UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

FORT MYERS DIVISION

E-VENTURES WORLDWIDE, LLC, Plaintiff, v. GOOGLE INC., Defendant.	Case No.: 2:14-cv-00646-PAM-CM

GOOGLE INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PUBLIC VERSION

TABLE OF ABBREVIATIONS

Adib Tr.	Deposition of Fahmi Adib (December 5, 2016), attached as Exhibit 1 to the Berman Decl.
Berman Ex.	Exhibit attached to the Declaration of Nathan Berman in support of Defendant Google Inc.'s Motion for Summary Judgment
CDA	Communications Decency Act (47 U.S.C. § 230)
e-ventures	Plaintiff e-ventures Worldwide, LLC
Falls Decl.	Declaration of Brandon Falls in support of Defendant Google Inc.'s Motion for Summary Judgment (Dkt. 138-1)
Falls Tr.	Deposition of Brandon Falls (October 28, 2016), attached as Exhibit 2 to the Rafferty Decl.
FDUTPA	Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. Ann. § 501.201-213)
FRE	Federal Rule of Evidence
Google	Defendant Google Inc.
Google Tr.	30(b)(6) Deposition of Brandon Falls (October 27, 2016), attached as Exhibit 1 to the Rafferty Decl.
MSJ	Google Inc.'s Motion for Summary Judgment and Supporting Memorandum of Law (Dkt. 138)
Opp.	e-ventures' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Dkt. 146)
Paton Tr.	Deposition of Jeremy Paton (November 10, 2016), attached as Exhibit 7 to the Rafferty Decl.
Plaintiff	e-ventures Worldwide, LLC
Powers Tr.	Deposition of Samuel Powers (December 6, 2016), attached as Exhibit 2 to the Berman Decl.
Rafferty Ex.	Exhibit attached to the Declaration of Sinead Rafferty in support of Plaintiff e-ventures Worldwide, LLC's' Memorandum of Law in Opposition to Google Inc.'s Motion for Summary Judgment (Dkt. 146-1)
SAC	Second Amended Complaint (Dkt. No. 75) (filed Nov. 2, 2015)

Trika Tr.	Deposition of Jeev Trika (November 8, 2016), attached as Exhibit 5 to the Rafferty Decl.
White Decl.	Declaration of Brian White in support of Defendant Google Inc.'s Motion for Summary Judgment (Dkt. 138-26)
White Tr.	Deposition of Brian White (November 2, 2016), attached as Exhibit 3 to the Rafferty Decl.
Willen Ex.	Exhibit attached to the Declaration of Brian Willen in support of Defendant Google Inc.'s Motion for Summary Judgment (Dkt. 138-28)

Plaintiff's opposition confirms that its case against Google is barred by the CDA and First Amendment. Beyond those broad federal immunities, moreover, Plaintiff offers no evidence to carry its burden of proving its claims under the Lanham Act, FDUTPA, and for tortious interference. The undisputed record points to only one conclusion: Google removed e-ventures' websites from search results because it determined that those sites were violating Google's spam guidelines. That determination was not based on a whim or an anti-competitive motive. A reasonable jury could not find otherwise. Google is entitled to summary judgment.

I. Plaintiff Ignores The Undisputed Record In A Futile Search For A Triable Issue

While Plaintiff's brief tells a story almost totally divorced from the actual evidence, there still is no issue for trial. The following facts, which Plaintiff cannot genuinely dispute, establish Google's immunities and defeat Plaintiff's claims:

- **At all times, Google's Guidelines have prohibited the specific spam tactics that Google observed across e-ventures' network of websites.** MSJ 3-7. (Plaintiff asserts that sites can only be removed from search results if they are "pure spam" (Opp. 5), but that ignores Google's clear public statements that link schemes and doorway domains are also violations that may lead to removal. Falls Decl., Ex. 2 at 4-9; *accord* Google Tr. 94:11-95:23.)

- **In 2014, Google's most experienced webspam analyst investigated e-ventures' websites and determined that this was a "clear-cut" case for removal because the sites were violating Google's guidelines in multiple ways.** MSJ 6-9; Falls Decl. ¶¶35-69.

