

\*\*E-Filed 12/17/08\*\*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

13 JENNA GODDARD, individually and on behalf of  
all others similarly situated,

14 Plaintiff,

15 v.

16  
17 GOOGLE, INC., a Delaware corporation,

18 Defendant.

Case Number C 08-2738 JF (PVT)

**ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS**

RE: Docket No. 43.

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**I. BACKGROUND**

Plaintiff Jenna Goddard (“Plaintiff”) alleges that she and a class of similarly situated individuals were injured as a result of clicking on web-based advertisements created by allegedly fraudulent providers of services for various mobile devices. These so-called mobile service subscription providers (“MSSPs”) sell consumer products such as ring tones, sports score reports, weather alerts, stock tips, direct payment services, and interactive radio over the Internet for use on mobile devices such as cellular phones. As alleged in detail in the complaint, MSSPs transmit

<sup>1</sup> This disposition is not designated for publication in the official reports.

1 their products directly to consumers' mobile devices and apparently are able to bill the consumer  
2 merely by providing the consumer's cellular telephone number to a billing aggregator. The  
3 aggregator in turn instructs the relevant cellular carrier to add the charges to the consumer's  
4 cellular telephone bill. Complaint ¶ 10. Plaintiff alleges that the largely unverifiable nature of  
5 MSSP billing has resulted in a high incidence of fraud in the mobile content subscription  
6 industry. Complaint ¶¶ 8-11.

7 Plaintiff seeks to hold Defendant Google, Inc. ("Google") liable for its alleged complicity  
8 in this scheme. According to the complaint, Google "operates the most widely-used Internet  
9 search engine in the world . . . [and] generates revenue primarily by online advertising."  
10 Complaint ¶ 2. A focus of Google's advertising efforts is its "AdWords" program, which allows  
11 advertisers to draft short advertisements known as "AdWords" and to select keywords that  
12 correspond to the advertisements. When a user's Google search matches the selected keywords,  
13 Google displays the AdWords alongside the search results. Plaintiff alleges that Google has a  
14 Content Policy designed to exclude advertisements by fraudulent MSSPs, but that Google  
15 "intentionally refuses to enforce its policies with respect to mobile subscription services."  
16 Complaint ¶ 26. Plaintiff does not disclose the identity of any specific MSSP in her complaint,  
17 but she does allege that she clicked on an AdWords advertisement linked to an allegedly  
18 fraudulent MSSP website where she entered her cellular telephone number, causing charges to  
19 appear on her cellular telephone bill for "unwanted mobile content services." Complaint ¶¶ 35-  
20 38.

21 Plaintiff asserts the following claims: (1) that Google's receipt of payments from the  
22 allegedly fraudulent MSSPs constitutes "money laundering," as defined by 18 U.S.C. § 1957,  
23 which in turn constitutes an "unlawful business practice and unfair competition" that violates  
24 California Business and Professions Code § 17200; (2) that Google breached its own Content  
25 Policy—an agreement between Google and its AdWords advertisers, of which Plaintiff allegedly  
26 is an intended third-party beneficiary—with respect to mobile services subscriptions; (3) that  
27 Google was negligent in protecting consumers from fraudulent MSSPs by failing to enforce its  
28 Content Policy; and (4) that Google aided and abetted the MSSPs in committing various other

1 statutory and common law violations. Complaint ¶¶ 47-83. In response, Google argues that each  
2 of Plaintiff's claims is barred by § 230 of the Communications Decency Act of 1996 ("CDA"),  
3 which immunizes providers of "interactive computer services" against liability arising from  
4 content created by third parties. Google also argues that Plaintiff otherwise has failed in each  
5 instance to state a claim upon which relief may be granted. After considering the papers and  
6 hearing oral argument, the Court agrees with Google that the claims, as pled, are barred by § 230  
7 of the CDA. Accordingly, Google's motion to dismiss will be granted. However, because the  
8 Court is not convinced that Plaintiff could not legitimately plead around § 230, leave to amend  
9 also will be granted.

