

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AMBASSADOR MARC GINSBERG and
 COALITION FOR A SAFER WEB,

Plaintiffs,

v.

GOOGLE INC.,

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]

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

¹ Plaintiffs filed two FACs, one on June 8, 2021 (ECF 17) and the other on June 11, 2021 (ECF 19). The Court’s references to the “FAC” herein are to the later-filed pleading (ECF 19), as 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.

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

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

I. BACKGROUND²

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

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

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

² Plaintiffs' factual allegations are accepted as true for purposes of the Rule 12(b)(6) motion. *See*

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

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

II. LEGAL STANDARD

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

III. DISCUSSION

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

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

A. Section 230

Section 230 of the CDA “protects certain internet-based actors from certain kinds of lawsuits.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). Under the statute, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). “No

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

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

1. Interactive Computer Service Provider

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

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

2. Seek to Treat as a Publisher or Speaker

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

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



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