UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RIAN WATERS, Plaintiff, v. FACEBOOK INC., et al., Defendants.	))))) Civil Action No.: 3:20-cv-30168-MGM)))))

DEFENDANT GOOGLE LLC'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S EMERGENCY EX PARTE MOTION
FOR A TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION ... 1

STATEMENT OF FACTS ... 2

ARGUMENT ... 4

I. PLAINTIFF'S CLAIMS AGAINST GOOGLE ARE BARRED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT ... 4

A. The CDA Broadly Immunizes Online Service Providers From Claims Arising Out of Content Provided by Third Parties ... 4

B. Plaintiff's Claims Meet All The Elements of Section 230 Immunity ... 8

1. YouTube and Google Are "Interactive Computer Services" ... 9

2. Third Parties Provided the Allegedly Harmful Content Underlying Plaintiff's Claims ... 9

3. Plaintiff Seeks to Treat Google as a "Publisher or Speaker" of the Third-Party Content Posted on YouTube ... 11

II. PLAINTIFF FAILS TO STATE A VIABLE CLAIM AGAINST GOOGLE ... 12

A. Plaintiff's Section 1985 Claims Fail Because There Is No Allegation of Conspiracy or Class-Based Animus ... 12

B. Plaintiff's Section 1986 Claim Fails Because He Fails to Show an Underlying Violation of Section 1985, Google's Knowledge of a Conspiracy, or Google's Power to Prevent a Conspiracy ... 14

C. Plaintiff's Section 1983 Claim Fails Because Google Is Not A State Actor ... 15

D. Plaintiff's Civil Rights Claim Fails Because Google Did Not Use Threats, Intimidation, or Coercion to Deprive Him of Life, Liberty, or Protection of the Law ... 16

E. Plaintiff's Emotional Distress Claim Fails Because He Does Not Allege Extreme and Outrageous Conduct by Google ... 17

CONCLUSION ... 17

TABLE OF AUTHORITIES

CASES

Ascentive, LLC v. Opinion Corp.,
842 F. Supp. 2d 450 (E.D.N.Y. 2011) 7

Asia Econ. Inst. v. Xcentric Ventures LLC,
No. CV 10-01360 SVW,
2011 U.S. Dist. LEXIS 145380 (C.D. Cal. May 4, 2011) 8

Ayyadurai v. Floor64, Inc.,
Civil Action No. 17-10011-FDS,
2017 U.S. Dist. LEXIS 144030 (D. Mass. Sept. 6, 2017) 6

Barnes v. Yahoo!, Inc.,
570 F.3d 1096 (9th Cir. 2009) 6, 12

Barrett v. Rosenthal,
40 Cal. 4th 33 (2006) 6

Batzel v. Smith,
333 F.3d 1018 (9th Cir. 2003) 6

Ben Ezra, Weinstein & Co. v. Am. Online, Inc.,
No. CIV 97-485 LH/LFG,
1999 U.S. Dist. LEXIS 23095 (D.N.M. Mar. 1, 1999),
aff'd, 206 F.3d 980 (10th Cir. 2000) 7

Butcher v. Univ. of Mass.,
483 Mass. 742 (2019),
cert. denied, No. 19-1345, 2020 U.S. LEXIS 3434 (U.S. June 29, 2020) 17

Carafano v. Metrosplash.com, Inc.,
339 F.3d 1119 (9th Cir. 2003) 6, 10

Chemlen v. Giulmette,
Civil Action No. 89-2308-NG,
1994 U.S. Dist. LEXIS 13784 (D. Mass. Aug. 30, 1994) 14

Collier v. City of Chicopee,
Civil Action No. 97-30123-KPN,
1998 U.S. Dist. LEXIS 21901 (D. Mass. Feb. 5, 1998),
aff'd, 158 F.3d 601 (1st Cir. 1998) 14

Commonwealth v. Keaton,
36 Mass. App. Ct. 81 (1994) 17

Commonwealth v. Prunty,
462 Mass. 295 (2012) 17

Darnaa, LLC v. Google, Inc.,
No. 15-cv-03221-RMW,
2016 U.S. Dist. LEXIS 152126 (N.D. Cal. Nov. 2, 2016)....................9

Doe v. MySpace, Inc.,
528 F.3d 413 (5th Cir. 2008) 5

Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC,
521 F.3d 1157 (9th Cir. 2008) 11

Force v. Facebook, Inc.,
34 F.3d 53 (2d Cir. 2019),
cert. denied, 140 S. Ct. 2761 (2020) 11

Francis-Sobel v. Univ. of Me.,
597 F.2d 15 (1st Cir. 1979)....................13

Freedom Watch, Inc. v. Google, Inc.,
368 F. Supp. 3d 30 (D.D.C. 2019),
aff'd, 816 F. App'x 497 (D.C. Cir. 2020) 16

Gavra v. Google Inc.,
No. 5:12-CV-06547-PSG,
2013 U.S. Dist. LEXIS 100127 (N.D. Cal. July 17, 2013)....................6, 8, 12

Gonzalez v. Google, Inc.,
No. 16-cv-03282-DMR,
2017 U.S. Dist. LEXIS 175327 (N.D. Cal. Oct. 23, 2017)....................8, 10, 12

Goodwin v. Jones,
Civil Action No. 16-10305-GAO,
2016 U.S. Dist. LEXIS 83759 (D. Mass. June 27, 2016) 13