## 10 II. LEGAL STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)

11 A complaint may be dismissed for failure to state a claim upon which relief may be  
12 granted for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts  
13 under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34  
14 (9th Cir. 1984). For purposes of a motion to dismiss, all allegations of material fact in the  
15 complaint are taken as true and construed in the light most favorable to the nonmoving party.  
16 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). A complaint should not be  
17 dismissed "unless it appears beyond doubt the plaintiff can prove no set of facts in support of his  
18 claim that would entitle him to relief." *Clegg*, 18 F.3d at 754. However, a plaintiff is required to  
19 provide "more than labels and conclusions," *Bell Atl. Corp. v. Twombly*, \_\_ U.S. \_\_, 127 S.Ct.  
20 1955, 1964 (2007), and the "[f]actual allegations must be enough to raise a right to relief above  
21 the speculative level." *Id.* at 1965.

## 22 III. DISCUSSION

23 Congress passed § 230 of the CDA in response to concerns that providers of Internet-  
24 based services could be held liable for unlawful content provided by third parties. *See, e.g., Fair*  
25 *Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163-64 (9th  
26 Cir. 2008) (en banc) (explaining congressional intent to allow Internet-based companies to "edit"  
27 offensive or unlawful user-generated content without risking liability for failure to eliminate all  
28 such content). Section 230(c)(1) states that "[n]o provider . . . of an interactive computer service

1 shall be treated as the publisher or speaker of any information provided by another information  
2 content provider.” 47 U.S.C. § 230(c)(1).<sup>2</sup> Courts consistently have held that § 230 provides a  
3 “robust” immunity, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003), and  
4 that all doubts “must be resolved in favor of immunity,” *Fair Housing Council*, 521 F.3d at  
5 1174. Indeed, § 230’s “broad immunity” extends to “*all claims stemming from* [an interactive  
6 service provider’s] publication of information created by third parties.” *Doe v. MySpace, Inc.*,  
7 528 F.3d 413, 418 (5th Cir. 2008) (emphasis added). The result is that “[p]arties complaining  
8 that they were harmed by a Web site’s publication of user-generated content . . . may sue the  
9 third-party user who generated the content, but not the interactive computer service that enabled  
10 them to publish the content online.” *MySpace*, 528 F.3d at 419 (citing *Zeran v. America Online,*  
11 *Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)). Conversely, CDA immunity generally “applies only  
12 if the interactive computer service provider is not also an ‘information content provider,’ which  
13 is defined as someone who is ‘responsible, in whole or in part, for the creation or development  
14 of’ the offending content.” *Fair Housing Council*, 521 F.3d at 1162 (quoting 47 U.S.C. §  
15 230(f)(3)). Thus, even where a third party “creates” the allegedly unlawful content, an  
16 interactive computer service provider may be liable for its publication if it “helps to develop [the]  
17 unlawful content,” meaning that it “contributes materially to the alleged illegality of the  
18 conduct.” *Id.* at 1168.

19 The Ninth Circuit provided an extensive discussion of § 230 in *Fair Housing Council v.*  
20 *Roommates.com*. In an *en banc* opinion, the court granted a website operator immunity with  
21

---

22 <sup>2</sup> Section 230 defines an “interactive computer service” as “any information service,  
23 system, or access software provider that provides or enables computer access by multiple users to  
24 a computer server.” 47 U.S.C. § 230(f)(2). “Today, the most common interactive computer  
25 services are websites,” *Fair Housing Council*, 521 F.3d at 1162 n.6, and a number of courts  
26 already have determined that Google is an interactive computer service provider. *See, e.g.,*  
27 *Langdon v. Google*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (dismissing claims against Google  
28 and other interactive computer service providers under § 230); *Parker v. Google*, 422 F. Supp. 2d  
492, 500-01 (E.D. Pa. 2006) (“[T]here is no doubt that Google qualifies as an ‘interactive  
computer service.’”); *Novak v. Overture Svcs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004)  
(noting that Google is a “provider or user of an interactive computer service” and eligible for §  
230 immunity).

