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Superior Court of California
County of Los Angeles

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Sherri R. Carter, Executive Officer/Clerk
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 STEVEN WITKOFF, Individually, and
 12 LAUREN WITKOFF, Individually,
 13
 14 Plaintiffs,

15 v.

16 TOPIX, LLC; DANIEL PARK; and Does 1
 17 THROUGH 100, Inclusive,
 18 Defendants.

) **CASE NO. BC517897**
) Complaint Filed: 8/12/2013
) 1st Amended Complaint Filed: 1/9/2014
) Assigned to: Hon. Michael M. Johnson
) Dept.: 56
)
) **TOPIX, LLC'S REPLY BRIEF IN**
) **SUPPORT OF DEMURRER TO ALL**
) **CAUSES OF ACTION IN PLAINTIFFS'**
) **FIRST AMENDED COMPLAINT**
)
) Hearing date: **April 30, 2014**
) Hearing Time: **8:30 a.m.**
) Dept: **56**

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BY FAX

TO THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant, TOPIX, LLC ("Topix") provides the following reply brief in support of its demurrer ("Demurrer") to all causes of action in STEVEN WITKOFF and LAUREN WITKOFF'S ("plaintiffs") first amended complaint ("FAC").

-

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26 LAUREN WITKOFF'S ("plaintiffs") first amended complaint ("FAC").
27
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT**

3 The opposition (“Opposition”) to Topix’s demurrer attempts to argue that plaintiffs have
4 included sufficient allegations in the First Amended Complaint (“FAC”) such that Topix is not
5 entitled to the protection of the federal Communications Decency Act, 47 U.S.C. § 230 (“Section
6 230”). However, the Opposition fails to address the authorities from the Second Appellate District,
7 the California Supreme Court and the Ninth Circuit confirming that websites such as Topix are not
8 liable for information provided by third party users of its website.

9 Plaintiffs attempt to construe the Topix website as a separate and distinct “nuisance” from the
10 third party communications yet it is evidently clear from the allegations in the FAC that the source of
11 the alleged nuisance stems solely from these third party posts. Allegations that Topix failed to
12 monitor or restrict such posts or deliberately ignored them invokes Topix’s role as a publisher of
13 content. There would not be a “nuisance” in the first place as plaintiffs claim, without the alleged
14 third party posts. Plaintiffs’ grand allegations that Topix is somehow so intimately involved in a vast
15 criminal drug trafficking enterprise detracts from the simple undisputed fact that Topix did not author
16 the online posts that plaintiffs allege caused the nuisance which allegedly led to their son Andrew
17 Witkoff’s death. As such, the Opposition further detracts from the fundamental issue at hand and
18 mischaracterizes the central premise of the FAC (as they must to attempt to argue that Section 230
19 does not apply) – the posts by Topix’s users, not Topix itself. Authorities confirm that plaintiffs
20 cannot “have their cake and eat it too” by pleading in their FAC that Topix’s website is used to
21 “facilitate drug transactions” as “one of the largest illegal internet drug trafficking bazaars on the
22 Internet” (Opposition, pg. 4: 25-26) via posts by alleged drug dealers, drug sellers and drug
23 purchasers yet for purposes of their Opposition claim that it does not seek to hold Topix liable for
24 these same posts.

25 The FAC alleges that Topix is liable for the tragic death of their son, however, even if the
26 allegations are taken as true solely for purposes of the present demurrer, they do not establish
27 causation on the part of Topix. Even assuming that Topix served as a conduit for plaintiffs’ son to
28