Green v. Am. Online (AOL),
318 F.3d 465 (3d Cir. 2003)....................6

Green v. YouTube, LLC,
No. 18-cv-203-PB,
2019 U.S. Dist. LEXIS 55577 (D.N.H. Mar. 13, 2019),
report and rec'n adopted,
2019 U.S. Dist. LEXIS 54101 (D.N.H. Mar. 29, 2019) 15

Griffin v. Breckenridge,
403 U.S. 88 (1971)....................14

Hennessy v. City of Melrose,
194 F.3d 237 (1st Cir. 1999) 15

Hetherson v. Mass. Exec. Office of Pub. Safety & Sec.,
No. SUCV2015-02451-G,
2016 Mass. Super. LEXIS 82 (Mass. Super. Ct. May 12, 2016) 16

Jane Doe No. 1 v. Backpage.com, LLC,
817 F.3d 12 (1st Cir. 2016) 5, 6, 12

Jarvis v. Vill. Gun Shop, Inc.,
805 F.3d 1 (1st Cir. 2015) 15

Jones v. Dirty World Entm't Recordings LLC,
755 F.3d 398 (6th Cir. 2014) 11

Kinderstart.com, LLC v. Google, Inc.,
No. C 06-2057 JF (RS),
2007 U.S. Dist. LEXIS 22637 (N.D. Cal. Mar. 16, 2007) 16

Lancaster v. Alphabet Inc.,
No. 15-cv-05299-HSG,
2016 U.S. Dist. LEXIS 88908 (N.D. Cal. July 8, 2016) 9

Langdon v. Google, Inc.,
474 F. Supp. 2d 622 (D. Del. 2007) 16

Lenz v. Universal Music Corp.,
572 F. Supp. 2d 1150 (N.D. Cal. 2008) 2

Lewis v. Google LLC,
No. 20-cv-00085-SK,
2020 U.S. Dist. LEXIS 150603 (N.D. Cal. May 20, 2020) 9

Lopez-Mieres v. Soto,
No. 18-1588 (GAG),
2019 U.S. Dist. LEXIS 152471 (D.P.R. Sept. 5, 2019) 13

Lowden v. William M. Mercer, Inc.,
903 F. Supp. 212 (D. Mass. 1995) 14

Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC,
No. 19-1284,
2020 U.S. LEXIS 4834 (U.S. Oct. 13, 2020) 12

Manchanda v. Google,
No. 16-CV-3350 (JPO),
2016 U.S. Dist. LEXIS 158458 (S.D.N.Y. Nov. 16, 2016) 7

Marshall's Locksmith Serv. Inc v. Google, LLC,
925 F.3d 1263 (D.C. Cir. 2019) 5

Maymi v. P.R. Ports Auth.,
515 F.3d 20 (1st Cir. 2008) 14

Murawski v. Pataki,
514 F. Supp. 2d 577 (S.D.N.Y. 2007) 6

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,
591 F.3d 250 (4th Cir. 2009) 8

Nieves-Marquez v. P.R.,
353 F.3d 108 (1st Cir. 2003) 4

Perez-Sanchez v. Pub. Bldg. Auth.,
531 F.3d 104 (1st Cir. 2008) 13

Prager Univ. v. Google LLC,
951 F.3d 991 (9th Cir. 2020) 15

Rendell-Baker v. Kohn,
457 U.S. 830 (1982) 15

Shiamili v. Real Estate Grp. of N.Y., Inc.,
17 N.Y.3d 281 (2011) 7, 10

Shulman v. Facebook.com,
Civil Action No. 17-764 (JMV),
2017 U.S. Dist. LEXIS 183110 (D.N.J. Nov. 6, 2017) 16

Small Justice LLC v. Xcentric Ventures LLC,
873 F.3d 313 (1st Cir. 2017) 7, 9

Smith v. Intercosmos Media Grp., Inc.,
Civil Action No. 02-1964,
2002 U.S. Dist. LEXIS 24251 (E.D. La. Dec. 17, 2002) 7

Universal Commc'n Sys., Inc. v. Lycos, Inc.,
478 F.3d 413 (1st Cir. 2007) 5, 9

Walker v. City of Bos.,
Civil Action No. 82-2290-S,
1983 U.S. Dist. LEXIS 16691 (D. Mass. May 25, 1983) 13

Weerahandi v. Shelesh,
No. 3:16-CV-06131-BRM-TJB,
2017 U.S. Dist. LEXIS 163910 (D.N.J. Sept. 29, 2017) 8, 9, 10, 12

Zeran v. Am. Online, Inc.,
129 F.3d 327 (4th Cir. 1997) 5, 6

STATUTES

42 U.S.C. § 1983...2, 3, 15

42 U.S.C. § 1985... *passim*

42 U.S.C. § 1986...2, 3, 14, 15

47 U.S.C. § 230... *passim*

Mass. Gen. Laws ch. 12, § 11H 16

Mass. Gen. Laws ch. 12, § 11I...16

INTRODUCTION

Plaintiff Rian Waters, proceeding *pro se*, alleges that co-Defendant Aidan Kearney ("Kearney") posted a series of disparaging messages about him on multiple websites across the Internet, including on Kearney's former website Turtleboy Sports (www.turtlesports.com), Facebook, and YouTube. YouTube – an online service provided by Defendant Google LLC ("Google") – did not create any of these videos or contribute to their content in any way. Google's only role in this case is as an online service provider that permits third-parties to post user-generated content of their choosing. Plaintiff claims that Google is somehow liable for Kearney's videos and now seeks a temporary restraining order and preliminary injunction compelling Google to remove them from YouTube's platform.