- **Mr. Falls "individually reviewed each of the e-ventures-related websites" and saw violations on each, specific examples of which he documented in a detailed report.** Rafferty Ex. 23 at 15; *accord* Falls Decl. ¶¶41-52, 59-60; Rafferty Ex. 9; Google Tr. 52:14-25, 84:10-85:2, 104:13-105:23; Falls Tr. 131:8-132:12. (Plaintiff's assertion that "Google admitted to reviewing only 'numerous individual websites'" (Opp. 6) mangles the document it cites, which says that Google's removal actions "were based on its comprehensive review of e-ventures' numerous individual websites." Rafferty Ex. 23 at 17; Google Tr. 49:6-50:9.)

- **Google's removal had nothing to do with competition from e-ventures or the SEO industry.** MSJ 17-18; Falls Decl. ¶¶11, 71. (Plaintiff blatantly mischaracterizes the evidence it cites in asserting that "Google targets SEOs" and that the "[SEO] vertical" is "hated." *Compare* Opp. 6 *with* Google Tr. 70:6-11 ("We are a big fan of SEO") *and id.* 155:2-6. Likewise, the 2010 audit document was not any kind of "hit list," did not relate to penalties against e-ventures, and had nothing to do with the removal *four years later*. Google Tr. 66:20-71:25.)

- **Google made no public statement about the removal, but it explained in multiple private communications to e-ventures what was wrong with its sites.** MSJ 9, 16 n.3. (Despite Plaintiff's baseless assertion (Opp. 12), the evidence indisputably shows that

Google told e-ventures on day one why its sites were delisted and provided more detail after e-ventures asked. Berman Exs. 3-4; Powers Tr. 167:16-169:3; Falls Decl. ¶¶75-80 & Ex. 21.)

While Google wins on these facts alone, it is telling that e-ventures makes no argument that its websites did not violate the Guidelines. Other than baseless evidentiary objections,[1] Plaintiff has no response to its consultant's finding that its sites were [redacted] (Willen Ex. 9) or its own admissions that the sites were beset with spam, including the vast array of scraped content, doorway pages, and disreputable links that e-ventures concedes jettisoning after the removal (Falls Decl. ¶¶77-82 & Exs. 19-20, 22-23; Berman Ex. 3; Powers Tr. 167:16-185:11; Adib Tr. 193:7-24).[2] Indeed, in an internal document produced just last week, e-ventures candidly acknowledged that the vast majority of its removed sites were "engaged in pure spam activities" and that it "deactivated" over 200 of them as a result. Berman Ex. 5.

Unable to defend its sites, Plaintiff abandons its contention that the removal amounted to a false statement about e-ventures, replacing it with new argument that Google did not spend enough time looking at e-ventures' websites and failed to adequately document its work. Opp. 6-12. The record speaks for itself (Falls Decl. ¶¶41-53; Rafferty Ex. 9), but this case is not about the number of hours Mr. Falls spent, whether this matter had his undivided attention, or the amount of detail in his report.[3] Google can take action against harmful and obvious spam across hundreds of related websites without having to conduct lengthy deliberations or create an ex-

[1] Plaintiff's admissions are not being used as evidence of "remedial measures" but as direct statements about what was on e-ventures' sites before the removal. In any event, Rule 407 only bars evidence of remedial measures taken by *defendants*. *Millennium Partners, L.P. v. Colmar Storage*, 494 F.3d 1293, 1302 (11th Cir. 2007). Plaintiff's hearsay objections are equally invalid. Falls Decl., Exs. 6-12 are not hearsay at all: they are images of websites offered to show the content of those sites, not to suggest the truth of any assertions made there. Those documents (along with Falls Decl., Exs. 4, 5, and 24) are also statements by e-ventures and admissible as party admissions. FRE 801(d)(2). The remaining document (the consultant's email) is a statement by e-ventures' "agent" and someone whom it "authorized to make a statement on the subject." FRE 801(d)(2)(C)-(D). It is also the consultant's present sense impression.

[2] Plaintiff says that "[n]one of e-ventures' websites contained duplicate content prior to September 2014." Opp. 10. But even the cited testimony does not support that. Trika Tr. 152:2-17 ([redacted]). And it ignores Plaintiff's own evidence confirming that e-ventures had [redacted] Willen Ex. 9; *e.g.*, Powers Tr. 151:6-15. Plaintiff's reference to the testimony of its purported "expert" (Opp. 13) omits his admission that [redacted] Paton Tr. 259:25-260:7.

