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4 **UNITED STATES DISTRICT COURT**
5 **NORTHERN DISTRICT OF CALIFORNIA**
6 **SAN JOSE DIVISION**

7
8 AMBASSADOR MARC GINSBERG and
9 COALITION FOR A SAFER WEB,

10 Plaintiffs,

11 v.

12 GOOGLE INC.,

13 Defendant.

Case No. 21-cv-00570-BLF

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT WITHOUT LEAVE TO
AMEND; AND DISMISSING ACTION
WITH PREJUDICE**

[Re: ECF 23]

14
15 Plaintiffs are former United States Ambassador Marc Ginsberg (“Ambassador Ginsberg”)
16 and an organization he created, Coalition for a Safer Web (“CSW”). CSW’s mission is to prevent
17 terrorist and extremist groups from using social media platforms to further their agendas.
18 Plaintiffs assert that such groups routinely use Telegram, an instant messaging app, to disseminate
19 racist speech and incite violence against Jewish people and people of color. Plaintiffs seek to
20 impose liability against Defendant Google Inc. (“Google”) based on the availability of Telegram
21 in Google’s online Play Store. The operative first amended complaint (“FAC”)¹ asserts claims
22 against Google for negligent infliction of emotional distress and violations of California’s Unfair
23 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*

24
25 _____
26 ¹ Plaintiffs filed two FACs, one on June 8, 2021 (ECF 17) and the other on June 11, 2021
27 (ECF 19). The Court’s references to the “FAC” herein are to the later-filed pleading (ECF 19), as
28 the docket entry for that pleading indicates that it is a corrected version. Unfortunately, exhibits
were omitted from the later-filed FAC (ECF 19). For the sake of efficiency, the Court has
considered the exhibits attached to the earlier version of the FAC (ECF 17) rather than requiring
Plaintiffs to refile the exhibits.

1 Google moves to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6) for
 2 failure to state a claim upon which relief may be granted. The Court has considered the parties’
 3 briefing, the oral arguments presented by counsel at the hearing on January 13, 2022, and the
 4 supplemental list of cases filed by Plaintiffs on January 21, 2022 with leave of the Court.

5 The motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND and the action is
 6 DISMISSED WITH PREJUDICE.

7 **I. BACKGROUND²**

8 Ambassador Ginsberg has had a notable career in public service and in the public eye. He
 9 has served as a White House liaison for the Secretary of State, a Deputy Senior Advisor to the
 10 President for Middle East Policy, and a United States Ambassador to Morocco. FAC ¶ 5. He was
 11 the first Jewish United States Ambassador to an Arab country. *Id.* ¶ 7. Ambassador Ginsberg has
 12 addressed Jewish groups in the United States and throughout the Arab world on the importance of
 13 Judaism and Israel, and he is involved with a number of synagogues in Maryland, where he
 14 resides. *Id.* ¶ 6. He has been subjected to two assassination attempts due to his religious beliefs.
 15 *Id.* ¶ 7.

16 “Ambassador Ginsberg created the Coalition for a Safer Web to compel social media
 17 platforms to end their tolerance of anti-Semitism and their enabling of extremist groups to operate
 18 with impunity over social media.” FAC ¶ 8. CSW employs Ambassador Ginsberg and reimburses
 19 him for business use of his Android smartphone, a Samsung Galaxy Express. *Id.* ¶¶ 9, 13.
 20 Ambassador Ginsberg purchases Google products in part because of the apps available through the
 21 Google Play Store. *Id.* ¶ 25.

22 Google requires that app developers comply with certain guidelines if they wish their apps
 23 to be available in the Play Store. *Id.* ¶ 27. Those guidelines include Google’s “Developer
 24 Program Policy” and written policies regarding “User Generated Content.” FAC Exhs. A, C, ECF
 25 17. Google publishes guidelines for developers online. FAC ¶ 27. Google’s Developer Program
 26 Policy advises app developers that Google does not allow: “apps that promote violence, or incite
 27

28 ² Plaintiffs’ factual allegations are accepted as true for purposes of the Rule 12(b)(6) motion. *See*
Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