Plaintiff's claims against Google – and the injunctive relief he seeks – are categorically barred by federal law, which provides broad immunity to service providers like Google in circumstances exactly like these. Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230 ("Section 230") explicitly bars any cause of action that seeks to treat the provider of an "interactive computer service" (such as Google) as the "publisher or speaker" of any information provided by a third-party (such as Kearney). One of the express purposes of this statute was to make clear that online services cannot be sued for content created by their users, or compelled on pain of liability to remove such content from their services. An unbroken line of cases, including here in the First Circuit, have applied Section 230 to bar claims just like this regardless of whether plaintiffs are seeking damages or injunctive relief, and regardless of the underlying theory of liability. Plaintiff's claims against Google, and his request for a preliminary injunction, run headlong into this immunity.

Plaintiff also fails to state a claim against Google regardless of Section 230. His Section 1985 claims fail because he does not allege and cannot show that Google engaged in a conspiracy

to interfere with his civil rights, or that Google held any class-based animus against him. The Section 1986 claim fails because Plaintiff has no viable Section 1985 claim, because Google had no knowledge of a conspiracy involving Kearney, and because Google had no power to prevent such a conspiracy. The Section 1983 claim fails because Google is not a state actor. The Massachusetts Civil Rights Act claim fails because Plaintiff does not allege and cannot show that Google engaged in any coercive, threatening, or intimidating conduct, and because Plaintiff was not deprived of any predicate civil right. Finally, his emotional distress claim fails because even if Kearney's actions were extreme or outrageous, Google's certainly were not.

This is a dispute between Plaintiff and Kearney. Google should never have been roped into it. The Court should deny Plaintiff's motion and dismiss Google from the case.

STATEMENT OF FACTS

YouTube is an online service provided by Google. YouTube allows users to upload, view, share, rate, and comment on a wide variety of user-generated videos and other audio-visual content through its website located at www.youtube.com and associated mobile applications. *See, e.g.*, *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008) (describing YouTube as a "popular Internet video hosting site" that provides "video sharing" and "user generated content").

On May 16, 2018, Plaintiff sued Aidan Kearney in Hampden County Superior Court for defamation, among other claims. The case was disposed of by summary judgment on June 27, 2019. *See* Docket, *Waters v. Kearney*, No. 1879CV00344 (Mass. Super. Ct. Hampden Cty.), *available at* https://www.masscourts.org/eservices; *see also* Compl. (Dkt. 1) ¶ 92 ("I suffered a humiliating loss by summary judgment."). Google had no involvement in that lawsuit.

Plaintiff filed the present action on October 26, 2020, alleging (in relevant part) that Kearney disparaged him on YouTube six times after Plaintiff initiated the prior lawsuit. *See*

Compl. ¶¶ 43, 44, 48, 51-53. He also claims that Kearney posted an additional video criticizing this new lawsuit several days later, on October 29, 2020. Waters Aff. (Dkt. 19) ¶ 3. Plaintiff does not allege, and makes no effort to show, that Google played any role whatsoever in creating or developing this content. Other than hosting Kearney's content, Waters' only allegations as to Google are that it "should have prevented" the videos (Compl. ¶ 1; *see also id.* ¶ 128) and that "YouTube's algorithms" supposedly "suggest[ed] the offending videos to radicalized users that liked similar content" (*id.* ¶ 122). For that alone, he brings six claims against Google:

1) witness intimidation in state court under 42 U.S.C. § 1985(2) [Count I];
2) conspiracy to deprive First Amendment rights under 42 U.S.C. § 1985(3) [Count II];
3) impairment of civil rights under Article XII of the Massachusetts Declaration of Rights [Count IV];
4) deprivation of Eighth Amendment rights under 42 U.S.C. § 1983 [Count V];
5) neglect to prevent a violation of his rights under 42 U.S.C. § 1986 [Count VI]; and
6) intentional infliction of emotional distress (IIED) [Count IX].

On December 1, 2020, Plaintiff filed the instant motion seeking what would be an unprecedented order requiring Google and co-Defendant Facebook "not to harass any of the natural parties or potential witnesses, and to make a diligent effort at removing all content from their platforms that harasses or attacks the credibility of the natural parties and potential witnesses in this case." Mot. (Dkt. 17) at 1. He also seeks a preliminary injunction requiring Google and Facebook "to remove all pages/profiles associated with Turtleboy Sports that have been primarily used for public shaming, and provide me with support to quickly deal with future harassing or obstructive content." *Id.* at 1-2.

ARGUMENT

As Plaintiff acknowledges in his motion, to obtain preliminary relief the movant must show, among other things, "a substantial likelihood of success on the merits[.]" Br. (Dkt. 18) at 6 (citing *Nieves-Marquez v. P.R.*, 353 F.3d 108, 120 (1st Cir. 2003), *superseded by statute on other grounds*). "Injunctive relief, of course, is available only if the plaintiffs have stated a valid cause of action; otherwise, there is no probability of success." *Nieves-Marquez*, 353 F.3d at 115.

