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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DANIEL JURIN,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

No. 2:09-cv-03065-MCE-KJM

MEMORANDUM AND ORDER

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Through this action Plaintiff Daniel Jurin ("Plaintiff") alleges several violations of state and federal law arising out of the use of the trademarked name "Styrotrim" as a suggested keyword in the "AdWords" program operated by Defendant Google, Inc. ("Defendant"). Presently before the Court is a Motion by Defendant to Dismiss the Second, Fifth, Sixth, Seventh, and Ninth Causes of Action alleged by Plaintiff for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

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1 Defendant also moves for costs and to stay the proceedings. For  
2 the reasons set forth below, Defendant's Motions are granted in  
3 part and denied in part.<sup>1</sup>  
4

5 **BACKGROUND<sup>2</sup>**  
6

7 This dispute is based on Plaintiff challenging the  
8 lawfulness of Defendant's Keyword Suggestion tool in its  
9 for-profit "Google AdWords" program.  
10

11 **A. Background on Search Engines**  
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13 Defendant is a highly recognized corporation most known for  
14 its widely-used search engine website. As part of operating its  
15 search engine, Defendant "indexes" websites, collecting  
16 information regarding their contents so that it may then store  
17 the information for use in formulas which respond to search  
18 queries. Generally, when a user enters a query into Defendant's  
19 website, the search engine will process relevant sites based on  
20 several information factors and then return results to the user.  
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26 <sup>1</sup> Because oral argument would not be of material assistance,  
27 this matter was deemed suitable for decision without oral  
28 argument. Local Rule 230(g).

<sup>2</sup> The factual assertions in this section are based on the  
allegations in Plaintiff's Complaint unless otherwise specified.

1 Web designers routinely use this process to influence their  
2 ranking on the results page. Prior to building a site, web  
3 designers will often conduct a keyword search using various  
4 available keyword tools in order to determine what terms or  
5 phrases internet users are most commonly searching for. A web  
6 designer will then build his site around more popular search  
7 terms in order to ensure a higher rank on a search engine results  
8 page.

9 Those with more capital may also "bid" on keywords. A web  
10 designer can use a keyword tool to discover popular terms,  
11 construct an ad or site using those key words, and then pay a  
12 search engine provider a fee to bid on those terms in an effort  
13 to appear on a results page as a "Sponsored Link". The higher a  
14 web designer bids, the higher the "Sponsored Link" placement when  
15 those bid upon keywords are searched for. "Sponsored links"  
16 appear either at the top or along the side of a search engine  
17 results page.

18 As part of its business, Defendant allows advertisers to bid  
19 on keywords in a program called "Google AdWords".

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21 **B. Plaintiff's Suit**

22  
23 Plaintiff owns a company which markets and sells its  
24 trademarked "Styrotrim" building material to homeowners,  
25 contractors, and those in the construction and remodeling  
26 industries. Plaintiff files suit in this case based on  
27 Defendant's, and Plaintiff's competitors, alleged unauthorized  
28 use of its trademarked name as a generic keyword.

1 Defendant's AdWords program picked up the trademark name  
2 "Styrotrim" as a commonly searched term and thereafter suggested  
3 it as a keyword to bidders in its AdWords program. It then  
4 allowed Plaintiff's competitors to bid on the keyword "Styrotrim"  
5 thus allowing them to appear as a "Sponsored Link" on a results  
6 page whenever the term "Styrotrim" was searched for.

7 Plaintiff now alleges that through its AdWords program,  
8 Defendant misappropriated its trademark name for its own use,  
9 generated advertising revenue from Plaintiff's competitors, and  
10 facilitated Plaintiff's competitors in infringing on Plaintiff's  
11 trademark.