1 make contact with alleged drug dealer Danial Park as pled in the FAC, ultimately, federal and
2 California law must be followed as there are countless decisions throughout the country, including
3 this court, barring all of plaintiffs’ claims. As set forth herein, the Opposition refers to various cases
4 which question the applicability of Section 230 or are based on causes of action or allegations that are
5 completely different from those alleged in this case. Plaintiffs do not provide even one case
6 anywhere in the country that has found a website such as Topix liable for content wholly posted by
7 third party users of its website. Plaintiffs’ reliance on the nuisance cause of action is insufficient to
8 overrule the immunity provided by Section 230, as another federal court has struck down the very
9 same arguments plaintiffs attempt to make in the instant case. In this case, plaintiffs have failed to
10 show that Section 230 does not apply and the demurrer should be sustained without leave to amend.
11 In ruling on this demurrer, the court is to “give the complaint a reasonable interpretation, reading it as
12 a whole and its parts in their context.” *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Here, based on
13 the allegations of the FAC and supporting authorities, plaintiffs cannot and do not show: 1) how
14 Topix has created and developed content; 2) that the FAC does *not* seek to hold Topix liable as a
15 publisher of third party content; and; 3) that plaintiffs nuisance claim stands because it is not
16 inconsistent with Section 230. Finally, the Opposition also puts forth numerous arguments which are
17 wholly unsubstantiated.¹

18 **A. Plaintiffs do Not Sufficiently Plead “Creation & Development” to Remove The FAC**
19 **From Section 230 Immunity.**

20 The Opposition asserts that plaintiffs “have alleged that Topix created, developed and
21 maintained the drug forums so that the unlawful public nuisance and the harm emanating therefrom
22 derives from Topix’s own content, not merely from third-party communications.” Opposition at pg.
23 6:19-20. Topix explained in its demurrer that Section 230 immunity applies to the extent that an
24

25 _____
26 ¹ The 2010 Consent Decree which plaintiffs continuously claim that Topix is “bound by” is also irrelevant to the instant
27 case. As attached to the first amended complaint as Exhibit A, the Consent Decree was in relation to changes to Topix’s
28 priority review system in response to reports of abusive posts. Plaintiffs desperately cling to the Consent Decree to
erroneously suggest that Topix entered into the Consent Decree in response to allegations of “drug dealing” is simply
false, as the Consent Decree itself confirms that it is not. See Exhibit A to FAC.

1 interactive computer service cannot be an information content provider. Indeed, plaintiffs' amended
2 complaint makes vague and conclusory statements alleging "development and creation" of the
3 forums (not content) and "aiding and abetting" by Topix:

4 ¶19: "by using the Topix.com website and the forums Topix **created and developed**,
5 anyone seeking to illegally sell drugs or controlled substances can almost instantaneously
6 get in touch with an interested buyer,... Topix knowingly, willfully and intentionally
7 continues to aid and abet this illegal activity."

8 ¶20: "In or around 2005, Topix **created and developed** a special feature for users of
9 Topix.com."

10 ¶21: "Topix.com users can and do communicate on the forums **created and developed by**
11 **Topix...**"

12 ¶22: "Topix, Does and the other defendants herein and each of them, **enable, encourage,**
13 **aid and abet** drug traffickers and buyers and sellers of illegal drugs and controlled
14 substances to identify, locate and communicate directly..."

15 ¶24: "... Topix's user profile forms, business practices and policies **facilitate the creation**
16 **of anonymous online accounts...**"

17 ¶25: "... Topix is **continually aiding and abetting** the illegal sale and purchase of lethal
18 drugs, in violation of federal and state laws..."

19 ¶29: "Topix also knows that it is **aiding and abetting large-scale drug trafficking,** since
20 the communications regarding illegal drug transactions taking place on its site are so
21 unmistakably explicit."

22 ¶32: "Topix thereby allows, encourages, and maintains the content posted to its website,
23 decides whether, in what form, and for how long such content will remain, and
24 **participates in the creation of said content and the form in which it appears and**
25 **continues to appear.**"

26 ¶46: "Topix allows, encourages, and maintains the content posted to its website deciding
27 whether, in what form, and for how long such content will remain, and **participates in the**
28 **creation of said content and the form in which it appears and continues to appear via its**
rights, exercised or not, to edit said content.

¶59: "... by defendants Topix, DOES defendants and each of them, **created an on-line,**
easily accessible and easily used means for the marketing, distribution and acquisition of
illegal drugs and/or controlled substances."

¶60: "As described in detail above, Topix and DOE defendants were **aiders and abettors**
in illegal sales and purchases of drugs that resulted in the death of Andrew."