For the reasons explained below, Plaintiff has no chance of succeeding on the merits against Google because each of his claims are barred as a matter of law by Section 230 of the CDA. Plaintiff also fails to state a viable claim regardless of CDA immunity.

I. PLAINTIFF'S CLAIMS AGAINST GOOGLE ARE BARRED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

A. The CDA Broadly Immunizes Online Service Providers From Claims Arising Out of Content Provided by Third Parties

Section 230(c)(1) of the Communications Decency Act mandates that "[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). The statute expressly bars any claims that run afoul of this directive, providing that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). Section 230 reflects Congress' determination that – to realize the Internet's full promise as a communications medium – online intermediaries should be afforded broad immunity for claims based on allegedly harmful or unlawful content that third parties might post on their services. Only those who *originally* create or develop content on the Internet may be sued in connection with such content; service providers who host or publish that content are immune. Otherwise, "the sheer number of postings on interactive computer services

would create an impossible burden in the Internet context" for platforms to monitor continuously. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

As the First Circuit explained, "Congress has granted broad immunity to entities … that facilitate the speech of others on the Internet" – and, as such, "Section 230 immunity should be broadly construed." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415, 418-19 (1st Cir. 2007) ("*Lycos*"). The immunity applies to "all cases arising from the publication of user-generated content." *Doe v. MySpace*, *Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *accord, e.g.*, *Zeran*, 129 F.3d at 330 ("[Section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."); *Marshall's Locksmith Serv. Inc v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("[Section] 230 immunizes internet services for third-party content that they publish, including false statements, against causes of action of all kinds."). Immunity "does not depend on the form of the asserted cause of action; rather, it depends on whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) ("*Backpage*"), *superseded by statute on other grounds*.[1]

Because Section 230 prohibits treating an online service provider as a "publisher or speaker" of third-party content, "immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally" – including objectionable material. *Lycos*, 478 F.3d at 422. The CDA "specifically

[1] Section 230 recognizes only a handful of exceptions. Prosecutorial enforcement of federal criminal laws is outside the ambit of immunity, as are civil claims for violation of the Electronic Communications Privacy Act, sex trafficking laws, and federal intellectual property rights. *See* 47 U.S.C. § 230(e)(1), (2), (4), (5). None of these exceptions apply here.

proscribes liability" for any claim based on hosting or linking to third-party content, including claims which seek to hold a provider liable for decisions about monitoring, screening, or removing material – "actions quintessentially related to a publisher's role." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003). Accordingly, the First Circuit concurs with courts across the country that "[l]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred." *Backpage*, 817 F.3d at 18 (quoting *Zeran*, 129 F.3d at 330). "[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *accord, e.g.*, *Murawski v. Pataki*, 514 F. Supp. 2d 577, 590-91 (S.D.N.Y. 2007) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity.") (citing *Zeran*, 129 F.3d at 330); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009) ("[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove."); *Ayyadurai v. Floor64, Inc.*, Civil Action No. 17-10011-FDS, 2017 U.S. Dist. LEXIS 144030, at *43-48 (D. Mass. Sept. 6, 2017) (CDA barred libel, tortious interference, and emotional distress claims under Massachusetts law against website that re-published disparaging user comments regarding the plaintiff).[2]

[2] Although Section 230 specifically refers to "publisher[s]," "every court to reach the issue has decided that Congress intended to immunize both distributors and publishers." *Batzel v. Smith*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003), *superseded by statute on other grounds*; *accord, e.g.*, *Gavra v. Google Inc.*, No. 5:12-CV-06547-PSG, 2013 U.S. Dist. LEXIS 100127, at *7-9 (N.D. Cal. July 17, 2013) (although Google was sued as a "distributor" of YouTube videos and not a "publisher," "distributors are still publishers for the purposes of Section 230"); *Barrett v.*

For these reasons, courts have consistently denied injunctions seeking to require websites to remove content authored by third parties, even if that content is alleged to be harmful and unlawful. *See, e.g.*, *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 321-23 (1st Cir. 2017) (affirming dismissal of complaint against website operator under Massachusetts law where plaintiff sought preliminary and permanent injunctions requiring defendant to remove third-party content from its website); *Minerva Biotechnologies Corp. v. John Doe No. 1, et al.*, No. 1881-CV-00025 (Mass. Super. Ct. Middlesex Cty. Jan. 26, 2018) (Fishman, J.) (denying motion for preliminary injunction to require Google "to remove a post from an anonymous reviewer that the plaintiff claims is defamatory" because Section 230 "provides immunity to interactive service providers like Google") (attached as Exhibit A); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 285 (2011) (affirming dismissal of complaint against website operators where plaintiff requested "injunctive relief requiring defendants to stop 'publication of any and all defamatory statements concerning [plaintiff]' and 'any further disparagement'"); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 471-76 (E.D.N.Y. 2011) (applying CDA to deny motion for preliminary injunction to disable webpages containing negative reviews of plaintiff's products); *Manchanda v. Google*, No. 16-CV-3350 (JPO), 2016 U.S. Dist. LEXIS 158458, at *7 (S.D.N.Y. Nov. 16, 2016) ("[T]he CDA's broad protection for internet publishers also protects Defendants from any obligation to remove or de-index any links.").[3]

Rosenthal, 40 Cal. 4th 33, 48-49 (2006) ("Given that 'distributors' are also known as 'secondary publishers,' there is little reason to believe Congress felt it necessary to address them separately.").