12 Plaintiff alleges that Defendant's actions have caused a  
13 dilution of its consumer base. Plaintiff states that as a result  
14 of Defendant's program, often times competitors' names may appear  
15 in a position higher than Plaintiff's business on a results page.  
16 Plaintiff argues this confuses consumers into believing that  
17 competitor's product is preferable to Plaintiff's and, in  
18 essence, is a form of "bait and switch" advertising purposefully  
19 using Plaintiff's trademarked name to misdirect consumers away  
20 from Plaintiff's site.

21 Defendant presently moves to dismiss Plaintiff's allegations  
22 of violation of the Lanham Act, Negligent Interference with  
23 Contractual Relations and Prospective Economic Advantage,  
24 Intentional Interference with Contractual Relations and  
25 Prospective Economic Advantage, Fraud, and Unjust Enrichment.

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**STANDARD**

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3 On a motion to dismiss for failure to state a claim under  
4 Rule 12(b)(6), all allegations of material fact must be accepted  
5 as true and construed in the light most favorable to the  
6 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
7 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and  
8 plain statement of the claim showing that the pleader is entitled  
9 to relief" in order to "give the defendant fair notice of what  
10 the...claim is and the grounds upon which it rests." Bell Atl.  
11 Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v.  
12 Gibson, 355 U.S. 41, 47 (1957)). While a complaint attacked by a  
13 Rule 12(b)(6) motion to dismiss does not need detailed factual  
14 allegations, a plaintiff's obligation to provide the "grounds" of  
15 his "entitlement to relief" requires more than labels and  
16 conclusions, and a formulaic recitation of the elements of a  
17 cause of action will not do. Id. at 1964-65 (internal citations  
18 and quotations omitted). Factual allegations must be enough to  
19 raise a right to relief above the speculative level. Id. at 1965  
20 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure  
21 § 1216, pp. 235-36 (3d ed. 2004) ("The pleading must contain  
22 something more...than...a statement of facts that merely creates  
23 a suspicion [of] a legally cognizable right of action")).

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1 "Rule 8(a)(2)...requires a 'showing,' rather than a blanket  
2 assertion of entitlement to relief. Without some factual  
3 allegation in the complaint, it is hard to see how a claimant  
4 could satisfy the requirements of providing not only 'fair  
5 notice' of the nature of the claim, but also 'grounds' on which  
6 the claim rests." Twombly, 550 U.S. 556 n.3. A pleading must  
7 contain "only enough facts to state a claim to relief that is  
8 plausible on its face." Id. at 570. If the "plaintiffs...have  
9 not nudged their claims across the line from conceivable to  
10 plausible, their complaint must be dismissed." Id.  
11 Nevertheless, "[a] well-pleaded complaint may proceed even if it  
12 strikes a savvy judge that actual proof of those facts is  
13 improbable, and 'that a recovery is very remote and unlikely.'" Id.  
14 at 556.

15 A court granting a motion to dismiss a complaint must then  
16 decide whether to grant leave to amend. A court should "freely  
17 give" leave to amend when there is no "undue delay, bad faith[,]  
18 dilatory motive on the part of the movant,...undue prejudice to  
19 the opposing party by virtue of...the amendment, [or] futility of  
20 the amendment...." Fed. R. Civ. P. 15(a); Foman v. Davis, 371  
21 U.S. 178, 182 (1962). Generally, leave to amend is denied only  
22 when it is clear the deficiencies of the complaint cannot be  
23 cured by amendment. DeSoto v. Yellow Freight Sys., Inc., 957  
24 F.2d 655, 658 (9th Cir. 1992).

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1 Optimum Technologies, Inc. v. Henkel Consumer Adhesives, Inc.,  
2 496 F. 3d 1231, 1248 (11th Cir. 2007) (citing Dastar Corp. v.  
3 Twentieth Century Fox Film Corp., 539 U.S. 23, 28 n. 1(2003)).  
4 The Supreme court has held that in the context of false  
5 designation of origin claims the use of the word "origin" refers  
6 to a false or misleading suggestion as to "the producer of the  
7 tangible goods that are offered for sale." Dastar, 539 U.S. at  
8 37. Essentially, a false designation claim requires a showing  
9 that the defendant falsely represented that it was the "source"  
10 of the goods when it was not, thereby suggesting that the  
11 defendant was "the producer of the tangible product sold in the  
12 marketplace." Id. at 31; see also Sybersound Records, Inc. v.  
13 UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008).