1 hatred against individuals or groups based on race or ethnic origin, religion”; “[a]pps that
2 depict or facilitate gratuitous violence or other dangerous activities”; or “apps with content related
3 to terrorism, such as content that promotes terrorist acts, incites violence, or celebrates terrorist
4 attacks.” FAC Exh. A. Google’s guidelines regarding User Generated Content (“UGC”) requires
5 that app developers define objectionable content in a way that complies with Google’s Developer
6 Program Policy, and prohibit such content in the app’s terms of use or user policies. FAC Exh. C.
7 Google advises that: “[a]pps whose primary purpose is featuring objectionable UGC will be
8 removed from Google Play,” and “apps that end up being used primarily for hosting objectionable
9 UGC, or that develop a reputation among users of being a place where such content thrives, will
10 also be removed from Google Play.” *Id.*

11 Plaintiffs allege that Google allows the Telegram app to be distributed through the Play
12 Store even though the app does not comply with Google’s developer guidelines and routinely is
13 used to transmit hate speech that violates California law. FAC ¶ 28. Telegram is a cloud-based
14 mobile and desktop messaging app that allows users to create private groups of up to 200,000
15 members, and to create public channels to broadcast to unlimited audiences. *Id.* ¶¶ 33-34.
16 Telegram has been downloaded from the Google Play Store an estimated 500 million times
17 worldwide. *Id.* ¶ 32. According to Plaintiffs, Telegram “is currently the most utilized messaging
18 app among extremists who are promoting violence in the United States,” and “currently serves as
19 the preferred Neo-Nazi/white nationalist communications channel, fanning anti-Semitic and anti-
20 black incitement during the current wave of protests across America.” *Id.* ¶¶ 48, 52.

21 Plaintiffs claim that Google is liable for failing to enforce its own developer guidelines and
22 policies. According to Plaintiffs, “Google owes a duty of reasonable care to ensure that their
23 services are not used as a means to inflict religious and racial intimidation,” and Google breached
24 that duty “by continuing to host Telegram on the Google Play Store despite Defendant’s
25 knowledge that Telegram was being used to incite violence, including violence against African
26 Americans and Jews.” FAC ¶¶ 73, 80. Ambassador Ginsberg claims that the use of Telegram to
27 promote violence against Jews generally has caused him to “live in apprehension of religiously
28 motivated violence being perpetrated against him.” *Id.* ¶ 83.

1 Plaintiffs filed the complaint in this action on January 25, 2021 and amended their
 2 complaint as of right in response to Google’s prior motion to dismiss. *See* Compl., ECF 1; FAC,
 3 ECF 19. The operative FAC asserts three claims: (1) negligent infliction of emotional distress
 4 (“NIED”); (2) violation of the unfair prong of California’s UCL; and (3) violation of the unlawful
 5 prong of California’s UCL. Google now brings a second motion to dismiss, directed to the FAC.

6 **II. LEGAL STANDARD**

7 “Under Rule 12(b)(6), a complaint should be dismissed if it fails to include ‘enough facts
 8 to state a claim to relief that is plausible on its face.’” *Hyde v. City of Willcox*, 23 F.4th 863, 869
 9 (9th Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A complaint’s
 10 claims are plausible when the pleaded facts ‘allow[] the court to draw the reasonable inference
 11 that the defendant is liable for the misconduct alleged.’” *Hyde*, 23 F.4th at 869 (quoting *Ashcroft*
 12 *v. Iqbal*, 556 U.S. 662, 678 (2009)).

13 **III. DISCUSSION**

14 Google seeks dismissal of all claims asserted by Plaintiffs. First, Google argues that it is
 15 immune from suit under Section 230 of the Communications Decency Act of 1996 (“CDA”), 47
 16 U.S.C. § 230. Second, Google asserts that Plaintiffs lack standing to sue under the UCL. Third,
 17 Google argues that Plaintiffs have failed to allege essential elements of their NIED claim,
 18 specifically, duty and proximate cause. In opposition, Plaintiffs argue that Section 230 immunity
 19 does not apply, they have standing to sue under the UCL, and their NIED claim is adequately pled.

20 For the reasons discussed below, the Court concludes that Plaintiffs’ claims are barred by
 21 Section 230 of the CDA, Plaintiffs have not alleged facts establishing standing to sue under the
 22 UCL, and Plaintiffs have not stated a claim for NIED.

23 **A. Section 230**

24 Section 230 of the CDA “protects certain internet-based actors from certain kinds of
 25 lawsuits.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). Under the statute, “[n]o
 26 provider or user of an interactive computer service shall be treated as the publisher or speaker of
 27 any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). “No
 28 cause of action may be brought and no liability may be imposed under any State or local law that

1 is inconsistent with this section.” 47 U.S.C. § 203(e)(3).