[3] *See also, e.g.*, *Smith v. Intercosmos Media Grp., Inc.*, Civil Action No. 02-1964, 2002 U.S. Dist. LEXIS 24251, at *14-15 (E.D. La. Dec. 17, 2002) ("[A]ny claim made by the plaintiffs for damages or injunctive relief … are precluded by the immunity afforded by Section 230(c)(1), and subject to dismissal."); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, No. CIV 97-485 LH/LFG, 1999 U.S. Dist. LEXIS 23095, at *11 (D.N.M. Mar. 1, 1999) ("Plaintiff seeks injunctive relief from the Defendant's continued publication of inaccurate stock information. AOL is again entitled to Section 230 immunity and this claim will be dismissed as well."), *aff'd*, 206 F.3d 980 (10th Cir.

Following these well-established principles, courts uniformly apply Section 230 to dismiss similar lawsuits against YouTube and Google arising from allegedly harmful videos posted by their users. *See Weerahandi v. Shelesh*, No. 3:16-CV-06131-BRM-TJB, 2017 U.S. Dist. LEXIS 163910, at *19-20 (D.N.J. Sept. 29, 2017) ("Plaintiff … argues the CDA does not bar claims for the 'failure to remove the videos' or to 'take corrective action.' To the contrary, the CDA expressly protects internet companies from such liability. Pursuant to the CDA, Plaintiff cannot assert a claim against Google or YouTube for decisions relating to the monitoring, screening, and deletion of content from its network.") (citations omitted); *Gavra*, 2013 U.S. Dist. LEXIS 100127, at *4-9 (CDA "explicitly prohibit[s] imposing liability" based on YouTube's "refraining from removing objectionable content, despite receiving notice" of allegedly defamatory videos on its website); *Gonzalez v. Google, Inc.*, No. 16-cv-03282-DMR, 2017 U.S. Dist. LEXIS 175327, at *27-48 (N.D. Cal. Oct. 23, 2017) (CDA immunized Google from liability arising from videos posted by terrorists on YouTube).[4]

B. Plaintiff's Claims Meet All The Elements of Section 230 Immunity

Section 230 precludes any cause of action, and thus mandates dismissal, where (1) the defendant is a "provider … of an interactive computer service"; (2) the content at issue was "provided by another information content provider" (i.e., a third-party); and (3) the claim seeks to

---

2000); *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 U.S. Dist. LEXIS 145380, at *20-23 (C.D. Cal. May 4, 2011) ("Because Defendants are not accountable for such postings under the CDA, they can not be liable for their effects in tort, and injunctive relief is similarly unavailable.").

[4] The application of Section 230 is appropriate at the pleading stage of a case. CDA immunity "is an immunity from suit rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) (citation omitted). Courts therefore "aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" *Id.* at 255 (citation omitted).

treat the interactive computer service provider as a "publisher or speaker" of that third-party content. 47 U.S.C. § 230(c)(1); *see also Lycos*, 478 F.3d at 418 (listing these as the three elements of Section 230 immunity); *Small Justice*, 873 F.3d at 318 (same). Each element is plainly established here on the face of the Complaint.

1. YouTube and Google Are "Interactive Computer Services"

The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]" 47 U.S.C. § 230(f)(2). "[W]eb site operators … are providers of interactive computer services within the meaning of Section 230." *Lycos*, 478 F.3d at 419. Numerous courts have already determined that YouTube and Google are "interactive computer services" entitled to CDA immunity. *See, e.g.*, *Weerahandi*, 2017 U.S. Dist. LEXIS 163910, at *19-20 ("Both Google and YouTube are 'interactive computer service[s].'") (citation omitted); *Lancaster v. Alphabet Inc.*, No. 15-cv-05299-HSG, 2016 U.S. Dist. LEXIS 88908, at *7 (N.D. Cal. July 8, 2016) ("YouTube and Google are 'interactive computer services.'"); *Lewis v. Google LLC*, No. 20-cv-00085-SK, 2020 U.S. Dist. LEXIS 150603, at *22 (N.D. Cal. May 20, 2020) ("There does not appear to be any dispute that YouTube and Google are providers of an interactive computer service.") (citing cases); *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 U.S. Dist. LEXIS 152126, at *20-21 (N.D. Cal. Nov. 2, 2016) ("[T]he YouTube website 'provides or enables computer access by multiple users to a computer server.'") (quoting 47 U.S.C. § 230(f)(2)).

2. Third Parties Provided the Allegedly Harmful Content Underlying Plaintiff's Claims

The second element – that "another information content provider" provided the content at issue – is likewise met here. An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through

the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Thus, content is provided by "another information content provider" whenever the defendant did not "create[] or develop[] the particular information at issue." *Carafano*, 339 F.3d at 1125.