24 The United States District Court for the Northern District of California, in interpreting Section
25 230, has already analyzed and wholly rejected these very same arguments made by plaintiff Goddard
26 in *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. Jul. 30, 2009). Goddard alleged that
27 she and a class of similarly situated individuals were harmed as a result of clicking on allegedly
28

1 fraudulent web-based advertisements for mobile subscription services. In her amended complaint,
2 Goddard alleged that "Google's involvement [in creating the allegedly fraudulent advertisements] was
3 so pervasive that the company controlled much of the underlying commercial activity engaged in by
4 the third-party advertisers" and that Google "not only encourages illegal conduct, [but] collaborates
5 in the development of the illegal content and, effectively, requires its advertiser customers to engage
6 in it." *Id.* at 1196. The court reasoned that such allegations do not circumvent Section 230
7 immunity:

8 Thus, a website operator does not become liable as an "information content provider"
9 merely by "augmenting the content [of online material] generally." *Roommates*, 521
10 F.3d at 1167-68. **Rather, the website must contribute "materially . . . to its alleged
11 unlawfulness." *Id.* at 1167-68. A website does not so "contribute" when it merely
12 provides third parties with neutral tools to create web content, even if the website
13 knows that the third parties are using such tools to create illegal content.**

13 The *Goddard* court further discussed the reasoning in *Carafano v. Metrosplash*, 339 F.3d 1119 (9th
14 Cir. 2003), and explained that "even if a particular tool 'facilitate[s] the expression of information,'
15 *id.* at 1124, it generally will be considered 'neutral' so long as users ultimately determine what
16 content to post, such that the tool merely provides 'a framework that could be utilized for proper or
17 improper purposes.'" *Goddard*, *supra*, 640 F. Supp. at 1197. The *Goddard* court concluded:

18 Plaintiff has failed to allege facts that plausibly would support a conclusion that
19 Google created or developed, in whole or in part, any of the allegedly fraudulent
20 AdWords advertisements. **Plaintiff offers numerous theories of such involvement,
21 but these theories merely lend truth to the Ninth Circuit's observation that there
22 almost always will be some "argu[ment] that something the website operator did
23 encouraged the illegality." . . . section 230 must be interpreted to protect websites
24 not merely from ultimate liability, but from having to fight costly and protracted
25 legal battles.**

26 *Goddard*, *supra*, 640 F. Supp. at 1201-1202. Similarly, in this case, plaintiffs offer numerous theories
27 as to Topix's "aiding and abetting" and "creating and developing" but, ultimately, plaintiffs' entire
28 theory of liability rests upon the third party posts of alleged drug dealers, drug purchasers and drug
29 sellers and Daniel Park and plaintiff's son Andrew Witkoff. As such, the extremely vague and

1 unsupported conclusions peppered into plaintiffs’ amended complaint that Topix “creates and
2 develops” content on its website (i.e., an information content provider outside of Section 230
3 immunity), fail as a matter of law. Plaintiffs’ allegations of Topix’s purported liability are so
4 attenuated that Section 230’s immunity clearly bars the instant claims.

5 In *Julie Doe II, a Minor v. Myspace*, 175 Cal. App. 4th 561 (2009), the Second Appellate
6 District also addressed plaintiffs’ arguments opposing Myspace’s demurrer claiming that Myspace
7 provided content:

8 Appellants also contend MySpace is an information content provider and thus is not
9 immunized by section 230. According to appellants, “MySpace acted as a content
10 provider when it collaborated with the Does and their eventual attackers to create and
11 then flesh out their MySpace profiles MySpace also acted as a content provider
12 when it allowed the attackers to channel information in profiles, search and browse
13 profiles for particular characteristics and then use the results of those queries to locate,
14 contact, and eventually sexually assault the Julie Does.”

13 *Id.* at 574. The Court concluded that the facts in that case aligned more closely with those in
14 *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1112 (9th Cir. 2009), involving an online dating service
15 which provided **neutral tools**, which the anonymous poster used to publish libelous content and the
16 defendants did nothing to encourage the posting of such content. *Id.* at 575.

