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6 **IN THE UNITED STATES DISTRICT COURT**
 7 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 8 **SAN JOSE DIVISION**

9
 10 JENNA GODDARD, on her own behalf and on
 behalf of all others similarly situated,
 11
 Plaintiff,
 12
 v.
 13 GOOGLE, INC., a Delaware corporation,
 14
 Defendant.

Case No. C 08-2738 JF (PVT)

**PLAINTIFF’S SUPPLEMENTAL
 BRIEF IN OPPOSITION TO
 DEFENDANT’S MOTION TO DISMISS
 THE AMENDED COMPLAINT**

Date: May 29, 2009
 Judge: Honorable Jeremy Fogel

1 Currently pending before this Court is Google, Inc.’s (“Google” or “Defendant”) 12(b)(6)
2 Motion to Dismiss. (Dkt. No. 50.) Pursuant to this Court’s order granting plaintiff Jenna Goddard
3 (“Plaintiff”) leave to file supplemental briefing in opposition to Google’s motion to dismiss,
4 Plaintiff addresses the recent Ninth Circuit decision *Barnes v. Yahoo!, Inc.*, __F.3d__, 2009 WL
5 1232367 (9th Cir. May 7, 2009), and its impact on the present litigation as follows:

6 **I. Google Cannot Use 47 U.S.C. § 230 As a Basis For Dismissal Under Rule 12(b)(6).**

7 The primary argument proffered in support of Google’s Motion to Dismiss the Amended
8 Complaint is that Google enjoys immunity under Section 230 of the Communications Decency
9 Act, 47 U.S.C. § 230(c) (“Section 230”). (See Dkt. No. 50.) In *Barnes*, however, the Ninth
10 Circuit clarified that 47 U.S.C. § 230 “is an affirmative defense and district courts are to treat it as
11 such.” *Barnes*, 2009 WL 1232367, at *2. As an affirmative defense, Section 230 *cannot* be used
12 as a basis for dismissal under Rule 12(b)(6); the “assertion of an affirmative defense does not
13 mean that the plaintiff has failed to state a claim, and therefore does not by itself justify dismissal
14 under Rule 12(b)(6).” *Id.* Google must therefore follow the “normal method of presenting
15 defenses” and assert Section 230 as an affirmative defense in its responsive pleading, if it so
16 chooses. *Id.* As with any affirmative defense, Google bears the burden of both pleading and
17 proving its Section 230 defense. *See id.*

18 As argued by Plaintiff in her opposition to the Motion to Dismiss the Amended Complaint,
19 Google’s Section 230 argument relies on a factual presumption—contrary to the allegations of the
20 Amended Complaint—that its KeyWord Tool is in fact “neutral.” (See Oppo. to Motion to
21 Dismiss, Dkt. No. 53, at 3.) The *Barnes* Court recognized the impropriety of allowing defendants
22 like Google to sidestep fact development and ask the Court presume the facts on which Section
23 230 relies—e.g., that Google does no more than provide “neutral tools.” *Barnes* simply requires
24 such disputed issues of fact to be pleaded and proved as affirmative defenses before Section 230
25 immunity can be afforded.

26 Therefore, to conform to the procedural requirements set out in *Barnes*, this Court should
27 deny that portion of Google’s Motion to Dismiss predicated upon Section 230 and require Google

1 to file an answer to Plaintiff’s Amended Complaint whereby it can assert any affirmative defenses
2 it so chooses.

3 **II. Google May Not Use 47 U.S.C. § 230 As a Defense**
4 **Against a Breach of Contract Claim.**

5 *Barnes* provides additional justification as to why Google’s Section 230 defense must fail
6 with regard to Count II of the Amended Complaint, the breach of contract claim. In *Barnes*, the
7 plaintiff brought suit against Yahoo! for, *inter alia*, its promise to remove indecent personal
8 profiles created as an act of revenge by an unscrupulous ex-boyfriend, plaintiff’s reliance to her
9 detriment on Yahoo’s promise, and Yahoo’s breach of that promise to remove those profiles.
10 *Barnes*, 2009 WL 1232367, at *1-2. The district court granted Yahoo!’s motion to dismiss,
11 accepting that Section 230(c) afforded Yahoo! immunity. *Id.* at *2. In reversing this decision, the
12 *Barnes* Court indicated that a Section 230 defense does not preclude a breach of contract claim
13 where the plaintiff seeks to hold the Defendant liable as a *promisor* or *counter-party* to the
14 contract, not as a *publisher* or *speaker*. *Id.* at *9, 11. This is because Section 230 does not provide
15 a “general immunity from liability from third-party content” but instead has a limited scope,
16 protecting only those providers or users of interactive computer services “whom a plaintiff *seeks*
17 *to treat . . . as a publisher¹ or speaker*” of information provided by another information content
18 provider. *Id.* at *3- 4 (emphasis added).

19 To determine whether defendants fall within the narrow scope of protection provided by
20 Section 230(c), courts should look to “whether the cause of action inherently requires the court to
21 treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Id.* at 4. Section
22 230(c) affords immunity where the duty defendant violated derives from the defendant’s status or
23 conduct performed as “publisher or speaker.” *Id.* However, in the context of a claim for breach of
24 contract,² “the duty the defendant allegedly violated springs from a contract—an enforceable
25

26 ¹ The *Barnes* Court finds publishers are those that review, edit, and decide “whether to publish
27 or to withdraw from publication third-party content.” *Barnes*, 2009 WL 1232367, at *5.

28 ² The Ninth Circuit makes clear that this principle applies to all contract claims by stating,
“[i]n a promissory estoppel case, *as in any other contract case*, the duty of the defendant allegedly
Plaintiff’s Supplemental Brief in Opposition 3 Case No. C 08-2738 JF (PVT)
to Defendant’s Motion to Dismiss

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CONCLUSION

WHEREFORE, Plaintiff requests that the Court deny Defendant’s Motion to Dismiss for the reasons stated above and for the reasons stated in Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss. (Dkt. No. 53.)

Dated: May 29, 2009

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