Plaintiff expressly alleges that Kearney and his associates – not Google – created all of the allegedly harmful content. *See, e.g.*, Compl. ¶ 43 ("Aidan Kearney stated on YouTube …."); *id.* ¶ 44 ("Aidan Kearney explained on YouTube …."); *id.* ¶ 51 ("Aidan Kearney hosted a show on YouTube …."), *id.* ¶¶ 52-53 (same); *see also* Waters Aff. ¶ 3 (same). Plaintiff does not allege (and could not allege) that Google had any involvement in authoring that content. Google is "not a 'content provider' with respect to comments posted by third-party users" on YouTube. *Shiamili*, 17 N.Y.3d at 290. "Creating an open forum for third parties to post content – including negative commentary – is at the core of what section 230 protects[.]" *Id.* at 290-91; *see also Weerahandi*, 2017 U.S. Dist. LEXIS 163910, at *19-20 (dismissing defamation claim against YouTube and Google where "Plaintiff does not allege Google or YouTube played any role in producing the allegedly defamatory content. Instead, Plaintiff alleges both websites failed to remove the defamatory content, despite his repeated requests."); *Gonzalez*, 2017 U.S. Dist. LEXIS 175327, at *39-48 (Google is not an "information content provider" as to YouTube videos posted by third parties).

Plaintiff argues that "YouTube designed algorithms that develop in part offending material by recommending the material based on behavioral analysis for profit." Br. at 8; *see also* Compl. ¶ 122 ("YouTube's algorithms materially contributed to the development and sting of the offending content by suggesting the offending videos to radicalized users that liked similar content."). But none of that makes Google a "creator" or "developer" of the videos – the actual allegedly actionable *content*; to the contrary, it shows that Plaintiff is attempting to hold Google liable for its decision on

how and where to *publish* that content. A service provider's conduct falls outside Section 230 only by "materially contributing to [the] *alleged unlawfulness*" of the content itself. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (emphasis added). As the Sixth Circuit explained, "[a] material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed content allegedly unlawful." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014). Google's automated decision to *link* to certain user-generated content on YouTube, without actually *authoring* that content, is precisely that kind of "traditional editorial function" that Section 230 protects. *Id.* at 409-10.

The Second Circuit rejected the same theory in *Force v. Facebook, Inc.*, where the plaintiffs claimed that Facebook forfeited Section 230 immunity because its algorithms recommended inciteful videos posted on its website by Hamas. 934 F.3d 53, 66-67 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020). The court held that this "is an essential result of publishing" protected by Section 230. *Id.* at 66. "Plaintiffs' 'matchmaking' argument would also deny immunity for the editorial decisions regarding third-party content that interactive computer services have made since the early days of the Internet," such as where to display content and who to display it to. *Id.* at 66-67. "[A]lgorithms might cause more such 'matches' than other editorial decisions. But that is not a basis to exclude the use of algorithms from the scope of what it means to be a 'publisher' under Section 230(c)(1)." *Id.* at 67. The same result applies here.

3. <u>Plaintiff Seeks to Treat Google as a "Publisher or Speaker" of the Third-Party Content Posted on YouTube</u>

Finally, Plaintiff seeks to treat Google as the "publisher or speaker" of content created by someone else on YouTube. Indeed, all of his claims are expressly premised on third-party videos

that "were *published* on YouTube" (Compl. ¶ 48, emphasis added) and because Google failed to remove them. That is a paradigmatic example of treating Google as a publisher of user content. *See Backpage*, 817 F.3d at 20 ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, *withdraw*, postpone or alter content – are barred[.]") (emphasis added; citation omitted); *Barnes*, 570 F.3d at 1103 ("[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove."). Courts routinely dismiss similar claims against YouTube and Google for the same reasons. *Supra* at 8 (citing *Weerahandi*, 2017 U.S. Dist. LEXIS 163910, at *19-20; *Gavra*, 2013 U.S. Dist. LEXIS 100127, at *4-9; *Gonzalez*, 2017 U.S. Dist. LEXIS 175327, at *27-48). This court should do the same, and deny Plaintiff's motion.[5]

II. PLAINTIFF FAILS TO STATE A VIABLE CLAIM AGAINST GOOGLE

On top of his claims being barred by Section 230, Plaintiff has no likelihood of succeeding on the merits because he fails to plead a single viable cause of action against Google. We address each claim in turn.

A. Plaintiff's Section 1985 Claims Fail Because There Is No Allegation of Conspiracy or Class-Based Animus

Count I alleges that certain Defendants intimidated witnesses in Plaintiff's prior state court action against Kearney, in violation of 42 U.S.C. § 1985(2). Compl. ¶¶ 95-99. Count II alleges

[5] Rather than citing controlling case law, Plaintiff relies exclusively on a "Statement of Justice Thomas respecting the denial of certiorari" in *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, No. 19-1284, 2020 U.S. LEXIS 4834, at *1 (U.S. Oct. 13, 2020), in which Justice Thomas raised questions in dicta regarding the application of Section 230. Br. at 7-9. Justice Thomas did not purport to be making any law under Section 230, and no other Justice joined in those observations. Rather, the law is what hundreds of courts across the country have concluded, including here in this district and the First Circuit: that Section 230 squarely bars claims exactly like this one.

that the same Defendants sought to "punish" Plaintiff for exercising his First Amendment rights, in violation of 42 U.S.C. § 1985(3). Compl. ¶¶ 100-05. Both Counts list Google as a Defendant, but none of the substantive allegations actually mention Google or purport to explain how it is liable under either theory.

