is alleged to have with plaintiffs is that a third-party review of their  
21 business can be found using Google Places. Under these circumstances, plaintiffs'  
22 allegations will necessarily fail under Section 230(c) no matter how they are pled.  
23 Indeed, plaintiffs have filed an extra brief and a procedurally improper declaration  
24 without articulating a theory of liability that survives Section 230(c). (Docket Nos.  
25 13, 16). Dismissal with prejudice is warranted. *See Gadda v. State Bar of Calif.*,  
26 511 F.3d 933, 939 (9th Cir. 2007) (plaintiff "has not suggested any possible way that  
27 he could cure his complaint to survive dismissal upon amendment, nor is one  
28 apparent. Because allowing amendment would be futile, we hold that the district

1 court properly dismissed [plaintiff's] claims with prejudice and without leave to  
2 amend.”); *Putz v. Schwarzenegger*, Case No. 10-00344 CW, 2010 WL 1838717, \*11  
3 (N.D. Cal. May 5, 2010) (dismissing claim for relief with prejudice where  
4 amendment would be futile); *Klausner v. Lucas Film Entertainment Co., Ltd.*, Case  
5 No. 09-03502 CW, 2010 WL 1038228, at \*4 (N.D. Cal. March 19, 2010) (same). That  
6 result is especially appropriate given that plaintiffs have withdrawn a request to  
7 amend their complaint in the event that Google’s motion to dismiss is granted.  
8 (Docket No. 19 at 4; Docket No. 15 at 6). Because plaintiffs have elected to stand on  
9 a deficient complaint, a final order dismissing their case with prejudice should be  
10 entered.

11 **CONCLUSION**

12 For the foregoing reasons, Google respectfully requests that the Court  
13 dismiss plaintiffs’ complaint with prejudice.<sup>3</sup>

14  
15 Respectfully submitted,

16 Dated: July 29, 2010

17 WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

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

20 Attorneys for Defendant  
21 Google Inc.

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22 <sup>3</sup> In their papers, plaintiffs have requested “statutory damages” in the amount of  
23 \$575,000 and punitive damages in the amount of \$20,000,000. (Docket No. 15 at 6;  
24 Docket No. 16 at 15; Docket No. 19 at 4). Those requests are specious and should be  
25 ignored. On Google’s motion to dismiss, the Court accepts as true the factual  
26 allegations stated in the complaint. *See Schmier v. U.S. Court of Appeals*, 279 F.3d  
27 817, 820 (9th Cir. 2002). That fiction, of course, does not apply to any other aspect  
28 of the case. In the event that this case moves beyond the pleadings stage, Google  
will challenge the factual allegations contained in the complaint (by answer and  
with evidence) as well as plaintiffs’ legal theories and damages assertions. There is  
no basis given the record and procedural posture for plaintiffs’ request for monetary  
relief. It should be disregarded.