14 By its terms, the Lanham Act seeks to prevent confusion as  
15 to the producer of the goods. Here, Defendant has in no way  
16 directly represented that it is the producer of the Styrotrim  
17 product. To the extent Plaintiff may contend that Defendant has  
18 helped "facilitate" confusion of the product with others, such is  
19 a highly attenuated argument. Even if one accept as true the  
20 allegation that a "Sponsored link" might confuse a consumer, it  
21 is hardly likely that with several different sponsored links  
22 appearing on a page that a consumer might believe each one is the  
23 true "producer" or "origin" of the Styrotrim product. As such,  
24 Plaintiff fails to properly plead a false designation of origin  
25 claim.

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1                                   **(b) False Advertising**

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3           Plaintiff also alleges that Defendant's AdWords program  
4 constitutes false advertising in violation of the Lanham Act as  
5 codified at 15 U.S.C § 1125(a)(1)(B). Maintenance of a false  
6 advertising claim under 15 U.S.C. § 1125(a)(1)(B) requires,  
7 "(1) a commercial injury based upon a misrepresentation about a  
8 product; and (2) that the injury is 'competitive,' or harmful to  
9 the plaintiff's ability to compete with the defendant." Jack  
10 Russell Terrier Network of Northern California v. American Kennel  
11 Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (holding that  
12 while under a "false association claim" parties need not be  
13 direct competitors, under a "false advertising" claim they do).

14           Here, Plaintiff and Defendant are not direct competitors.  
15 Although Defendant may provide advertising support for others in  
16 Plaintiff's industry, Defendant nonetheless does not directly  
17 sell, produce, or otherwise compete in the building materials  
18 market. Without a showing of direct competition, Plaintiff fails  
19 to sustain a claim for false advertising under the Lanham Act.

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21                                   **2. Communications Decency Act**

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23           Defendant alleges that the Communications Decency Act  
24 ("CDA") immunizes it from Plaintiff's allegations of Negligent  
25 Interference with Contractual Relations and Prospective Economic  
26 Advantage, Intentional Interference with Contractual Relations  
27 and Prospective Economic Advantage, Fraud, and Unjust Enrichment.

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1 The goal of the CDA is to promote the continued development  
2 of the Internet and other interactive computer services.

3 47 U.S.C. § 230(b)(1); see also Perfect 10 Inc v. CCBill LLC,

4 488 F.3d 1102, 1118 (9th Cir. 2007). The CDA provides complete

5 immunity to any "provider or user of an interactive computer

6 service" from liability premised on "information provided by

7 another content provider." 47 U.S.C. §§ 230(c)(1). Under the

8 CDA an interactive computer service qualifies for immunity so

9 long as it does not also function as an 'information content

10 provider' for the portion of the statement or publication at

11 issue. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123

12 (9th Cir. 2003). An unprotected service provider is defined as

13 any person or entity that is responsible, in whole or in part,

14 for the creation or development of information provided through

15 the Internet or any other interactive computer service.

16 47 U.S.C. §§ 230(f)(3). "So long as a third party willingly

17 provides the essential published content, the interactive service

18 provider receives full immunity regardless of the editing or

19 selection process." Carafano, 339 F.3d at 1124.

20 Defendant argues that it satisfies the definition of a

21 protected interactive computer service. Plaintiff conversely

22 argues that through its keyword suggestion tool Defendant does in

23 fact participate in the content of the advertisements, rendering

24 them an "information content provider" outside of the protection

25 of the CDA.