1 respect to allegedly discriminatory content provided voluntarily by its users, and denied  
2 immunity only as to content that the website *required* its users to provide as a condition of use.  
3 *See Fair Housing Council*, 521 F.3d at 1165, 1166 & n.19, 1169-70 & n.26, 1173-74. The court  
4 emphasized repeatedly that the website lost immunity only by *forcing* its users to provide the  
5 allegedly discriminatory information as a condition of access. *Id.* In explaining why the website  
6 was immune from liability based on voluntarily contributed third-party content, the court stated  
7 that “[w]ithout reviewing every [posting], [the website] would have no way to distinguish  
8 unlawful discriminatory preferences from perfectly legitimate statements . . . . This is precisely  
9 the kind of situation for which section 230 was designed to provide immunity.” *Id.* at 1174.  
10 Because the website did not “encourage or enhance any discriminatory content created by users,”  
11 it did not qualify as a “developer of the information posted.” *Id.*; *accord Chicago Lawyers’*  
12 *Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008)  
13 (finding that § 230 provided immunity to online classified ads website for discriminatory housing  
14 advertisements posted by users because “[n]othing in the service craigslist offers induces anyone  
15 to post any particular listing or express a preference for discrimination”).

16 The broad scope of § 230 extends to multiple forms of putative “involvement” by an  
17 interactive service provider in generating online content. Thus, providing third parties with  
18 neutral tools to create web content is considered to be squarely within the protections of § 230.  
19 *See, e.g., Fair Housing Council*, 521 F.3d at 1169 & n.24, 1171, 1174 n.37, 1175. Moreover,  
20 even if a service provider knows that third parties are using such tools to create illegal content,  
21 the service’s provider’s failure to intervene is immunized. *See, e.g., Fair Housing Council*, 521  
22 F.3d at 1169 n. 24 (noting that where a plaintiff brings a claim “based on a website operator’s  
23 passive acquiescence in the misconduct of its users,” the website operator would be immune  
24 “even if the users committed their misconduct using tools of general availability provided by the  
25 website operator”); *Zeran*, 129 F.3d at 333 (holding that provider is shielded from liability  
26 despite receiving notification of objectionable content on its website and failing to remove it);  
27 *Barrett v. Rosenthal*, 40 Cal. 4th 33, 47 (2006) (same); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th  
28 816, 822, 835 (2002) (same); *Mazur v. eBay*, No. C 07-03967 MHP, 2008 WL 618988, at \*9

1 (N.D. Cal. Mar. 4, 2008) (same). Finally, the fact that a website elicits online content for profit is  
 2 immaterial; the only relevant inquiry is whether the interactive service provider “creates” or  
 3 “develops” that content. *See Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (holding  
 4 that an interactive computer service provider was immune from defamation liability based on its  
 5 hosting of a gossip column, even though the service provider had contracted with the gossip  
 6 columnist to provide the column for a monthly compensation of \$3000, had retained considerable  
 7 editorial rights, and affirmatively had promoted the columnist as a new source of unverified  
 8 instant gossip); *see also Gentry*, 99 Cal. App. 4th at 822, 828-31 (immunizing eBay from  
 9 allegedly fraudulent postings on its auction website despite the fact that eBay received placement  
 10 fees from dealers listing an item for auction); *Fair Housing Council*, 521 F.3d at 1161, 1174-75  
 11 (partially immunizing website “which seeks to profit by collecting revenue from advertisers and  
 12 subscribers” from liability for user-generated postings). In short, for § 230 *not* to apply, it must  
 13 be “*very clear* that the website *directly* participates in developing the illegality” at issue. *Fair*  
 14 *Housing Council*, 521 F.3d at 1174 (emphasis added). Otherwise, “[t]he message to website  
 15 operators is clear: If you don’t encourage illegal content, or design your website to require users  
 16 to input illegal content, you will be immune.”