2 In *Barnes*, the Ninth Circuit created a three-prong test for Section 230 immunity. See
3 *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (discussing *Barnes*
4 test). “Immunity from liability exists for ‘(1) a provider or user of an interactive computer service
5 (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3)
6 of information provided by another information content provider.’” *Id.* (quoting *Barnes*, 570 F.3d
7 at 1100-01). “When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a
8 plaintiff’s claims should be dismissed.” *Id.*

9 1. Interactive Computer Service Provider

10 Under the first prong of the *Barnes* test, the Court must determine whether Plaintiffs’
11 allegations establish that Google is an interactive computer service provider. “Websites are the
12 most common interactive computer services.” *Dyroff*, 934 F.3d at 1097; see also *Fair Hous.*
13 *Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008)
14 (“Today, the most common interactive computer services are websites.”). Plaintiffs do not dispute
15 that Google is an interactive computer service provider.

16 The Court finds that the first prong of the *Barnes* test is satisfied.

17 2. Seek to Treat as a Publisher or Speaker

18 Under the second prong of the test, the Court must determine whether Plaintiffs’
19 allegations show that Plaintiffs seek to treat Google as a publisher or speaker with respect to
20 content on the Google Play Store. Google argues that Plaintiffs seek to treat it as a publisher,
21 while Plaintiffs argue that they do not.

22 “In this particular context, publication generally involve[s] reviewing, editing, and
23 deciding whether to publish or to withdraw from publication third-party content.” *Lemmon v.*
24 *Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021) (internal quotation marks and citation omitted).
25 “A defamation claim is perhaps the most obvious example of a claim that seeks to treat a website
26 or smartphone application provider as a publisher or speaker, but it is by no means the only type of
27 claim that does so.” *Id.* “[W]hat matters is whether the cause of action inherently requires the
28 court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Barnes*,

1 570 F.3d at 1102. A website acts as a publisher when it decides whether or not to post online
2 material submitted for that purpose by a third party. *See Roommates*, 521 F.3d at 1170. “[A]ny
3 activity that can be boiled down to deciding whether to exclude material that third parties seek to
4 post online is perforce immune under section 230.” *Id.* at 1170-71.

5 Here, Plaintiffs “seek[] damages and injunctive relief against Defendant Google LLC for
6 allowing Telegram to be made available through Google’s Google Play Store.” FAC ¶ 1.
7 Plaintiffs allege that “[b]y failing to remove Telegram from the Google Play Store, Defendant has
8 proximately caused Ambassador Ginsberg’s emotional distress.” *Id.* ¶ 88. Google’s alleged
9 activity boils down to deciding whether to exclude material (Telegram) that a third party seeks to
10 place in the online Play Store. Thus, Plaintiffs’ claims inherently require the Court to treat Google
11 as the publisher of content provided by another.

12 Plaintiffs argue that their “claims are not premised on the nature of the third-party content
13 involved in this case and thus are not premised on a publishing act by Google.” Opp. at 8-9, ECF
14 34. Plaintiffs assert that their claims instead are premised on Google’s nonenforcement of its own
15 guidelines. *See id.* Relying on *Barnes*, Plaintiffs contend that Section 230 does not insulate
16 Google from its own wrongful conduct in failing to enforce its guidelines.

17 In *Barnes*, the plaintiff’s ex-boyfriend posted profiles about her on a website operated by
18 the defendant, Yahoo!, Inc. (“Yahoo”). *See Barnes*, 570 F.3d at 1098. The profiles included nude
19 photographs of Barnes, solicitations to engage in sexual intercourse purporting to be from her, and
20 contact information for her. *See id.* Barnes asked Yahoo to remove the unauthorized profiles over
21 a period of several months, but Yahoo failed to do so. *See id.* Finally, a representative of Yahoo
22 assured Barnes that the matter would be taken care of. *See id.* at 1099. After months without
23 word or action from Yahoo, Barnes sued Yahoo for negligence and promissory estoppel, and at
24 that point the profiles were removed. *Id.*

25 The Ninth Circuit determined that Barnes’ negligence claim fell within the scope of the
26 immunity afforded to Yahoo under Section 230, but her claim for promissory estoppel did not.
27 *See Barnes*, 570 F.3d at 1105, 1109. The negligence claim was based on Oregon law providing
28 that one who undertakes to render services to another may be subject to liability from his failure to

