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DISTRICT COURT

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THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY

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*Attorneys for Defendant Google Inc.*

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAUREN ROSENBERG,

Plaintiff,

v.

PATRICK HARWOOD, as an individual,  
GOOGLE, a corporation, and JOHN DOES I  
through X, inclusive,

Defendants.

**REPLY MEMORANDUM OF  
DEFENDANT GOOGLE INC.  
IN SUPPORT OF MOTION TO DISMISS**

(Hearing Requested)

Case No. 100916536

Judge Deno Himonas

## INTRODUCTION

Having abandoned her strict product liability claims against Google Inc. (“Google”)– and having conceded that her negligence claims against Google also cannot succeed if Google is the “publisher” of information obtained from Google Maps – Plaintiff seeks to salvage her negligence claims by arguing Google is not a publisher but rather an expert advisor for everyone who obtains information from Google Maps, and therefore owes each of them the same duty of care that an accountant or stockbroker owes to his or her individual clients.

Plaintiff presented no plausible rationale for treating Google like an expert advisor – in a one-on-one relationship with each of millions of people who obtain information from Google Maps – rather than a publisher. Moreover, none of the authority Plaintiff cites supports the imposition of negligence liability based on walking directions obtained from Google Maps. Moreover, even putting aside the constitutional protections for publishers like Google, Plaintiff’s own authority confirms that under Utah law there can be no duty owed by Google to someone injured in a traffic accident while walking a route obtained from Google Maps. As Plaintiff acknowledges, this question of duty is a purely legal one, appropriate for resolution through a motion to dismiss, and therefore all Plaintiff’s claims against Google should be dismissed with prejudice.<sup>1</sup>

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<sup>1</sup> Effectively conceding her product liability claims against Google are meritless, Plaintiff “does not contest” dismissal of those claims but nevertheless asks the Court to dismiss them without prejudice. Opp. 11. Just as a motion for voluntary dismissal should be denied when its purpose is to avoid determination on the merits, Plaintiff’s attempt to preserve her ability to maintain fundamentally flawed products liability claims, by not contesting dismissal without prejudice, should not be permitted. *Phillips USA v. Allflex USA*, 77 F.3d 354, 358 (10th Cir. 1996) (“a party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice”); 8-41 Moore’s Federal Practice - Civil § 41.40 (“A motion for a voluntary dismissal should generally be denied when the purpose is to avoid an adverse determination on the merits of the action.”); *Barton v. Utah Transit Auth.*, 872 P.2d 1036, 1039 n.5 (Utah 1994) (state Supreme Court “recognizes the persuasiveness of federal interpretations

**I. Making Searchable Information Available Online For All Internet Users To Access Does Not Transform Google From A Publisher Into An Expert Advisor**

Throughout her opposition, Plaintiff concedes that one who publishes information to the world at large is protected against tort liability for injuries allegedly resulting from information negligently published. Opp. 11 (“It is not surprising that courts are reluctant to find that publishers owe a duty of care. When something is published, a single piece of information may be provided to thousands, if not millions of people. Imposing a duty of care on a publisher, therefore, would create a nearly infinite exposure.”).<sup>2</sup> Whether these protections are couched in terms of the First Amendment, *e.g.*, *Bailey v. Huggins*, 952 P. 2d 768 (Colo. Ct. App. 1997), or the common law, *e.g.*, *Roman v. City of New York*, 442 N.Y.S.2d 945 (N.Y. Sup. Ct. 1981), they bar liability where, as here, an entity provides information to a large audience. Without these constitutional and common law protections, the risk of unlimited liability would chill speech.

Plaintiff attempts to circumvent these protections by mischaracterizing Google as an expert advisor rather than one who merely conveys information to a broad audience. But Plaintiff’s proposed dichotomy – between cases “holding those who give advice liable for negligence” and those “limiting tort claims based on providing information,” with the salient difference being that the latter involve publication to an unlimited group, Opp. 5-6 – is deeply flawed. As discussed below, even for non-publishers and “expert advisors,” liability based on negligent misstatements is permitted only in narrowly circumscribed situations. And even if Plaintiff’s distinction were valid, her claims still must fail because Google clearly fits into the

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when the state and federal rules are similar and few Utah cases deal with the rule in question”).