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1           However Defendant does not provide the content of the  
2 "Sponsored Link" advertisements. It provides a space and a  
3 service and thereafter charges for its service. By suggesting  
4 keywords to competing advertisers Defendant merely helps third  
5 parties to refine their content. This is tantamount to the  
6 editorial process protected by the CDA. Defendant's keyword  
7 suggestion tool hardly amounts to the participation necessary to  
8 disqualify it of CDA immunity. Rather it is a "neutral tool,"  
9 that does nothing more than provide options that advertisers  
10 could adopt or reject at their discretion, thus entitling the  
11 operator to immunity. Goddard v. Google, Inc., 640 F. Supp. 2d  
12 1193, 1197-98 (N.D. Cal. 2009)

13           The purpose of the CDA is to encourage open, robust, and  
14 creative use of the internet. See 47 U.S.C §230(b). Ultimately,  
15 Defendant's Adwords program simply allows competitors to post  
16 their digital fliers where they might be most readily received in  
17 the cyber-marketplace. Accordingly, Defendant meets the  
18 definition of a protected interactive computer service and is  
19 therefore immunized from liability on Plaintiff's Fifth, Sixth,  
20 Seventh, and Ninth Causes of Action.

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22           **B. Motion for Costs and to Stay Proceedings**

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24           Defendant concurrently moves for an order requiring  
25 Plaintiff to pay costs for an almost identical complaint  
26 previously filed by Plaintiff against Defendant in the Central  
27 District of California on June 2, 2009 and voluntarily dismissed  
28 on July 23, 2009.

1 Defendant also moves for an order to stay the current proceedings  
2 until Plaintiff has complied with the order to pay costs.  
3 Specifically, Defendant seeks \$6,030.52, as the cost of the  
4 previous litigation including attorney fees.

5 Rule 41(d) of the Federal Rules of Civil Procedure provides:

6 Costs of a Previously-Dismissed Action. If a  
7 plaintiff who previously [voluntarily] dismissed an  
8 action in any court files an action based on or  
9 including the same claim against the same defendant,  
10 the court:

(1) may order the plaintiff to pay all or part  
of the costs of that previous action; and (2) may  
stay the proceedings until the plaintiff has  
complied.

11 Fed. R. Civ. P. 41(d). Rule 41(d) is an expression of the  
12 Court's inherent power to protect defendants from the harassment  
13 of repeated lawsuits by the same plaintiff on the same claims.  
14 See Hacopian v. United States Dept. of Labor, 709 F.2d 1295, 1296  
15 (9th Cir. 1983).

16 Comparing the Complaint of the previous action against that  
17 of the present action confirms that Plaintiff's current suit does  
18 in fact include all of the claims previously brought before the  
19 Central District, as well as additional claims. It appears that  
20 Plaintiff has simply re-filed an amended version of his earlier  
21 suit. Pursuant to Rule 41(d), Plaintiff may not voluntarily  
22 dismiss his original suit only to further harass Defendant with  
23 renewed allegations of the same claims. Resultantly, the Motion  
24 for Costs is granted.

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**CONCLUSION**

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3 For the foregoing reasons, Defendant's Motion to Dismiss  
4 (Docket No. 9) Plaintiff's Second, Fifth, Sixth, Seventh and  
5 Ninth Causes of Action is GRANTED with leave to amend. Plaintiff  
6 may file an amended complaint not later than twenty (20) days  
7 after the date this Memorandum and Order is filed electronically.  
8 If no amended complaint is filed within said twenty (20)-day  
9 period, without further notice, the causes of action addressed by  
10 this Order will be dismissed without leave to amend.

11 Defendant's Motion for Costs (Docket No. 10) is GRANTED.  
12 Defendant's Motion to Stay Proceedings (Docket No. 10) is DENIED.  
13 Plaintiff is ordered to pay costs for the previous action brought  
14 against Defendant not later than twenty (20) days after the date  
15 this Memorandum and Order is filed electronically.

16 IT IS SO ORDERED.

17 Dated: February 26, 2010

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20 MORRISON C. ENGLAND, JR.  
21 UNITED STATES DISTRICT JUDGE  
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