1 exercise reasonable care in that undertaking. *See id.* at 1102. Barnes argued that this theory
2 “treat[ed] Yahoo not as a publisher, but rather as one who undertook to perform a service and did
3 it negligently.” *Id.* The Ninth Circuit rejected this argument, concluding that Barnes could not
4 “escape section 230(c) by labeling as a ‘negligent undertaking’ an action that is quintessentially
5 that of a publisher.” *Id.* at 1103. The *Barnes* court pointed out that the undertaking Yahoo
6 allegedly failed to perform with due care was the removal of the profiles from its website. *See id.*
7 The Ninth Circuit pointed out that removing or failing to remove content is the act of a publisher,
8 and thus that a claim based on such an act is barred by Section 230. *See id.*

9 With respect to the promissory estoppel claim, however, the Ninth Circuit determined that
10 Section 230 did not apply. *See Barnes*, 570 F.3d at 1109. Observing that promissory estoppel “is
11 a subset of a theory of recovery based on a breach of contract,” the Ninth Circuit concluded that
12 “Barnes does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but
13 rather as the counter-party to a contract, as a promisor who has breached.” *Id.* at 1106-07. The
14 Ninth Circuit explained that “[c]ontract liability here would come not from Yahoo’s publishing
15 conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which
16 happens to be removal of material from publication.” *Id.* at 1107.

17 In the present case, Plaintiffs’ claims are akin to the negligence claim that the *Barnes* court
18 found to be barred by Section 230. Plaintiffs’ theory is that by creating and publishing guidelines
19 for app developers, Google undertook to enforce those guidelines with due care, and can be liable
20 for failing to do so with respect to Telegram. As in *Barnes*, however, the undertaking that Google
21 allegedly failed to perform with due care was removing offending content from the Play Store.
22 “But removing content is something publishers do, and to impose liability on the basis of such
23 conduct necessarily involves treating the liable party as a publisher of the content it failed to
24 remove.” *Barnes*, 570 F.3d at 1103. Plaintiffs in the present case do not allege the existence of a
25 contract – or indeed any interaction – between themselves and Google. Plaintiffs do not allege
26 that Ambassador Ginsberg purchased his smartphone from Google or that he downloaded
27 Telegram or any other app from the Play Store. Thus, the *Barnes* court’s rationale for finding that
28 Section 230 did not bar Barnes’ promissory estoppel claim is not applicable here.

1 Accordingly, the Court finds that the second prong of *Barnes* is satisfied.

2 **3. Information Provided by Another Content Provider**

3 Under the third prong of the *Barnes* test, the Court must determine whether Plaintiffs'
4 allegations show that the published material was provided by another content provider. It is clear
5 from the allegations of the FAC that the Telegram app was created by a third party, and that the
6 alleged hate speech posted on Telegram also was created by third parties. FAC ¶¶ 29, 56-67.

7 Plaintiffs argue that the third *Barnes* prong is not met because their “claims do not seek to
8 hold Google liable purely for the actions of third parties.” Opp. at 10, ECF 34. Plaintiffs’
9 argument that their claims are grounded in Google’s own wrongful conduct is addressed above
10 under the second *Barnes* prong. The third *Barnes* prong focuses solely on who created the content
11 at issue. Plaintiffs do not allege that Google helped to develop Telegram or created any of the
12 online content giving rise to this lawsuit.

13 Plaintiffs rely on *Lemmon* in arguing that the third *Barnes* prong is not satisfied. That
14 reliance is misplaced. In *Lemmon*, the parents of two boys who died in a high-speed car accident
15 sued Snap, Inc., a social media provider. *See Lemmon*, 995 F.3d at 1087. The boys had been
16 using Snapchat’s “Speed Filter” shortly before the crash. *See id.* at 1088. Many Snapchat users try
17 to reach 100 MPH, take a photo or video with the Speed Filter, and then share it on Snapchat. *See*
18 *id.* at 1089. Some users suspect or believe that Snapchat will reward them for doing so. *See id.*
19 The plaintiffs alleged that Snapchat’s Speed Filter encouraged their sons to drive at dangerous
20 speeds and thus caused the boys’ deaths through its negligent design. *See id.* at 1088. The Ninth
21 Circuit held that the plaintiffs’ negligent design claim – “a common products liability tort” – was
22 not barred by Section 230, because the plaintiffs did not seek to hold Snap liable for its conduct as
23 a publisher or speaker, but for its conduct as products manufacturer and designer. *See id.* at 1092.

