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

GARY BLACK and HOLLI BEAM-BLACK,

No. 10-02381 CW

Plaintiffs,

ORDER GRANTING  
DEFENDANT'S  
MOTION TO DISMISS  
AND DENYING AS  
MOOT PLAINTIFFS'  
MOTION FOR  
JUDGMENT ON THE  
PLEADINGS  
(Docket Nos. 10  
and 15)

v.

GOOGLE INC.,

Defendant.

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Plaintiffs Gary Black and Holli Beam-Black, who are proceeding pro se, plead several claims against Defendant Google Inc. related to an anonymous "online comment" on Defendant's website. Defendant moves to dismiss their claims. Plaintiffs oppose Defendant's motion and move for judgment on the pleadings. The motions were taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS Defendant's motion to dismiss and DENIES as moot Plaintiffs' motion for judgment on the pleadings.

BACKGROUND

Plaintiffs, who are husband and wife, allege that they are sole proprietors of Cal Bay Construction and Castle Roofing. Both businesses appear to provide roofing services.

They allege that, on or about October 20, 2009, an anonymous

1 defamatory comment was posted on Defendant's website about Cal Bay  
2 Construction. They aver that the comment misrepresents their work  
3 and has devastated their businesses.

4 According to Plaintiffs, Defendant enables any "member of the  
5 general public or the Defendant, Google, Inc., . . . to post a  
6 businesses name, address, and phone number upon the Defendant's  
7 website then defame anonymously in review of that business."  
8 Compl. ¶ 18. Plaintiffs plead that they undertook several efforts  
9 to have Defendant remove the comment.

10 Plaintiffs claim that they have been "emotionally disturbed"  
11 by Defendant's conduct and that their businesses "were suffering  
12 financially on a daily basis from the on line defamation." Compl.  
13 ¶ 28. They plead six causes of action: (1) a "Breach of Authority"  
14 claim for violations of 15 U.S.C. §§ 45(a) and 53(a)-(b);  
15 (2) breach of contract; (3) unfair business practices and false  
16 advertising in violation of 15 U.S.C. §§ 45(a)(1)-(2) and 53(a)-  
17 (b); (4) negligence; (5) misrepresentation; and (6) intentional  
18 infliction of emotional distress.

19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the  
21 claim showing that the pleader is entitled to relief." Fed. R.  
22 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
23 claim is appropriate only when the complaint does not give the  
24 defendant fair notice of a legally cognizable claim and the grounds  
25 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
26 (2007). In considering whether the complaint is sufficient to  
27 state a claim, the court will take all material allegations as true

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1 and construe them in the light most favorable to the plaintiff. NL  
2 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
3 However, this principle is inapplicable to legal conclusions.  
4 "Threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements," are not taken as true.  
6 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009)  
7 (citing Twombly, 550 U.S. at 555).

8 When granting a motion to dismiss, the court is generally  
9 required to grant the plaintiff leave to amend, even if no request  
10 to amend the pleading was made, unless amendment would be futile.  
11 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
12 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
13 would be futile, the court examines whether the complaint could be  
14 amended to cure the defect requiring dismissal "without  
15 contradicting any of the allegations of [the] original complaint."  
16 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).  
17 Leave to amend should be liberally granted, but an amended  
18 complaint cannot allege facts inconsistent with the challenged  
19 pleading. Id. at 296-97.

20 DISCUSSION

21 Defendant asserts that, under the Communications Decency Act  
22 of 1996 (CDA), it is immune from Plaintiffs' action and that, in  
23 the alternative, Plaintiffs fail to state claims upon which relief  
24 can be granted.

25 "Section 230 of the CDA immunizes providers of interactive  
26 computer services against liability arising from content created by  
27 third parties: 'No provider . . . of an interactive computer

1 service shall be treated as the publisher or speaker of any  
2 information provided by another information content provider.'"  
3 Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC,  
4 521 F.3d 1157, 1162 (9th Cir. 2008) (quoting 47 U.S.C. § 230(c);  
5 alteration in original; footnotes omitted). In enacting § 230,  
6 "Congress wanted to encourage the unfettered and unregulated  
7 development of free speech on the Internet, and to promote the  
8 development of e-commerce." Batzel v. Smith, 333 F.3d 1018, 1027  
9 (9th Cir. 2003). As a result, "courts construing § 230 have  
10 recognized as critical in applying the statute the concern that  
11 lawsuits could threaten the 'freedom of speech in the new and  
12 burgeoning Internet medium.'" Id. (quoting Zeran v. Am. Online,  
13 Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

14 The statute defines an "interactive computer service" to be  
15 "any information service, system, or access software provider that  
16 provides or enables computer access by multiple users to a computer  
17 server, including specifically a service or system that provides  
18 access to the Internet and such systems operated or services  
19 offered by libraries or educational institutions." 47 U.S.C.  
20 § 230(f)(2). The immunity applies to such a service "so long as it  
21 does not also function as an 'information content provider' for the  
22 portion of the statement or publication at issue." Carafano v.  
23 Metrosplash.com Inc., 339 F.3d 1119, 1123 (9th Cir. 2003). An  
24 "information content provider" is "any person or entity that is  
25 responsible, in whole or in part, for the creation or development  
26 of information provided through the Internet or any other  
27 interactive computer service." 47 U.S.C. § 230(f)(3).

1           Based on the congressional intent discussed above, courts  
2 "have treated § 230(c) immunity as quite robust, adopting a  
3 relatively expansive definition of 'interactive computer service'  
4 and a relatively restrictive definition of 'information content  
5 provider.'" Carafano, 339 F.3d at 1123. All doubts "must be  
6 resolved in favor of immunity." Roommates.Com, 521 F.3d at 1174.