17 **B. The Allegations in the FAC Controvert Plaintiffs’ Misrepresentations that the FAC**
18 **Does Not Treat Topix as A Publisher of Third Party Content.**

19 Plaintiffs allege in this case that the “nuisance” complained about is brought about by Topix’s
20 failure to remove or filter content. While plaintiffs allege that “Topix has maintained and is currently
21 maintaining an unlawful public nuisance,” the nuisance is due to third party content. As set out in
22 pages 8 through 10 of Topix’s demurrer, the allegedly offensive material supporting plaintiffs’
23 nuisance claim originates from third parties. While plaintiffs argue that they “seek to hold Topix
24 liable for creating an unlawful public nuisance, in violation of § 3479” and that “this claim is not
25 inconsistent with the CDA because treating Topix as a publisher or speaker is not an essential
26 element of the claim,” (Opposition, pg. 11:12-15), the first amended complaint is squarely grounded
27

1 in allegations of third party conduct and plaintiffs fail to explain how they are not holding Topix
2 liable as the publisher of this content generated by its users.

3 In *Julie Doe II, a Minor, supra*, 175 Cal. App. 4th 561, 564 (2009), the plaintiffs, underage
4 girls who were sexually assaulted by older men they met through Myspace.com, also argued in
5 opposition to Myspace’s demurrer that their complaint did not seek to hold Myspace liable as a
6 publisher but instead alleged a breach of a legal duty to provide reasonable safety measures to ensure
7 that sexual predators did not gain otherwise unavailable access to minors through the use of the
8 Myspace.com website. *Id.* at 569. The Court of Appeal for the Second Appellate District dismissed
9 the MySpace plaintiffs’ attempts to mischaracterize their complaint to circumvent Section 230
10 immunity:

11 That appellants characterize their complaint as one for failure to adopt reasonable
12 safety measures does not avoid the immunity granted by section 230. **It is undeniable**
13 **that appellants seek to hold MySpace responsible for the communications between**
14 **the Julie Does and their assailants.** At its core, appellants want MySpace to regulate
15 what appears on its Web site. Appellants argue they do not “allege liability on account
16 of MySpace’s exercise of a publisher’s traditional editorial functions, such as editing,
17 altering, or deciding whether or not to publish certain material, which is the test for
18 whether a claim treats a website as a publisher under *Barrett*.” But that is precisely
19 what they allege; that is, they want MySpace to ensure that sexual predators do not gain
20 access to (i.e., communicate with) minors on its Web site. **That type of activity – to**
21 **restrict or make available certain material—is expressly covered by section 230.**

22 *Id.* at 573. Here, it is undeniable that plaintiffs seek to hold Topix liable for the third party
23 communications between alleged drug dealers, drug sellers and drug buyers as well as Andrew
24 Witkoff and alleged drug dealer Daniel Park. Further, plaintiffs allege that Topix failed to monitor
25 such communications, and/or deliberately ignored them (see FAC, ¶¶20-26). As such, plaintiffs’
26 mischaracterization of the FAC as grounded in a “nuisance” cause of action which does not seek to
27 hold Topix liable in its role as a *publisher*, defies logic because the primary theory of liability in the
28 FAC is that Topix is liable for third party content which created an alleged nuisance.

1 **C. Plaintiffs’ Argument that Its Nuisance Cause of Action is not Inconsistent with the CDA**
2 **is Misplaced Because the Court of Appeal for the Second Appellate District Has Already**
3 **Interpreted Section 230 and What Liability it Provides to Websites**

4 Plaintiffs state that Section 230 does not provide absolute immunity to website operators and
5 that the statute states that the language of Section 230 allows a civil action by a private party to
6 enforce any state law so long as it is consistent with the CDA. (Opposition, pg. 8:9- 9:15). Plaintiffs
7 further claim that “unless an ISP attempts to act as a ‘good Samaritan’ to block offensive or illegal
8 material, it is not entitled to immunity under the CDA and that the legislative history of Section 230
9 indicates that it only protected ISPs that attempted in good faith to block material.”² Opposition, pg.
10 9:16-23; 12:6-26. However, the holding of the Second Appellate District in *Julie Doe II, supra*, 175
11 Cal. App. 4th 561, 564 (2009), directly contradicts this argument because the court examined the
12 plaintiffs’ complaint in that suit and noted that they included allegations that:

13 MySpace has made a decision to not implement reasonable, basic safety precautions
14 with regard to protecting young children from sexual predators[.] [¶] MySpace is
15 aware of the dangers that it poses to under-aged minors using [its Web site]. MySpace
16 is aware that its Web site poses a danger to children, facilitating an astounding number
17 of attempted and actual sexual assaults.”

17 As such, although there was no evidence before the Court that Myspace was a “good Samaritan”
18 blocker and the plaintiffs in that case alleged to the contrary, the Court of Appeal for the Second
19 Appellate District affirmed the trial court’s ruling that Section 230 barred all causes of action.³

21 ² Plaintiffs also reference the Seventh Circuit’s reasoning in *Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v.*
22 *Craigslist, Inc.*, 461 F. Supp. 2d 681 (2006), which held that Section 230 did not create an “absolute immunity” but
23 rather, bars those causes of action that would require treating an Interactive Computer Service as a publisher of third-party
24 content. *Id.* at 693. This court then found that under Section 230, plaintiffs’ claim failed on the pleadings because
25 Craigslist operates a website, accessible by multiple public users to create allegedly discriminatory housing notices which
26 constituted information from the users of Craigslist’s website and that Craigslist was serving as a conduit for this third
27 party information. *Id.* As such, because Craigslist was being treated as the publisher of third party content, Section 230
28 foreclosed these causes of action. *Id.*

26 ³ Plaintiffs argue without any basis or evidence that “only in response to the Complaint, Topix recently took steps to
27 remove certain of its drug-related forums from Topix.com, in particular those entitled, oxycontin, Percocet, adderall,
28 *Viagra, ambient, xanax and vicodin.* Accordingly, Topix has acknowledged a sound factual basis for Plaintiff’s request
for injunctive relief – and on this demurrer, only seeks to escape liability for the underlying wrongful conduct alleged in
the Complaint.” Opposition, pg. 3:8-12. Topix’s verified responses to requests for admissions and corresponding form

1 Additionally, in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006), the California Supreme Court held
2 that “the immunity conferred by Section 230 applies even when self-regulation is unsuccessful, or
3 completely unattempted.” Three years after *Barrett*, in *Barnes v. Yahoo*, 570 F.3d 1096, 1101 (9th
4 Circ. 2009), the Ninth Circuit stated that “[A]ny activity that can be boiled down to deciding whether
5 to exclude material that third parties seek to post online is perforce immune under section 230.” As
6 such, plaintiffs’ claim that Section 230 only applies to “good Samaritans” is misleading and simply
7 not supported by the law.⁴

8 Plaintiffs also rely upon *City of Chicago, Ill. V. StubHub!, Inc.* 624 F.3d 363 (7th Cir. 2010)
9 for the proposition that a that a website was not entitled to immunity for state law claims. However,
10 that court found Section 230 was irrelevant because Chicago's amusement tax has nothing to do with
11 who “publishes” any information or is a “speaker.” The case involved a website’s lack of compliance
12 with Chicago’s tax, not any actions taken by third party users of its service as in the instant case. *Id.*

13 Plaintiffs further cite portions of *Barnes v. Yahoo*, 570, F. 3d 1096 (9th Cir. 2009) and *Seldon*
14 *v. Macedon* (S.D.N.Y. 2012) 2012 WL 4475274 as instances where plaintiffs’ claims were not
15

16
17 interrogatory 17.1 stated under penalty of perjury that the reason for Topix’s removal of the “drug related” forums from
18 public view was a business decision in response to continued posting of spam posts and as such, the unsupported
19 allegations must be disregarded. See Declaration of Erik D. Buzzard in Support of Topix, LLC’S Motion for Records to
20 be Filed Under Seal Pursuant to Cal. Rule of Court 2.551(B). ¶8. Topix submits this declaration in response to plaintiffs’
21 unsubstantiated and incorrect arguments.