24 As an initial matter, *Lemmon* does not speak to the question presented by the third *Barnes*
25 prong, whether the content at issue was created by a third party. Moreover, Plaintiffs in the
26 present case do not allege a products liability claim or any other claim that would implicate the
27 rationale of *Lemmon*.

28 Accordingly, the Court finds that the third *Barnes* prong is satisfied.

1 **4. Conclusion Re Section 230**

2 Based on the facts alleged in the FAC, the Court finds that Google is entitled to Section
3 230 immunity. Accordingly, the motion to dismiss is GRANTED as to all claims in the FAC.

4 Even if Section 230 did not apply, Plaintiffs' claims are subject to dismissal on other
5 grounds, discussed as follows.

6 **B. UCL – Claims 2 and 3**

7 Claims 2 and 3 assert violations of California's UCL. Google asserts that Plaintiffs' UCL
8 claims are subject to dismissal for lack of statutory standing. Plaintiffs contend that they have
9 alleged statutory standing under the UCL.

10 The UCL prohibits an individual or entity from engaging in any "unlawful, unfair or
11 fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "Each prong of the UCL is
12 a separate and distinct theory of liability." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir.
13 2009). A private person has statutory standing under the UCL only if he or she "has suffered
14 injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. &
15 Prof. Code § 17204.

16 Claim 2 is for violation of the unfair prong and Claim 3 is for violation of the unlawful
17 prong. Both claims center on Ambassador Ginsberg's purchase of an Android smart phone. The
18 FAC alleges that "Ambassador Ginsberg purchased and uses a Samsung Galaxy Express for
19 personal and professional purposes related to his work for CSW," and that "Ambassador Ginsberg
20 is to be reimbursed for all phone and data costs associated with his work with CSW." FAC ¶ 102.
21 Plaintiffs claim that "[a] portion of the cost of the Samsung Galaxy Express was related to the
22 benefits provided under the terms of service and policies of Google." *Id.* ¶ 103. Plaintiffs
23 allegedly were "deprived of a key benefit of the purchase and use of the Samsung Galaxy
24 Express" by Google's allegedly unfair business practice of failing to follow its own policies and
25 guidelines for developers. *Id.* ¶¶ 105-07. Google allegedly "has violated the 'unfair' prong of the
26 UCL by not following their own policies and allowing Telegram to be downloaded despite the
27 aforementioned violations of Google's guidelines." *Id.* ¶ 105. And, by continuing to allow
28 Telegram to be downloaded from the Google Play Store, Google allegedly aids and abets

1 commission of criminal acts in violation of the unlawful prong of the UCL. *Id.* ¶ 119.

2 Google asserts that Plaintiffs' allegations are insufficient to establish the requisite
3 economic harm, citing *Birdsong*. In *Birdsong*, the Ninth Circuit addressed the economic injury
4 requirement for UCL standing in the context of a putative class action claim based on an alleged
5 defect in Apple, Inc.'s iPod product. *See Birdsong*, 590 F.3d at 961. The iPod allegedly could
6 produce sounds as loud of 115 decibels and therefore posed an unreasonable risk of noise-induced
7 hearing loss to users. *See id.* at 957-58. The plaintiffs claimed that the iPods' inherent risk of
8 hearing loss reduced the value of the iPods and deprived them of the full benefit of their bargain
9 because they could not "safely" listen to music. *See id.* at 961. The Ninth Circuit held that:

10 [The plaintiffs] have not alleged that they were deprived of an agreed-upon benefit
11 in purchasing their iPods. The plaintiffs do not allege that Apple made any
12 representations that iPod users could safely listen to music at high volumes for
13 extended periods of time. In fact, the plaintiffs admit that Apple provided a
14 warning against listening to music at loud volumes. The plaintiffs' alleged injury
15 in fact is premised on the loss of a 'safety' benefit that was not part of the bargain
16 to begin with.