[3] While legally irrelevant, Plaintiff's repeated claim that Mr. Falls violated Google's so-called "spam documentation policy" is unsupported and directly contrary to what his manager testified. White Tr. 63:5-10, 91:21-92:18, 124:17-22.

haustive forensic record of every last violation. In short, Plaintiff identifies no genuine dispute about any material fact. It has no evidence from which a jury could find that Google acted in bad faith or anti-competitively or made any deceptive statement about e-ventures to the public.

II. Plaintiff's Claims Fail Under the CDA and First Amendment

CDA. Plaintiff's suggestion that Section 230 does not apply at all to its Lanham Act and FDUTPA claims (Opp. 14) ignores the case law and the law of the case. It is settled that Section 230 covers claims for "unfair business practices" (*Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003)), including FDUTPA claims. MSJ 15; 47 U.S.C. § 230(e)(3). And this Court has already held that "Plaintiff's claims against Google are subject to the CDA." Dkt. 86, at 13.[4]

Section 230(c)(1). Ignoring all the relevant case law (MSJ 12-13), Plaintiff argues that it is not seeking to hold Google liable as a publisher. Opp. 15-16. But, "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher." *Sikhs for Justice*, 144 F. Supp. 3d at 1095.[5] Plaintiff cannot evade this rule by asserting, without any factual basis, that Google acted for anti-competitive reasons.[6] The law is clear that an online publisher's purpose for removing content is irrelevant under 230(c)(1), which has no "good faith" requirement. *See Darnaa*, 2016 U.S. Dist. LEXIS 152126, at *23 (immunity applies "regardless of defendants' alleged motive"); *Sikhs*, 144 F. Supp. 3d at 1094-96 (dismissing claim that Facebook removed the plaintiff's content for discriminatory reasons); *Lancaster*, 2016 U.S. Dist. LEXIS 88908, at *6-8 ("§ 230(c)(1) of the CDA precludes as a matter of law any claims arising from Defendant's removal of Plaintiff's videos"). Accusing a

[4] Section 230(e)(2)'s exception is irrelevant because Plaintiff's claims have nothing to do with "intellectual property."

[5] *Nunes* did not involve a removal and does not help Plaintiff. The court declined to apply 230(c)(1) to the act of delivering unwanted text messages because the plaintiff's claim was unrelated to Twitter's editorial decisions regarding the messages. Here, in contrast, e-ventures seeks to hold Google liable for deciding which websites it wanted to "publish or to withdraw from publication," a decision that was plainly based on their content. *Nunes* only confirms that such removals are editorial decisions protected by the CDA. 2016 WL 3660526, at *8.

[6] Plaintiff's assertion that Google's investigation started and ended the same day is demonstrably untrue. *Supra* at 1. Likewise, the idea that trying to act "efficiently" against a large-scale network of spam websites suggests "anti-competitive conduct" is baffling and contrary to the record. Google Tr. 49:17-52:12; Falls Decl. ¶¶62-66.

service even of serious violations does not deprive it of publisher status. Instead, what matters is that "the act that Defendant allegedly conducted in a discriminatory manner is the removal of the [plaintiff's content]." *Sikhs*, 144 F. Supp. 3d at 1095. That is exactly the situation here.

Section 230(c)(2). At the motion to dismiss stage, e-ventures made the same argument that spam is not "objectionable" under 230(c)(2). Opp. 18-20. But the Court rightly brushed aside that claim, holding that the immunity applied unless Plaintiff could prove "that Google failed to act in good faith." Dkt. 86, at 13.[7] It is clear from e-ventures' brief that it cannot. Section 230(c)(2) imposes a subjective test for "good faith": so long as Google *actually believed* that e-ventures' websites were engaged in improper spam tactics, the immunity applies. MSJ 14. Plaintiff does not offer any evidence (because none exists) that Google lacked such a belief. *Id.*[8]

e-ventures' efforts to distort the record (Opp. 20-22) are unavailing and irrelevant. The claim that Google did no "content analysis" is demonstrably false. The undisputed evidence—including Mr. Falls's 53-page report (Rafferty Ex. 9)—shows Google's comprehensive review of the websites, which revealed "obvious" violations and a "clear-cut" basis for removal. MSJ 5-8. Good faith does not turn on whether Google created documents showing *every one* of the violations it found or whether a witness could recite from memory *each specific instance* of spam that he observed.[9] Nor does it require Google to have conducted a certain number of internal meetings