These claims fail out of the gate for at least two reasons. ***First***, a plaintiff must sufficiently plead a conspiracy in order to have a viable Section 1985 claim. *See* 42 U.S.C. § 1985(1), (2), (3). "Pleading a conspiracy under section 1985 'requires at least minimum factual support of the existence of a conspiracy.'" *Lopez-Mieres v. Soto*, No. 18-1588 (GAG), 2019 U.S. Dist. LEXIS 152471, at *14 (D.P.R. Sept. 5, 2019) (quoting *Francis-Sobel v. Univ. of Me.*, 597 F.2d 15, 17 (1st Cir. 1979)). That is, there must be "a meeting of the minds and an understanding as to the goals of the conspiracy" among the defendants. *Walker v. City of Bos.*, Civil Action No. 82-2290-S, 1983 U.S. Dist. LEXIS 16691, at *9 (D. Mass. May 25, 1983).

Plaintiff nowhere alleges that Google pursued or endorsed the unlawful goals of any other person. He never alleges that Google entered into an agreement with – or, indeed, even *communicated* with – any other Defendant. Nor does Plaintiff allege that any Defendant entered into any agreement with other persons. This is plainly insufficient to show a conspiracy. *See, e.g.*, *Goodwin v. Jones*, Civil Action No. 16-10305-GAO, 2016 U.S. Dist. LEXIS 83759, at *13 (D. Mass. June 27, 2016) ("[A] claim of conspiracy must allege specific facts that suggest a conspiracy or agreement; conclusory statements that the defendants conspired are insufficient to meet the pleading standard.").

Second, as Plaintiff acknowledges in his motion (*see* Br. at 11-12), each of his Section 1985 claims "requires 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Perez-Sanchez v. Pub. Bldg. Auth.*, 531 F.3d 104, 107

(1st Cir. 2008) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Discrimination based on personal animus or dislike of political views does not meet this requirement. *See id.* at 109 ("We thus decline to extend § 1985(3)'s protection to political affiliation."); *Collier v. City of Chicopee*, Civil Action No. 97-30123-KPN, 1998 U.S. Dist. LEXIS 21901, at *9 (D. Mass. Feb. 5, 1998) (evidence "of personal disputes" is not enough to support a "contention of class based animus"), *aff'd*, 158 F.3d 601 (1st Cir. 1998).

But that is all Plaintiff alleged: "Aidan Kearney discriminated against me because I was arrested, because I am intelligent, and because I exercised my first amendment right making statements showing my disapproval of the Ludlow and Palmer police." Compl. ¶ 97; *see also* Br. at 11 ("The initial article published about me on Turtleboy Sports pointed out and attempted to shame me for stating that the police were stupid to mistreat me and implying that I might sue them for it."). Personal animus by Kearney against the Plaintiff because of conflicting views on the police does not come close to class-based, discriminatory animus under Section 1985. And there is no allegation that Google itself held *any* animus whatsoever toward the Plaintiff. Section 1985 is simply inapplicable to this dispute.

B. Plaintiff's Section 1986 Claim Fails Because He Fails to Show an Underlying Violation of Section 1985, Google's Knowledge of a Conspiracy, or Google's Power to Prevent a Conspiracy

Count VI alleges that Google neglected to prevent witness intimidation in violation of 42 U.S.C. § 1986. Compl. ¶¶ 125-29. But a prerequisite for a claim under section 1986 "is the existence of a conspiracy actionable under section 1985." *Lowden v. William M. Mercer, Inc.*, 903 F. Supp. 212, 218 (D. Mass. 1995) (quoting *Chemlen v. Giulmette*, Civil Action No. 89-2308-NG, 1994 U.S. Dist. LEXIS 13784, at *14 n.8 (D. Mass. Aug. 30, 1994)). Because Plaintiff failed to plead a predicate conspiracy or class-based animus under Section 1985 (*supra*), his Section 1986 claim fails as well. *See Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 31 (1st Cir. 2008) ("[A]bsent a

showing of conspiracy, she has no claim under § 1986, which extends liability to those who knowingly failed to prevent conspiracies under § 1985."); *Hennessy v. City of Melrose*, 194 F.3d 237, 244 (1st Cir. 1999) ("[Plaintiff] has made no showing that the defendants' conduct originated in an invidiously discriminatory class-based animus, and, thus, his conspiracy claim under 42 U.S.C. § 1985(3) flounders. This same circumstance dooms his section 1986 claim.") (citation omitted).

Plaintiff also fails to allege that Google had any knowledge of a conspiracy between other persons, or that it had the "power to prevent or aid in preventing the commission of the same" – both of which are required to state a claim under Section 1986. 42 U.S.C. § 1986.

C. Plaintiff's Section 1983 Claim Fails Because Google Is Not A State Actor

Count V alleges that Google subjected Plaintiff to "cruel and unusual punishment" by hosting Kearney's videos, and therefore violated his Eighth Amendment rights under 42 U.S.C. § 1983. Compl. ¶¶ 116-24. This claim fails too, because "[w]hen the named defendant in a section 1983 case is a private party, the plaintiff must show that the defendant's conduct can be classified as state action." *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)). Courts have repeatedly held that Google and YouTube are not state actors. *See Prager Univ. v. Google LLC*, 951 F.3d 991, 996-99 (9th Cir. 2020) ("YouTube may be a paradigmatic public square on the Internet, but it is not transformed into a state actor solely by provid[ing] a forum for speech…. [T]he state action doctrine precludes constitutional scrutiny of YouTube's content moderation[.]") (citations omitted); *see also id.* at 997 & n.3 (collecting cases, including *Green v. YouTube, LLC*, No. 18-cv-203-PB, 2019 U.S. Dist. LEXIS 55577, at *10 (D.N.H. Mar. 13, 2019) (dismissing claim that YouTube "discriminated against [plaintiff] based on his political views and censored his expression of those views … in violation

of his First Amendment rights"), *report & rec'n adopted*, 2019 U.S. Dist. LEXIS 54101 (D.N.H. Mar. 29, 2019)).[6]