17 *Id.*

18 In the present case, Plaintiffs have not alleged facts showing that Google's compliance
19 with its developer guidelines was an agreed-upon benefit of the phone purchase transaction.
20 Plaintiffs do not allege that Ambassador Ginsberg purchased the phone from Google, so no such
21 agreement could have been reached at the point of sale. Plaintiffs point to Google's guidelines for
22 app developers who distribute apps through the Play Store. However, Plaintiffs do not allege any
23 basis for Ambassador Ginsberg's apparent belief that Google's enforcement of those guidelines
24 was part of his bargain with whomever he purchased the smartphone from. Consequently,
25 Plaintiffs have not plausibly alleged that Google's alleged failure to enforce its guidelines for app
26 developers, that is, failure to remove Telegram from the Play Store, caused Plaintiffs to suffer
27 economic injury.

28 At the closing of the hearing, the Court granted Plaintiffs leave to file case citations
supporting their position on the UCL claims by January 21, 2022. On that date, Plaintiffs filed a
list of three cases: *Coffee v. Google, LLC*, No. 20-CV-03901-BLF, 2021 WL 493387 (N.D. Cal.
Feb. 10, 2021); *Hawkins v. Kroger Co.*, 906 F.3d 763, 768 (9th Cir. 2018); and *Johnson v.*

1 *Mitsubishi Digital Elecs. Am., Inc.*, 365 F. App'x 830, 832 (9th Cir. 2010). *See* List of Requested
 2 Cases, ECF 44. All three cases were cited in Plaintiffs' opposition brief and were considered by
 3 the Court prior to the hearing. None of the cases helps Plaintiffs here. In *Coffee*, this Court held
 4 that the plaintiffs had failed to allege economic injury arising from the purchase of virtual
 5 currency, and thus lacked standing to pursue their UCL claims, where they received all the "Lapis
 6 Crystals" and "dragon stones" for which they paid. *Coffee*, 2021 WL 493387, at *9. This Court
 7 held that "If one gets the benefit of his bargain, he has no standing under the UCL." *Id.* (quoting
 8 *Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 365 F. App'x 830, 832 (9th Cir. 2010)). In
 9 *Johnson*, quoted in *Coffee*, the Ninth Circuit concluded that the plaintiff had failed to establish the
 10 requisite economic injury for UCL standing where he "sought the best 1080p television available
 11 at the time, for the best price," and "[t]he record show[ed] that he got the benefit of his bargain."
 12 *Johnson*, 365 F. App'x at 832. Nothing in *Coffee* or *Johnson* supports Plaintiffs' assertion that
 13 they have alleged the requisite economic injury to pursue UCL claims in this case.

14 In *Hawkins*, the Ninth Circuit held that the plaintiff had UCL standing where she alleged
 15 that she relied on a misrepresentation on a product label and would not have bought the product
 16 without the misrepresentation. *See Hawkins*, 906 F.3d at 768-69. Plaintiffs in the present case
 17 have not alleged a labeling claim or any other claim based on fraudulent misrepresentation. While
 18 Plaintiffs allege that Google failed to enforce its guidelines for developers, they do not allege that
 19 those guidelines constituted fraudulent misrepresentations. Nor could they do so, as the guidelines
 20 govern Google's relationship with app developers, not with the general public. Plaintiffs do not
 21 allege that Google promised Android owners that the Google Play Store would be free of hate
 22 speech.

23 In conclusion, the Court finds that Plaintiffs have failed to allege facts demonstrating that
 24 they suffered an economic injury as a result of Google's allegedly unfair practice of failing to
 25 enforce its guidelines for app developers. For that reason, the motion to dismiss is GRANTED as
 26 to Claims 2 and 3.

27 **C. NIED – Claim 1**

28 Claim 1 is for NIED. "[T]he negligent causing of emotional distress is not an independent

1 tort but the tort of negligence.” *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 48 Cal. 3d
2 583, 588 (1989) (internal quotation marks and citation omitted). “The traditional elements of
3 duty, breach of duty, causation, and damages apply.” *Id.* (internal quotation marks and citation
4 omitted).

5 “[B]usiness entities cannot recover emotional distress damages.” *Geragos & Geragos*
6 *Fine Arts Bldg., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04427-RGK-JPR, 2020
7 WL 4048504, at *3 (C.D. Cal. July 20, 2020) (citing *Templeton Feed & Grain v. Ralston Purina*
8 *Co.*, 69 Cal. 2d 461, 468 (1968)). Accordingly, the Court considers Plaintiffs’ NIED claim only
9 with respect to Ambassador Ginsberg.