17 **A. California Unfair Competition Law (“UCL”) claims**

18 Plaintiff’s UCL claim is based on an intricate series of alleged statutory violations.  
 19 Plaintiff alleges that certain fraudulent MSSPs, in providing her with unwanted mobile  
 20 subscription content, “accessed” her mobile phone in violation of § 1030 of the Computer Fraud  
 21 and Abuse Act, and that this conduct constitutes a “specified unlawful activity” under the federal  
 22 money laundering statute, 18 U.S.C. § 1957. Plaintiff alleges that Google violated § 1957 by  
 23 receiving funds generated by this “specified unlawful activity,” and that this violation constitutes  
 24 an “unfair business practice” under California law. *See* Cal. Bus. & Profs. Code § 17200 et seq.

25 In the absence of any argument that Google created or developed the offending content,<sup>3</sup>  
 26

---

27 <sup>3</sup> Plaintiff does allege that Google “assists its customers in drafting AdWords and  
 28 selecting keywords through both live support from its AdWords Specialists and its advertising  
 campaign optimization services,” Complaint ¶ 15. However, Plaintiff provides no details to

1 Plaintiff seeks to avoid the application of § 230 by arguing that her UCL claim does not seek to  
2 treat Google as the publisher of third-party content. Plaintiff contends that her claim “is  
3 independent of the fraudulent mobile content providers’ AdWords . . . [and] stems from  
4 Google’s acceptance of tainted funds from fraudulent mobile content providers.” Pl.’s Opp. at  
5 2:8-11. Google counters that the claim still would result in its being held liable for third-party  
6 content, and that Plaintiff is engaging in mere “artful pleading” in an attempt to avoid the proper  
7 application of § 230. Google points out that courts repeatedly have rejected attempts to  
8 recharacterize claims fundamentally based on the posting of online information in order to avoid  
9 §230’s prohibition on “treat[ing] [the defendant] as a ‘publisher’ of information.” As explained  
10 below, this Court agrees with Google that Plaintiff’s UCL claim is just such an impermissible  
11 recharacterization.<sup>4</sup>

12 In *Gentry v. eBay*, the plaintiffs brought a claim under California’s autographed sports  
13 memorabilia statute, Cal. Civ. Code § 1739.7, seeking to hold eBay liable for its alleged failure  
14 to furnish certificates of authenticity in connection with the sale of autographed merchandise  
15 offered by users of its website. 99 Cal. App. 4th at 820-24. To avoid the application of § 230,  
16 the plaintiffs argued that they merely were “seek[ing] to enforce eBay’s independent duty under  
17 the statute to furnish a warranty as the ‘provider of descriptions,’ not as a publisher.” *Id.* at 831.

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  

---

substantiate this allegation, and fails even to argue the point in her opposition. This allegation  
falls far short of making it “very clear that [Google] directly participates in developing the  
alleged illegality.” *Fair Housing Council*, 521 F.3d at 1174. Indeed, there is no suggestion in  
the current record that Google “encouraged” the MSSPs to create the allegedly fraudulent  
content, or that the creation of such content was anything less than voluntary.

<sup>4</sup> At oral argument, Plaintiff appeared to argue that § 230 does not apply because Google  
“caused” the alleged harm by receiving the allegedly tainted funds. This argument is foreclosed  
by the line of cases holding that a website’s act of eliciting online content for profit is immaterial,  
and that the only relevant inquiry is whether the interactive service provider “creates” or  
“develops” that content. *See Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (holding  
interactive computer service provider immune despite active solicitation and payment for online  
column); *see also Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 822, 828-31 (2002) (immunizing  
eBay from liability for allegedly fraudulent postings despite its receipt of placement fees for use  
of auction services); *Fair Housing Council*, 521 F.3d at 1161, 1174-75 (partially immunizing  
website “which seeks to profit by collecting revenue from advertisers and subscribers”).

