

Lower Court's opinions/rulings follow: chronological order.

APPENDIX

Notice to the Court from Petitioner.

Petitioner is a Pro Se, INDIGENT litigant who has been held in Pretrial Confinement over (2) years — since 21 February 2019 — under a \$40,000.00 money bail he hasn't a hope of making.

Petitioner has only limited access to the LEXIS via a GTL Tablet System with time-limited access. The system does NOT allow users to COPY/PRINT OUT any Text, NOR to electronically transfer such Text.

The ONLY way Petitioner could reproduce the Text of the Authorities, at page 5 of this Petition, would be by hand — which would require weeks of transcribing and volumes of paper.

Petitioner, therefore, respectfully requests the requirement for the complete Text of the Authorities be suspended herefor.

Respectfully, *J. Logan Diery* Pro Se

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JAMES LOGAN DIEZ,
Plaintiff,

V.

GOOGLE, INC.,
Defendant.

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A-20-CV-495-RP-ML

**ORDER ON *IN FORMA PAUPERIS* STATUS AND
REPORT AND RECOMMENDATION ON THE MERITS OF THE CLAIMS**

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the court is Plaintiff's Application to Proceed *In Forma Pauperis* (Dkt. #2) and Plaintiff's Motion on Waiver of Account Statement (Dkt. #3). Because Plaintiff is requesting permission to proceed *in forma pauperis*, this court must review and make a recommendation on the merits of Plaintiff's claims pursuant to 28 U.S.C. § 1915(e).

I. REQUEST TO PROCEED *IN FORMA PAUPERIS*

The court has reviewed Plaintiff's financial affidavit and determined Plaintiff is indigent and should be granted leave to proceed *in forma pauperis* and Plaintiff's Motion on Waiver of Account Statement (Dkt. #3). Accordingly, the court hereby **GRANTS** Plaintiff's request for *in forma pauperis* status and Plaintiff's Motion on Waiver of Account Statement (Dkt. #3). The Clerk of the Court shall file the complaint without payment of fees or costs or giving security

B. Standard of Review

Because Plaintiff has been granted leave to proceed *in forma pauperis*, the court is required by statute to review the Complaint. Section 1915(e)(2) provides in relevant part that “the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A complaint is frivolous, if it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325, (1989); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). A claim lacks an arguable basis in law when it is “based on an indisputably meritless legal theory.” *Neitzke*, 490 U.S. at 327. A claim lacks an arguable basis in fact when it describes “fantastic or delusional scenarios.” *Id.* at 327–28.

Pro se complaints are liberally construed in favor of the plaintiff. *Haines v. Kerner*, 404 U.S. 519, 20–21 (1972). However, *pro se* status does not offer a plaintiff an “impenetrable shield, for one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.” *Ferguson v. MBank Houston N.A.*, 808 F.2d 358, 359 (5th Cir. 1986).

C. Discussion

Diez first asserts a claim under 18 U.S.C. § 2252A(f). Section 2252A is a federal criminal child pornography statute, and subsection (f) provides a civil remedy for “any person aggrieved by reason of the conduct prohibited” by the statute. Diez’s claim fails. First, the undersigned has found no legal authority that Diez falls into the intended group of “any person aggrieved” for which Congress intended to provide a civil remedy. To the extent he could successfully argue that Google violated the criminal statute, he would also indict his own behavior. Second, 47 U.S.C. § 230(c)(1)

states that “No 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). Diez argues Google is not entitled to the protections of 47 U.S.C. § 230(f)(3) because Google functioned as an “Internet Content Provider” rather than an “Internet Service Provider” with respect to the images it returned to his searches. Dkt. #1 at Appx. A. However, Diez’s argument is contrary to the statute’s definitions of “information content provider” and “interactive computer service.” *Compare* 47 U.S.C. § 230(f)(2), *with* (f)(3). “Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws.” *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *5 (E.D. Tex. Dec. 27, 2006). Accordingly, Diez has failed to state a federal claim against Google.

Diez’s Texas DTPA claims also fail on their face. The Texas DTPA defines “goods” as “tangible chattels or real property purchased or leased for use” and “services” as “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.” TEX. BUS. & COMM. CODE § 17.45(1)-(2). Diez does not allege that he purchased or leased anything—goods or services—from Google. Accordingly, he has failed to state a DTPA claim against Google.