7           A fair reading of Plaintiffs' complaint demonstrates that they  
8 seek to impose liability on Defendant for content created by an  
9 anonymous third party. They assert that their lawsuit "arises from  
10 an online comment posted upon the Google web site . . . ." <sup>1</sup> Compl.

11 ¶ 1. They aver that the allegedly defamatory comment is  
12 "anonymous," id. ¶ 21, but they do not allege that Defendant was  
13 its author. Finally, they summarize their action by stating that  
14 Defendant's "business review 'courtesy advertisement' process which  
15 allows for consumer generated content is illegal and inappropriate  
16 as it manifest into allowing parties to seek revenge against  
17 businesses and professionals." Id. ¶ 34. Based on these  
18 allegations, Defendant is immune from their suit.

19           Plaintiffs appear to argue that CDA immunity does not apply  
20 because their claims are based on Defendant's "programming," not  
21 the third-party content. Pl.'s Br. of July 19, 2010 at 6.  
22 Plaintiffs seem to be referring to the source code underlying the  
23 services offered on Defendant's website. See Compl. ¶ 30

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24  
25 <sup>1</sup> Plaintiffs do not dispute that Defendant is an interactive  
26 computer service. Several other courts have recognized Defendant  
27 as such a service. See, e.g., Jurin v. Google Inc., 695 F. Supp.  
28 2d 1117, 1123 (E.D. Cal. 2010); Parker v. Google, Inc., 422 F.  
Supp. 2d 492, 501 (E.D. Pa. 2006).

1 (asserting that Defendant engaged "in the acts and practices set  
2 forth in this complaint via software programming on their web  
3 site"). In light of Plaintiffs' complaint, this argument is  
4 unavailing; they aver that their lawsuit arises from the third-  
5 party content and that their businesses suffered damage therefrom.  
6 Further, Defendant's programming does not transform it into the  
7 creator of the offending comment. Indeed, several courts have  
8 considered and rejected theories that an interactive computer  
9 service could be held liable merely because its programming  
10 facilitated the creation of the content at issue. See, e.g.,  
11 Carafano, 339 F.3d at 1124-25 (concluding defendant was immune,  
12 even though "the content was formulated in response" to its  
13 questionnaire); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 833-34  
14 (2002) (holding that plaintiffs could not avoid § 230 by attacking  
15 the structure of defendant's "safety program").

16 Plaintiffs also argue that Defendant could be held liable  
17 because it sponsored and endorsed the comment. However, Plaintiffs  
18 make no allegations that suggest any sponsorship or endorsement of  
19 the comment by Defendant. Even if they did, Defendant would remain  
20 entitled to immunity. Plaintiffs' attempt to depict Defendant as a  
21 sponsor or endorser of the comment is, in effect, an end-around the  
22 prohibition on treating it as the publisher or speaker of it. Such  
23 a ploy, if countenanced, would eviscerate the immunity granted  
24 under § 230. Further, even if Defendant were a sponsor or  
25 endorser, the fact remains that Plaintiffs seek to hold it liable  
26 for content generated by a third-party.

27 Finally, Plaintiffs contend that their claims rest on  
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1 Defendant's failure to provide an adequate "dispute resolution"  
2 system to resolve their concerns about the comment. Pl.'s Br. of  
3 July 19, 2010 at 6. Again, this argument fails because the  
4 predicate for liability remains the third-party content. In  
5 addition, several courts have held that immunity is not vitiated  
6 because a defendant fails to take action despite notice of the  
7 problematic content. See, e.g., Universal Commc'ns Sys., Inc. v.  
8 Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007) ("It is, by now,  
9 well established that notice of the unlawful nature of the  
10 information provided is not enough to make it the service  
11 provider's own speech."); Zeran, 129 F.3d at 333 ("Liability upon  
12 notice would defeat the dual purposes advanced by § 230 of the  
13 CDA."); Barrett v. Rosenthal, 40 Cal. 4th 33, 45 (2006).  
14 Plaintiffs offer no persuasive argument that their theory presents  
15 an exception.

16 Accordingly, Plaintiffs' claims are barred by § 230. Because  
17 their complaint makes clear that their action "arises from an  
18 online comment posted upon" Defendant's website, Compl. ¶ 1, any  
19 amendment would be futile and dismissal with prejudice is  
20 warranted.

21 CONCLUSION

22 For the foregoing reasons, the Court GRANTS Defendant's motion  
23 to dismiss. (Docket No. 10.) Plaintiffs' action is dismissed with  
24 prejudice as barred by 47 U.S.C. § 230. Consequently, their motion  
25 for judgment on the pleadings is DENIED as moot. (Docket No. 15.)  
26 The case management conference set for September 14, 2010 is  
27 VACATED.

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The Clerk shall enter judgment and close the file. The parties shall bear their own costs.

IT IS SO ORDERED.

Dated: August 13, 2010



CLAUDIA WILKEN  
United States District Judge



UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

GARY BLACK and HOLLI BEAM-BLACK,  
Plaintiffs,

Case Number: CV10-02381 CW

**CERTIFICATE OF SERVICE**

v.

GOOGLE INC.,

Defendant.

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 13, 2010, I SERVED a true and correct copy of the attached, by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy into an inter-office delivery receptacle located in the Clerk's office.

Gary Black  
101 Auld Court  
Green Valley Falls, CA 94534

Holli Beam-Black  
101 Auld Court  
Green Valley Falls, CA 94534

Dated: August 13, 2010

Richard W. Wieking, Clerk  
By: MP, Deputy Clerk