1 The court rejected this argument, holding that “the substance of [plaintiffs’] allegations reveal  
2 they ultimately seek to hold eBay responsible for . . . eBay’s dissemination of representations  
3 made by the individual defendants, or the posting and compilations of information generated by  
4 those defendants and other third parties.” *Id.* The court concluded that if it “*ultimately h[eld]*  
5 *eBay responsible* for content originating from other parties, [it] would be treating [eBay] as the  
6 publisher” of the information. *Id.* (emphasis added).

7 The Fifth Circuit addressed a similar attempt at recharacterization in *Doe v. MySpace*.  
8 There, the plaintiffs sued the online social utility website MySpace for its alleged failure to  
9 implement safety measures that purportedly would have prevented an assault on one of the  
10 plaintiffs, a thirteen-year-old girl, by another MySpace user whom she encountered online.  
11 *MySpace*, 528 F.3d at 419. To avoid § 230, the plaintiffs argued that their claims were  
12 “predicated solely on MySpace’s failure to implement basic safety measures,” and therefore did  
13 “not attempt to treat [MySpace] as a ‘publisher’ of information.” *Id.* Rejecting this contention,  
14 the Fifth Circuit held that the allegations, no matter how they were characterized, were “merely  
15 another way of claiming that MySpace was liable for publishing the communications.” *Id.* The  
16 court emphasized that “[i]f MySpace had not published communications between Julie Doe and  
17 [the attacker], . . . Plaintiffs assert they never would have met and the sexual encounter never  
18 would have occurred.” *Id.*

19 Here, despite Plaintiff’s efforts to characterize her UCL claim as one merely arising from  
20 Google’s receipt of “tainted funds,” *Gentry* and *MySpace* support the application of § 230.  
21 Plaintiff alleges repeatedly that “[a]bsent Google’s provision of AdWords services to the  
22 Fraudulent Mobile Subscription Services, the Class members would never have been damaged by  
23 the Fraudulent Mobile Subscription Services.” Complaint ¶¶ 58, 64, 70. Indeed, the sole basis  
24 for each of Plaintiff’s claims is that she “suffered damages as a result of clicking on a Google  
25 AdWords advertisement for mobile subscription services which linked to a Fraudulent Mobile  
26 Subscription Services website.” Complaint ¶ 40. Like the plaintiffs in *MySpace* and *Gentry*,  
27 Plaintiff claims in essence that she was harmed because Google hosted certain online content,  
28 and her UCL claim effectively would hold Google liable for its publication of third-party content

1 in contravention of § 230.<sup>5</sup>

2 **B. Breach of contract and negligence claims**

3 Plaintiff next asserts that her contract and negligence claims hinge not on content created  
 4 by the allegedly fraudulent MSSPs, but “on information Google *created*—such as the terms of  
 5 Google’s Content Policy.” Pl.’s Opp. at 2. Plaintiff focuses largely on a single clause in  
 6 Google’s Advertising Program Terms stating that “Google and Customer hereby agree and  
 7 acknowledge” that the consumer protections found in the Content Policy are incorporated into  
 8 the contract between Google and its AdWords advertisers. Pl.’s Opp. at 10-14. However, the  
 9 fact that Google requires advertisers to agree to certain terms—terms designed to *protect* Plaintiff  
 10 from the conduct of which she now complains—does not lead to the conclusion that Google is  
 11 responsible for the content the advertisers ultimately created. Indeed, Plaintiff’s argument is  
 12 fundamentally inconsistent with her complaint, which asserts repeatedly that “[a]bsent Google’s  
 13 provision of AdWords services to the Fraudulent Mobile Subscription Services, the Class  
 14 members would never have been damaged by the Fraudulent Mobile Subscription Services.”  
 15 Complaint ¶¶ 64, 70. Based on the allegations in the complaint, the breach of contract and  
 16 negligence claims only can be read to assert (1) that Google breached its Content Policy by  
 17 failing to remove advertisements by MSSPs whose websites did not comply with the Policy, and