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[7] Beyond what the Court has already ruled, it is clear that 230(c)(2) covers this case. The undisputed evidence shows that Google considers webspam to be not just "objectionable" but also "harassing" (Falls Decl. ¶6; MSJ 13-14), so the websites at issue fall specifically within the statute. And Plaintiff ignores settled law that 230(c)(2) bars claims involving spam blocking. *e360Insight*, 546 F. Supp. 2d at 607-08; *Holomaxx*, 783 F. Supp. 2d at 1104. *Smith* holds expressly that "[u]sers or providers of an interactive computer service may determine that spam is material that is harassing or otherwise objectionable under Section 230(c)(2)(A)." 2011 U.S. Dist. LEXIS 26757, at *13. And *Song fi* specifically distinguished cases involving "spam," which it said *would* be "harassing" or "similar enough to harassment." 108 F. Supp. 3d at 884 n.3 (N.D. Cal. 2015). *eBay* does not suggest otherwise; it did not address spam at all.

[8] Plaintiff relies on *Smith*, where the service provider "simply ignore[d] a subscriber's request for information concerning an allegedly improper email blockage." 2011 U.S. Dist. LEXIS 26757, at *25-26. There is nothing like that here. Not only did Google explain in written messages to e-ventures why its websites were removed, it restored many of those sites once the violations were fixed. Berman Exs. 3-4; Falls Decl. ¶¶75-83 & Ex. 21; *supra* at 1-2.

[9] As discussed, Plaintiff ignores the record in suggesting that Mr. Falls failed to follow Google's policies for documenting the spam violations he observed. *Supra* at 2 n.3; Google Tr. 110:18-111:5. But even crediting Plaintiff's baseless claim would not create a triable issue regarding Google's subjective beliefs, which is all that matters under 230(c)(2). The same is true of Plaintiff's argument about the "tip." While there is no evidence that this tip was the

or to have uncovered *every individual example* of the scraped content (or other violations) to which e-ventures later admitted. *Supra* at 2. Congress did not impose some onerous documentation requirement as a prerequisite for CDA immunity, and the sheer scale of e-ventures' violations—as seen and recounted by Mr. Falls—is more than enough to confirm Google's good faith. Indeed, Google would be protected even if its belief had been "mistaken" (*e360Insight*, 546 F. Supp. 2d at 609), but Plaintiff itself agrees that "no mistake was made." Opp. 22-23 n.9. Google's decision to block websites that it found using harmful spam tactics is exactly what 230(c)(2) immunizes.

First Amendment. Plaintiff's legal arguments (Opp. 24) ignore what this Court has already held: Google's decisions about what to include, and what not to include, in its search results "are protected by the First Amendment." MSJ 16 (quoting Dkt. 86, at 15). Beyond evading the law of the case, Plaintiff's attempts to distinguish established case law fail. *Zhang* was not limited to politically-motivated exclusions; it made clear that "the First Amendment's protections apply whether or not a speaker articulates, or even has, a coherent or precise message." 10 F. Supp. 3d at 437. The court also refuted Plaintiff's claim about market power, explaining that search engines "lack the physical power to silence anyone's voices, no matter what their alleged market shares may be." *Id.* at 441. *Search King* involved tortious interference, just like this case. And *Langdon*'s categorical holding that the First Amendment bars claims for removing websites from search results (474 F. Supp. 2d at 630) applies equally to the undisputed record here.

In response to Google's motion, Plaintiff abandons its theory that the removal "falsely stated that e-ventures' websites failed to comply with Google's policies." Dkt. 86, at 16. Plaintiff now asserts that Google "did not block e-ventures' websites and advertisements because of their content." Opp. 23. Plaintiff cites no evidence for this remarkable claim. It is beyond dispute that Google acted after determining that e-ventures' websites violated Google's guidelines regarding

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basis for Google's decision (MSJ 8 n.2), even if it were, it would make no difference. Taking action based on a tip that was consistent with Google's own findings (Falls Decl. ¶57) would in no way suggest a lack of good faith.

doorway pages, link schemes, and scraped content. MSJ 4-10; Falls Decl. ¶¶35-61. That determination was (and could only have been) based on the *content* of the sites. And though Google would be protected by the First Amendment either way, as discussed above, it is demonstrably false that "Google did not even review all of the websites before removing them." Opp. 23.