10 Google argues that Plaintiffs have not alleged facts establishing a duty or causation. The
11 Court agrees.

12 1. Duty

13 Under California law, there is no general duty of reasonable care to prevent emotional
14 distress. *See Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 985 (1993). A duty of
15 reasonable care “may be imposed by law, be assumed by the defendant, or exist by virtue of a
16 special relationship.” *Id.* Plaintiffs allege that “[b]ecause Ambassador Ginsberg purchased
17 Apple’s iPhone [*sic*], Google owes a duty of reasonable care to ensure that their services are not
18 used as a means to inflict religious and racial intimidation.” FAC ¶ 73. The Court assumes that
19 the reference to the iPhone was a typographical error, and that Plaintiffs intended to allege that
20 Google owes a duty of reasonable care because Ambassador Ginsberg purchased an Android
21 smartphone. Plaintiffs allege that “Defendant breached their duty by continuing to host Telegram
22 on the Google Play Store despite Defendant’s knowledge that Telegram was being used to incite
23 violence, including violence against African Americans and Jews.” *Id.* ¶ 80. As Google points
24 out, however, the Ninth Circuit has held that “[n]o website could function if a duty of care was
25 created when a website facilitates communication, in a content-neutral fashion, of its users’
26 content.” *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019).

27 Accordingly, Google does not owe a general duty to the public bases on its operation of the Play
28 Store.

1 In their opposition, Plaintiffs articulate a different basis for their assertion of a duty,
2 arguing that Google assumed a legal duty of care by drafting and publishing guidelines for app
3 developers. Plaintiffs has not cited, and the Court has not discovered, any authority for the
4 proposition that Google's publication of guidelines for its app developers creates an enforceable
5 duty to any purchaser of an Android device. Accordingly, even if this theory were alleged in the
6 NIED claim, the Court would conclude that Google's developer guidelines do not establish a duty
7 of care to Plaintiffs.

8 2. Causation

9 Moreover, Plaintiffs have not alleged facts showing that Google's alleged failure to
10 enforce its developer guidelines caused Ambassador Ginsberg's alleged emotional distress. The
11 Court understands Plaintiffs' theory to be: Ambassador Ginsberg is a Jewish person in the public
12 eye; he lives in apprehension of religiously motivated violence being directed against him;
13 Telegram is used by extremist and terrorist organizations to incite violence against Jewish persons;
14 and therefore Google's failure to remove Telegram from the Play Store has caused Ambassador
15 Ginsberg to suffer emotional distress. While the Court is sympathetic to Ambassador Ginsberg's
16 apprehensions regarding religiously motivated violence, the alleged connection between Google's
17 conduct and Ambassador Ginsberg's emotional distress is too attenuated to satisfy the causation
18 element.

19 Accordingly, the motion to dismiss is GRANTED as to Claim 1.

20 D. Leave to Amend

21 Having determined that Plaintiff's claims are subject to dismissal, the Court must decide
22 whether leave to amend is warranted. Leave ordinarily must be granted unless one or more of the
23 following factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure
24 to cure deficiencies by amendment, (4) undue prejudice to the opposing party, and (5) futility of
25 amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Eminence Capital, LLC v.*
26 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (discussing *Foman* factors).

27 The Court finds no undue delay (factor 1) or bad faith (factor 2). The Court has not
28 previously issued an order identifying the deficiencies in Plaintiffs' claims (factor 3), and at this

United States District Court
Northern District of California

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early stage in the litigation granting further opportunity to amend would not impose undue prejudice on Google (factor 4).

The Court nonetheless concludes that leave to amend is not warranted because amendment would be futile (factor 5). It is clear from the FAC that Plaintiffs’ claims are barred by Section 230 of the CDA, that Plaintiffs lack statutory standing under the UCL, and that the facts of this case do not give rise to liability for NIED. Plaintiffs have given no indication, either in their opposition brief or during oral argument, that they could allege additional facts to cure these deficiencies. To the contrary, Plaintiffs clearly have set forth the facts upon which their claims are based. In the view of the Court, those facts simply do not give rise to a viable claim against Google.

Based on its determination that amendment would be futile, the motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND.

IV. ORDER

- (1) Google’s motion to dismiss the FAC is GRANTED WITHOUT LEAVE TO AMEND as to all claims; and
- (2) The action is DISMISSED with prejudice.

Dated: February 18, 2022



BETH LABSON FREEMAN
United States District Judge