---

18  
 19 <sup>5</sup> Plaintiff argues that because her UCL claim is based on § 1957, a criminal statute, it  
 20 falls within a narrow exception to § 230 providing that “[n]othing in this section shall be  
 21 construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to  
 22 obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal  
 23 criminal statute.” 47 U.S.C. § 230(e)(1). Plaintiff argues that she “seeks to enforce 18 U.S.C. §  
 24 1957 under the UCL’s ‘unlawful’ prong, which ‘borrows violations of other laws and treats them  
 25 as unlawful practices that the unfair competition law makes independently actionable.’” Pl.’s  
 26 Opp. at 13:26-28. Plaintiff has provided no authority for such a potentially vast expansion of §  
 27 230 to include criminal provisions that are enforceable privately only through state law.  
 28 Congress enacted § 230(e)(1) in order to “ensure vigorous enforcement of Federal criminal laws  
 to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” 47  
 U.S.C. § 230(b)(5). The broad “unlawful” prong of California’s UCL, which applies to any  
 practice “forbidden by law, be it civil or criminal, federal, state, or municipal, statutory,  
 regulatory, or court-made,” *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002), would  
 appear to expand the narrow exception created by Congress well beyond its intended scope.  
 More importantly, because the UCL claim is an impermissible recharacterization of allegations  
 that ultimately turn on Google’s hosting of the fraudulent AdWords, § 230(e)(1) is inapplicable.

1 (2) that Google negligently undertook to prevent fraudulent MSSP content by failing to enforce  
2 the Content Policy. Complaint ¶¶ 63, 69.

3 Plaintiff's contract and negligence claims, as pled in the complaint, are barred because  
4 they would hold Google responsible for third-party content, in violation of § 230(c)(1). The  
5 claims are virtually indistinguishable from those rejected by the Third Circuit in *Green v. AOL*.  
6 In that case, the plaintiff alleged that "AOL negligently failed to live up to . . . contractual  
7 obligations" in its member agreement by failing to ban AOL users who harassed him and  
8 transmitted a virus to his computer through AOL chatrooms. 318 F.3d 465, 468 (3d Cir. 2002).  
9 In dismissing the claims, the court concluded that to hold "AOL liable for its alleged negligent  
10 failure to properly police its network for content transmitted by its users . . . would 'treat' AOL  
11 'as the publisher or speaker' of that content." *Id.* at 470. In the instant case, Plaintiff's  
12 negligence and contract claims seek to hold Google liable for failing to enforce its Content  
13 Policy.

14 Plaintiff cites *Mazur v. eBay*, No. C 07-03967 MHP, 2008 WL 618988 (N.D. Cal. Mar. 4,  
15 2008), for the proposition that an interactive service provider may be held liable for "creat[ing]  
16 an expectation" of certain online conditions but failing to enforce them. However, in *Mazur*,  
17 which involved allegedly fraudulent seller activities in eBay's online auction forums, the court  
18 held explicitly that "plaintiff's assertion that eBay knew of the seller's illegal conduct and failed  
19 to prevent it is . . . 'the classic kind of claim that [is] preempted by section 230.'" *Mazur*, 2008  
20 WL 618988, at \*9 (quoting *Barrett v. Rosenthal*, 40 Cal. 4th 33, 47 (2006)). The only allegations  
21 that the *Mazur* court allowed to proceed in the face of § 230 were those based on eBay's  
22 *affirmative representations* to users that its live auctions were "safe." Plaintiff in the instant case  
23 relies solely on her alleged status as a third-party beneficiary of Google's Advertising Terms—an  
24 agreement exclusively between Google and its advertisers. Plaintiff does not—and apparently  
25 cannot—allege that Google made any affirmative representations of the kind alleged in *Mazur*.