Plaintiff's effort to overcome this protection with bare references to "anticompetitive" motive are equally unsupported. MSJ 17-18. No jury could find on this record that Google acted with an improper purpose. Plaintiff now suggests that Google removed its websites from organic search results in order to force e-ventures to run Google ads for those sites. But e-ventures knows that's not true. Its own complaint alleges otherwise: "An automatic byproduct of the ban was that *e-ventures' websites could not appear in Google's paid* or unpaid search results." SAC ¶ 27 (emphasis added). Indeed, it is undisputed that shortly after the removal, Google blocked ads from the e-ventures' websites it could identify as associated with an AdWords account. MSJ 18 n.5. That rules out any suggestion that Google acted to extract advertising dollars from e-ventures; but Plaintiff also ignores the Supreme Court's holding in *Pittsburgh Press* that even editorial decisions made to increase revenue (which this was not) are protected by the First Amendment.

III. Plaintiff Makes No Meaningful Effort To Support Its Affirmative Claims

Though Plaintiff bears the burden of proving its legal claims, it devotes just two pages of its brief to them, and what little it says confirms that Google is entitled to summary judgment.

Lanham Act. Section 1125(a)(1)(A) is not a catch-all unfair competition provision and does not apply to this case. MSJ 19-20. Plaintiff fails even to mention the language of the statute, much less explain how Google said anything to deceive the public about the "affiliation" of its service with, or its "approval" by, another person. Opp. 24-25. The one case Plaintiff cites shows what's missing. There, the defendant falsely told plaintiff's purchasers that it was an alternative supplier of plaintiff's goods and that plaintiff could no longer supply them. *Mario Valente Collezioni, Ltd., v. AAK Ltd.*, 280 F. Supp. 2d 244, 255-56 (S.D.N.Y. 2003). In contrast, Google

did not offer to sell e-ventures' services to anyone else or falsely hold itself out as being associated with e-ventures. It simply stopped e-ventures' websites from appearing in Google's search results. Falls Decl. ¶¶8, 69. Nothing here implicates false association under the Lanham Act.

FDUTPA. Plaintiff offers no clear theory of FDUTPA liability and cites no case applying the statute to facts remotely like these. Nor does e-ventures even try to make the showing this Court contemplated. Dkt. 86, at 22. Plaintiff's new argument that Google "communicated to the public that e-ventures had gone out of business" (Opp. 25) is just rhetoric. That is not what Google did, and Plaintiff offers no evidence suggesting otherwise. That is not surprising, as nothing in the record would allow a jury to find that Google made *any* public statement about the removal, much less a deceptive one, much less one that suggested that e-ventures was no longer a going concern. MSJ 16 n.3, 22 n.7; Rafferty Ex. 20 (¶24); Falls Decl. ¶¶88-89.[10]

Tortious Interference. Plaintiff offers no response to the Court's order, which makes clear that this claim is barred by Florida's single-action doctrine. MSJ 22. Beyond that, e-ventures simply has no evidence that "Google was motivated to harm e-ventures' client relationships." Opp. 25. What little Plaintiff cites (Opp. 4)—an accurate description of e-ventures' pay-for-play business model (Rafferty Ex. 11)) and an offhand remark from someone who played no role in the removal (Google Tr. 77:6-7))—confirms that. *See* Google Tr. 144:21-145:3; Falls Tr. 112:11-113:17. Moreover, Google did not look at e-ventures' customer list and certainly did not act with the aim of impairing those relationships. Google Tr. 81:16-20, Falls Decl. ¶¶58, 72; White Decl. ¶33. Nothing in the record suggests otherwise. Finally, even crediting its baseless story, Plaintiff runs headlong into the established rule that a tortious interference claim does not lie "where the action complained of is undertaken to safeguard or promote one's financial or economic interest." MSJ 23 (citing cases). Google is entitled to summary judgment on this claim as well.

[10] e-ventures also repeats its story that Google decided that the removed websites were "good enough for AdWords." Opp. 25. Plaintiff does not explain why, even if this were true, it would violate FDUTPA. But it is indisputably not true, as e-ventures is well aware. MSJ 18 n.5; SAC ¶ 27.

Dated: December 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system.

/s/ Nathan M. Berman

Nathan M. Berman