III. ORDER AND RECOMMENDATIONS

The Magistrate Court hereby **GRANTS** Plaintiff’s Application to Proceed *In Forma Pauperis* (Dkt. #2) and Plaintiff’s Motion on Waiver of Account Statement (Dkt. #3). The Magistrate Court **RECOMMENDS** the District Court **DISMISS WITH PREJUDICE** Plaintiff’s cause of action pursuant to 28 U.S.C. § 1915(e)(2)(B).

The referral of this case to the Magistrate Court should now be canceled.

IV. WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED May 12, 2020



MARK LANE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAMES LOGAN DIEZ,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

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1:20-CV-495-RP

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Mark Lane concerning Plaintiff James Logan Diez's ("Diez") complaint pursuant to 28 U.S.C. § 1915(e), 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. (R. & R., Dkt. 5). In his report and recommendation, Judge Lane recommends that the Court dismiss this action pursuant to 28 U.S.C. § 1915(e)(2)(B). (*Id.* at 4). Johnson timely filed objections to the report and recommendation. (Objs., Dkt. 12).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure de novo review by the district court. 28 U.S.C. § 636(b). Because Defendants timely objected to each portion of the report and recommendation, the Court reviews the report and recommendation de novo. Having done so, the Court overrules Defendants' objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Mark Lane, (Dkt. 5), is **ADOPTED**. Diez's complaint, (Dkt. 1), is **DISMISSED WITHOUT PREJUDICE**. Diez's Motion for Subpoena, (Dkt. 16), Motion for Mandamus, (Dkt. 18), and motions to expedite review, (Dkt. 19; Dkt. 24) are **MOOT**. The Clerk of the Court is directed to **CLOSE** this action.

SIGNED on October 30, 2020.

A handwritten signature in black ink, appearing to read 'R. Pitman', with a horizontal line extending to the right.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAMES LOGAN DIEZ,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

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1:20-CV-495-RP

FINAL JUDGMENT

On October 30, 2020, the Court issued an order dismissing Plaintiff James Logan Diez's complaint with prejudice. On that date, the Court inadvertently omitted a Final Judgment order.

As nothing remains to resolve, the Court renders Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that the case is **CLOSED**.

IT IS ORDERED that that each party bear its own costs.

SIGNED on November 19, 2020.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 17, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 20-50940 James Diez v. Google, Incorporated
USDC No. 1:20-CV-495

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Nancy F. Dolly".

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. James Logan Diez

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 17, 2020

Lyle W. Cayce
Clerk

No. 20-50940
Summary Calendar

JAMES LOGAN DIEZ,

Plaintiff—Appellant,

versus

GOOGLE, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-495

Before KING, SMITH, and WILSON, *Circuit Judges.*

PER CURIAM:*

James Logan Diez, appearing *pro se* and *in forma pauperis*, sued Google, Inc., alleging violations of the Texas Deceptive Trade Practices Act, as well as 18 U.S.C. § 2252A(f) (a federal child pornography statute). The district

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-50940

court dismissed these claims with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B). We AFFIRM.

I.

Plaintiff-appellant James Logan Diez is jailed in Burnet County awaiting trial on charges related to child pornography. He brought this *pro se* suit against defendant-appellee, Google, Inc. Diez filed an application to proceed before the court below *in forma pauperis*. Because Diez requested permission to proceed without the prepayment of fees, pursuant to 28 U.S.C. § 1915(a), the lower court¹ was under a statutory obligation to “dismiss the case at any time if the court determine[d] that . . . the action . . . fail[ed] to state a claim upon which relief [could] be granted,” 28 U.S.C. § 1915(e)(2)(B)(ii).

In this case, the lower court found that Diez failed to state a claim under either the Texas Deceptive Trade Practices Act (the “TDTPA”) or 18 U.S.C. § 2252A(f).

II.

We review de novo a district court’s dismissal of a complaint both as frivolous and as failing to state a claim under 28 U.S.C. §§ 1915(e)(2)(B)(i) & (ii). *Samford v. Dretke*, 562 F.3d 674, 678 (5th Cir. 2009). And, we apply the same standard of review applicable to dismissals made pursuant to FED.

¹ The district court dismissed Diez’s claims after adopting the magistrate judge’s report and recommendation and overruling Diez’s timely objections. We note also that the magistrate judge recommended that service upon Google should be withheld pending the district court’s decision. Because the district court adopted the recommendations in full, the case was dismissed before Google was served. This is apparently common practice for lower courts reviewing cases in this posture under 28 U.S.C. §1915. *See, e.g., Ariosa v. DPS Texas*, No. A-13-CV-908-LY, 2013 WL 6628760, at *3 (W.D. Tex. Dec. 16, 2013); *Birdow v. Allen*, No. A-13-CV-709-LY, 2013 WL 4511639, at *1 (W.D. Tex. Aug. 23, 2013).