26 Google argues that even if Plaintiff could avoid the application of § 230(c)(1) by alleging  
27 that Google drafted or "developed" the advertisements "in part," *Fair Housing Council*, 521 F.3d  
28 at 1167, her contract and negligence claims would be barred independently by § 230(c)(2), which

1 provides that no interactive computer service “shall be held liable on account of any action  
2 voluntarily taken in good faith to restrict access or availability of material that the provider or  
3 user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise  
4 objectionable.” The intent of Congress in enacting § 230(c)(2) was to encourage efforts by  
5 Internet service providers to eliminate such material by immunizing them from liability where  
6 those efforts failed. *See Carafano*, 339 F.3d at 1122. Plaintiff argues that § 230(c)(2) applies  
7 only to “completed courses of action which result in the removal of online material.” Pl.’s Opp.  
8 at 6:9-10. However, while it is true that § 230(c)(2) “insulates service providers and users from  
9 claims premised on the taking down of a customer’s posting[,] such as [claims for] breach of  
10 contract or unfair business practices,” *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003),  
11 it also “allows [an interactive service provider] to establish *standards* of decency without risking  
12 liability for doing so.” *Green*, 318 F.3d at 472 (emphasis added). Plaintiff has not alleged that  
13 Google adopted its Policy in bad faith, and the Policy would appear to fall squarely within §  
14 230(c)(2)’s authorization to establish standards for online content.

15       Ultimately, however, the Court concludes that the relevant portions of Google’s Content  
16 Policy fall outside of the statute for a more basic reason. In *National Numismatic Certification,*  
17 *LLC. v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404, at \*25 (M.D. Fla. July 8,  
18 2008), the plaintiffs sued eBay for reputational harm allegedly inflicted when eBay removed their  
19 coin auction items for violations of eBay’s Counterfeit Currency and Stamp Policy. eBay argued  
20 that it was immune from liability based on its policy of removing “objectionable” material under  
21 § 230(c)(2). The district court noted the vagueness of the word “objectionable,” and observed  
22 that “[i]n the context of section 230, ‘objectionable’ is preceded by the words ‘obscene, lewd,  
23 lascivious, filthy, excessively violent, [and] harassing.’” *Id.* Applying the canon of ejusdem  
24 generis, the court concluded that “[i]t is difficult to accept . . . that Congress intended the general  
25 term ‘objectionable’ to encompass an auction of potentially-counterfeit coins when the word is  
26 preceded by seven other words that describe pornography, graphic violence, obscenity, and  
27 harassment.” In the instant case, the relevant portions of Google’s Content Policy require that  
28 MSSPs provide pricing and cancellation information regarding their services. These

1 requirements relate to business norms of fair play and transparency and are beyond the scope of §  
2 230(c)(2).<sup>6</sup>

3 **C. Aiding and abetting claims**

4 Plaintiff also alleges that Google aided and abetted the MSSPs in violating various  
5 statutory and common law rules. Plaintiff does not dispute that her aiding and abetting claims  
6 would hold Google liable for publication of the MSSPs' advertisements, but she argues that  
7 aiding and abetting liability is beyond the scope of § 230. Plaintiff supports her argument with a  
8 creative reading of a single line in *Fair Housing Council*, in which the Ninth Circuit stated that  
9 "if [website operators] don't encourage illegal content . . . [,] [they] will be immune." 521 F.3d  
10 at 1175. Plaintiff thus attempts to draw a connection between the word "encourage" in *Fair*  
11 *Housing Authority* and the requirement of "substantial assistance or encouragement" under  
12 aiding and abetting law. Beyond the fact that the court in *Fair Housing Council* was addressing  
13 the scope of a website's liability as a "developer . . . in part" of third-party content, and that there  
14 are no allegations here that Google "developed" the offending ads in any respect, Plaintiff's  
15 aiding and abetting claims are simply inconsistent with § 230. Neither *Fair Housing Council* nor  
16 any other case supports Plaintiff's proposed exception to § 230, which provides "broad immunity  
17 . . . for all claims stemming from [an interactive service provider's] publication of information