D. Plaintiff's Civil Rights Claim Fails Because Google Did Not Use Threats, Intimidation, or Coercion to Deprive Him of Life, Liberty, or Protection of the Law

Plaintiff's remaining state law claims are equally frivolous. In Count IV, he alleges that Google violated Chapter 12, Section 11I of the Massachusetts Civil Rights Act by depriving him of privileges under Article 12 of the Massachusetts Declaration of Rights. Specifically, Plaintiff alleges that "defendants despoiled me of my right to earn a living, exiled me, and put me out of protection of the law," although he makes no specific allegations as to how Google did or could have done such a thing. Compl. ¶¶ 112-15.

To make this claim, Plaintiff must allege that Google interfered or attempted to interfere with his civil rights "by threats, intimidation or coercion[.]" Mass. Gen. Laws ch. 12, § 11H; *see also, e.g.*, *Hetherson v. Mass. Exec. Office of Pub. Safety & Sec.*, No. SUCV2015-02451-G, 2016 Mass. Super. LEXIS 82, at *5 (Mass. Super. Ct. May 12, 2016) ("[A]sserting this count against any defendant would require a good-faith basis to believe that the evidence will show that the particular defendant used threats, intimidation or coercion to remove Hetherson from her job."). Plaintiff does not allege and cannot show that Google did anything like that.

Moreover, Plaintiff never explains how or when he lost a "right to earn a living," was "exiled," or was "put … out of protection of the law" under Article 12, which concerns the rights of persons accused of a crime. Compl. ¶ 114. The Complaint references criminal charges against

[6] *Accord, e.g.*, *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (Google, Facebook, Twitter, and Apple are not state actors), *aff'd*, 816 F. App'x 497 (D.C. Cir. 2020); *Shulman v. Facebook.com*, Civil Action No. 17-764 (JMV), 2017 U.S. Dist. LEXIS 183110, at *9 (D.N.J. Nov. 6, 2017) (same); *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 U.S. Dist. LEXIS 22637, at *39-43 (N.D. Cal. Mar. 16, 2007) (Google is not a state actor); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631-32 (D. Del. 2007) (same).

him, but those charges were "dropped for failure to prosecute." *Id.* ¶ 77; *cf. Commonwealth v. Prunty*, 462 Mass. 295, 304 & n.12 (2012) (Article 12 "afford[s] a criminal defendant the right to a trial by an impartial jury"); *Commonwealth v. Keaton*, 36 Mass. App. Ct. 81, 86 (1994) ("[A]rt. 12 … guarantees a defendant an impartial jury."). There is no allegation that Google played any role in any of the prior civil or criminal proceedings involving Plaintiff, and thus no basis to infer that Google did anything to deprive Plaintiff of his rights under Article 12.

E. Plaintiff's Emotional Distress Claim Fails Because He Does Not Allege Extreme and Outrageous Conduct by Google

Finally, Count IX alleges that defendants Kearney and Peter engaged in intentional infliction of emotional distress because they "acted out of malice." Compl. ¶¶ 139-42. Google is listed as a Defendant to the claim, although there is no mention of Google in any of the substantive allegations. *Id.* To the extent Plaintiff intends to assert an IIED claim against Google, it easily fails because he pleads no facts suggesting that Google intended to inflict extreme emotional distress upon him, or that Google's conduct was "extreme and outrageous." *E.g.*, *Butcher v. Univ. of Mass.*, 483 Mass. 742, 758 (2019) (listing elements of IIED claim), *cert. denied*, No. 19-1345, 2020 U.S. LEXIS 3434 (U.S. June 29, 2020).

CONCLUSION

Plaintiff has no likelihood – let alone a substantial likelihood – of success on the merits against Google. Accordingly, Plaintiff's request for a temporary restraining order and preliminary injunction should be denied. Indeed because Plaintiff's claims fail as a matter of law, the Court should dismiss this action against Google with prejudice.

Dated: December 4, 2020

Respectfully submitted,

*/s/ Alan D. Rose*__________________________
Alan D. Rose (BBO # 427280)
Laura B. Kirshenbaum (BBO # 684886)
ROSE LAW PARTNERS LLP
One Beacon Street, 23rd Floor
Boston, Massachusetts 02108
Telephone: (617) 536-0040
Facsimile: (617) 536-4400
adr@rose-law.net
lbk@rose-law.net

Jason Mollick
WILSON SONSINI GOODRICH & ROSATI PC
(application for *pro hac vice* pending)
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 497-7700
Facsimile: (212) 999-5899
jmollick@wsgr.com

Counsel for Defendant Google LLC

CERTIFICATE OF SERVICE

I hereby certify that I caused this document to be filed through the ECF system and that it will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper and/or electronic copies will be sent to those indicated as non-registered participants.

*/s/ Alan D. Rose*_______________
Alan D. Rose

Date: December 4, 2020