No. 20-50940

R. CIV. P. 12(b)(6). *Id.* We uphold a dismissal if, “taking the plaintiff’s allegations as true, it appears that no relief could be granted based on the plaintiff’s alleged facts.” *Id.* (quoting *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999)). Alternatively, a claim may be dismissed as frivolous if “it lacks any arguable basis in law or fact.” *Id.*

III.

Diez’s original complaint asserts two claims against Google. First, he alleges a claim under TEX. BUS. & COMM. CODE §§ 17.50(a)(1)(B)(3), 17.46 (a)(b)(5), (7), (24), the TDTPA. Next, he alleges violations of 18 U.S.C. § 2252A(f)(1)-(2), a federal child pornography statute. We address each in turn.

A. TDTPA Claims

To state a TDTPA claim, a plaintiff must allege that: (1) he is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer’s damages. *See* TEX. BUS. & COMM. CODE § 17.46(a); *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). Diez’s claim fails from the start because he has not alleged that he is a consumer, that is, he has failed to allege that he purchased or leased goods or services.

Specifically, the TDTPA defines “goods” as “tangible chattels or real property purchased or leased for use” and “services” as “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.” TEX. BUS. & COMM. CODE 17.45(1)-(2). So, even liberally construing Diez’s argument on appeal, as we must, *see Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995), and reading his point to be that he is the *ultimate* consumer, his claim still fails. To be clear, “[c]onsumer status depends on the transaction, not the contractual relationship between the parties.” *See Flenniken v. Longview Bank & Trust*

No. 20-50940

Co., 661 S.W.2d 705, 707 (Tex. 1983); *Ortiz v. Collins*, 203 S.W.3d 414, 424 (Tex. App.—Houston [14th Dist.] 2006, no pet.). By failing to allege the purchase or lease of goods or services, Diez has not alleged a transaction that would create consumer status.

Further, Diez’s claim also fails on the third prong regarding “false, misleading, or deceptive acts.” Specifically, Diez’s original complaint includes nothing more than bare allegations that “Google [p]ublically [*sic*] professes a commitment to providing legal and wholesome content, and had a reputation for filtering illegal child pornography from its search results.” These threadbare assertions are insufficient to establish that Google engaged in “false, misleading, or deceptive acts.” TEX. BUS. & COMM. CODE § 17.46(a); *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

For these reasons, Diez failed to state a TDTPA claim, and the district court properly dismissed it.

B. Violations of 18 U.S.C. § 2252A

Diez’s original complaint also alleged that Google’s conduct violates 18 U.S.C. § 2252A, a child pornography statute. Subsection (f) of § 2252A provides a civil remedy for “any person aggrieved by reason of the conduct prohibited by the statute.” Diez alleges that he is a person aggrieved by Google’s failure to filter out certain images. The district court concluded that 47 U.S.C. § 230 provides Google with protection from suit and thus held that Diez failed to state a claim. We agree.

The relevant portion of § 230 states: “No 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.A. § 230 (c)(1) (West 2018). By its plain text, § 230 creates federal immunity to any cause of action that would make internet service providers liable for information originating with a third-party user of the service. *Doe v.*

No. 20-50940

MySpace, Inc., 528 F.3d 413, 419 (5th Cir. 2008); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997). A majority of federal circuits have interpreted § 230 “federal immunity” to be rather broad. *See, e.g., Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting *Zeran*, 129 F.3d at 330). This is so, particularly, where there is no evidence that the defendant is an “information content provider.” *See* 47 U.S.C.A. § 230 (f)(3) (West 2018).

Here, Google is merely an interactive computer service provider as opposed to an information content provider.² Further, Diez’s complaint is without adequately supported allegations that Google created the disputed content. Google is therefore immune from Diez’s claims under federal law, and his claim fails.

IV.

For the foregoing reasons, we AFFIRM.

² An information content provider “means 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.A. § 230 (f)(3) (West 2018).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 25, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-50940 Diez v. Google
USDC No. 1:20-CV-495

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By: _____
Charles B. Whitney, Deputy Clerk
504-310-7679

Ms. Jeannette Clack
Mr. James Logan Diez

United States Court of Appeals
for the Fifth Circuit

No. 20-50940

JAMES LOGAN DIEZ,

Plaintiff—Appellant,

versus

GOOGLE, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-495

ON PETITION FOR REHEARING

Before KING, SMITH, and WILSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.