18 \_\_\_\_\_  
19 <sup>6</sup> Notably, § 230(c)(1) contains no such limitations. As the Seventh Circuit recently  
20 explained,

21 [s]ection 230(c)(1) is general. Although the impetus for the enactment of §  
22 230(c) as a whole was a court's opinion holding an information content provider  
23 liable, as a publisher, because it had exercised some selectivity with respect to  
24 the sexually oriented material it would host for customers, a law's scope often  
25 differs from its genesis . . . . Congress could have written something like: "No  
26 provider or user of an interactive computer service shall be treated as the  
27 publisher or speaker of any sexually oriented material provided by another  
28 information content provider." That is not, however, what it enacted. Where the  
phrase "sexually oriented material" appears in our rephrasing, the actual statute  
has the word "information." That covers ads for housing, auctions of paintings  
that may have been stolen by Nazis, biting comments about steroids in baseball,  
efforts to verify the truth of politicians' promises, and everything else that third  
parties may post on a web site; "information" is the stock in trade of online  
service providers.

*Chicago Lawyers' Committee*, 519 F.3d at 671 (7th Cir. 2008).

1 *created by third parties.” MySpace, 528 F.3d at 418 (emphasis added).*

2 **IV. CONCLUSION**

3 Each of Plaintiff’s claims, as currently pled, is premised fundamentally on Google’s  
4 publication of the AdWords advertisements. While Plaintiff might avoid § 230 immunity by  
5 alleging that Google, in addition to acting as an “internet content provider,” also is an  
6 “information content provider,” she has failed to do so in her complaint. While she does allege  
7 that Google “assists its customers in drafting AdWords and selecting keywords through both live  
8 support from its AdWords Specialists and its advertising campaign optimization services,”  
9 Complaint ¶ 15, Plaintiff does not articulate this relationship in her complaint and fails even to  
10 argue the point in her opposition. *See supra* note 3. This bare allegation is insufficient to  
11 overcome the “robust” protections of the CDA. *Id.*

12 Nonetheless, there may be instances in which an internet content provider will be  
13 considered “‘responsible’ at least ‘in part’ for [posted third-party content] because every  
14 [posting] is a collaborative effort” between the internet provider and the third-party content  
15 provider. *Fair Housing Council, 521 F.3d at 1167.* If Plaintiff could establish Google’s  
16 involvement in “creating or developing” the AdWords, either “in whole or in part,” she might  
17 avoid the statutory immunity created by § 230. In light of that possibility, Plaintiff will be given  
18 an opportunity to amend her complaint in order to allege such involvement.<sup>7</sup> Any amended  
19 pleading shall be filed not later than thirty days from the date of this Order.

20  
21  
22 **IT IS SO ORDERED.**

23 DATED: 12/17/08

24  
25   
26 JEREMY FOGEL  
United States District Judge

27  
28 <sup>7</sup> Since at present it appears unlikely that Plaintiff can do so, the Court will defer further  
consideration of the sufficiency of Plaintiff’s underlying claims.

1 This Order has been served electronically upon the following persons:

2 Alan Himmelfarb Consumerlaw1@earthlink.net  
3 Ethan Mark Preston epreston@kamberedelson.com  
4 Karen Johnson-McKewan kjohnson-mckewan@orrick.com  
5 Nancy E. Harris nharris@orrick.com  
6 Nikka Noel Rapkin nrapkin@orrick.com

7 This Order has been served by other means upon the following persons:  
8

9 Kikka N. Rapkin  
10 Orrick Herrington & Sutcliffe LLP  
11 The Orrick Building  
12 405 Howard Street  
13 San Francisco, CA 94105-2669  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28