22 ⁴ Plaintiffs further cite *Fair Housing Council of San Fernando Valley v. Roommates,Com, LLC* 521 F. 3d 1157(9th Cir.
2007)⁴ for their argument that: 1) Section 230 immunity does not extend to websites that create or develop content; 2) the
21 website must be a “good Samaritan” blocker of content to qualify for such immunity. *Roommates.com* required its users
22 to answer discriminatory questions in its questionnaires to prospective roommates and then further synthesized, organized
23 and presented that information to viewers in a discriminatory search mechanism which violated fair housing laws such
24 that it was a content provider. *Id.* at 1165, 1170-1172. In our case, paragraph 23 of the FAC alleges that Topix allows its
25 users to create content “without creating a user profile or providing any other identifiable information” to Topix and that
26 Topix “knowingly and intentionally makes no effort to evaluate the accuracy of any of this information.” As such, there
27 is no method by which Topix could utilize any user information to “create and develop” content to render it an
28 information content provider as was the case in *Roommates*. The court in *Roommates* concluded:

“Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue
that something the website operator did encouraged the illegality. Such close cases, we believe, must be
resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten
thousand duck-bites, fighting off claims that they promoted or encouraged--or at least tacitly assented to--the
illegality of third parties . . . **section 230 must be interpreted to protect websites not merely from ultimate
liability, but from having to fight costly and protracted legal battles.** *Id.* at 1174.

1 inconsistent with the CDA. However, as explained in the Opposition pgs. 10:18-11:11), these cases
2 involved *breach of contract* claims which are clearly not present in the instant case.

3 Finally, plaintiffs attempt to distinguish *Dart v. Craigslist, Inc.* 665 F. Supp. 2d 961 (N.D. Ill.
4 2009) from this case because the court found that an online “adult services” category was not illegal
5 on its face. In *Dart*, plaintiffs made similar allegations as in the instant case that Craigslist’s “adult”
6 services section facilitated prostitution and constituted a public nuisance, wherein the court held that,
7 per Section 230, Craigslist was not liable as a nuisance for “aiding and abetting” their customers who
8 misused their services to commit illegal acts. *Id.* at 967-968. As such, *Dart* is directly on point with
9 the instant case, as the court concluded that “Sheriff Dart’s lengthy complaint relies heavily on a few
10 conclusory allegations to support the contention that Craigslist induces users to post ads for illegal
11 services.” In reaching this conclusion, the *Dart* court defined the nuisance per the Restatement
12 (Second) of Torts § 821(B)(1) (“A public nuisance is an unreasonable interference with a right
13 common to the general public”) and Sheriff Dart’s allegations that Craigslist violated federal, state and
14 local prostitution laws.

15 **D. Plaintiffs Should Not Be Granted Leave to Amend as They Have Not Shown How They**
16 **Can Amend The First Amended Complaint.**

17 Plaintiffs must show in what manner they can amend their complaint and how the amendment
18 will change the legal effect of the pleading. *Hendy v. Losse* 54 Cal.3d 723, 742 (1991). Pursuant to
19 this Court’s order dated **March 5, 2014** granting plaintiffs’ *ex parte* application to partially lift the
20 discovery stay and conduct discovery, Topix produced in excess of 1 million raw metadata files,
21 thousands of pages of electronic mails as well as responses to requests for admissions and form
22 interrogatories. *See* Declaration of Erik D. Buzzard in Support of Topix, LLC’S Motion for Records
23 to be Filed Under Seal Pursuant to Cal. Rule of Court 2.551(B), ¶9. Despite this “treasure trove” of
24 information, plaintiff’s opposition does not include any references as to how they would amend the
25 FAC to show how Topix “creates and develop content” which was the basis for the *ex parte*
26 application. Further, plaintiffs have already had an opportunity to amend and they are unable to
27 plead actionable claims. As such, the court must sustain the instant demurrer without leave to amend.