<sup>2</sup> *See also, e.g.*, Opp. 2 (“The First Amendment circumscribes the kind of tort actions that can be brought against publishers because they contribute to the public discussion of ideas that we so jealously guard in our society. Courts are reluctant to hold that publishers owe a duty of care, because that duty would extend to everyone that [sic] reads their publication.”); *id.* at 3 (“It is not surprising that Google tries to portray itself as a publisher because Courts have used the First Amendment and other rules to limit tort actions against true publishers.”).

latter category (information providers) and not the former (those who give expert advice).

As a threshold matter, Plaintiff's major premise fails. Contrary to her assertion that "information ... provided only to a limited audience ... does not trigger First Amendment concerns," Opp. 6, First Amendment protections do apply to statements "directed at an extremely narrow audience," even one "consisting principally of [a single person]" and even if the "case in no way resemble[d] ... media cases." *Avins v. White*, 627 F.2d 637, 648 (3d Cir. 1980); *accord*, e.g., *Davis v. Schuchat*, 510 F.2d 731, 735-736 (D.C. Cir. 1975) (applying First Amendment standards to defamation claim based on alleged false statement made in one-on-one telephone call by reporter).<sup>3</sup> Thus even if, as in *Avins*, Google Maps provides information only to a "narrow audience" consisting principally of one person, First Amendment protections still apply.

The Court need not reach that issue, however, because Plaintiff's minor premise also fails for the obvious reason that Google does not provide information "only to a limited audience." Rather, as Plaintiff alleges, directions from Google Maps are "readily available via the internet at maps.google.com." Comp., ¶ 22. Nothing in Plaintiff's opposition contradicts this concession. Nor could it, because the information Google makes available to the world at large is nothing like the expert advice provided by various professionals – such as accountants and surveyors – whose professional status and special relationships with their clients justify imposing a duty on their representations. *See, e.g., Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 33, 221 P.3d 234, 245 ("Knowledge and expertise alone do

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<sup>3</sup> Contrary to Plaintiff's assertions, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), did not hold that information provided to a limited audience loses First Amendment protection. Rather, it held that recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern, and the limited audience factored into that analysis. *Id.* at 761-62. The same was true in another credit rating case, *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155 (S.D.N.Y. 2009). As *Avins* explains, this result appears to be "limited to the situation of commercial credit reports." 627 F.2d at 649 n.5.

not establish an independent duty; privity or a direct relationship is also required.”).

Plaintiff seems to theorize that she was the only person who at a particular date, time and location entered the beginning point A and end point B into Google Maps, and thus the suggested route she obtained was “advice” tailored especially for her. Opp. 8. What Plaintiff overlooks, however, is that there is no limitation on the number of people who could obtain precisely the same information from Google Maps. That is because Google makes available a large and “comprehensive index of web sites and other online content” – including a vast amount of geographic data in Google Maps – to an unlimited audience of internet users. *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, 698 (W.D. Pa. 2009) (granting motion to dismiss claims over images of property depicted on Google Maps), *aff’d in part, rev’d in part*, 362 Fed. Appx. 273 (3d Cir. 2010) (affirming dismissal of claims based on publication of photos on Google Maps).

In this case, Plaintiff happened to limit her request to a small slice of this information – namely, information suggesting how one might arrive at point B from point A in Park City. But this does not transform Google from an indiscriminate provider of information to the masses into an expert advisor. There is no logical basis for distinguishing placement of a walking tour of Park City on a web site – which Plaintiff agrees would trigger First Amendment concerns, Opp. 8 – from making a much greater collection of the same information available with the ability for users to filter out the data of no interest. Just because a user views only a single webpage of an online atlas or library does not mean the atlas publisher or library communicated the information on that page only to her. To the contrary, courts recognize that making information available in an online database, where it can be searched and accessed by any internet user, publishes or distributes that information “to the public.” *New York Times Co. v. Tasini*, 533 U.S. 483, 496 n.4, 498 (2001); *see Reno v. ACLU*, 521 U.S. 844, 852-53, 870 (1997) (finding “no basis for qualifying the level of First Amendment” protection for, *inter alia*, web sites on the World Wide

Web that “allows users to search for and retrieve information stored in remote computers,” all of which the Supreme Court treated as “publishers” that are making available the functional equivalent of “a vast library including millions of readily available and indexed publications”).

Accordingly, Plaintiff’s assertions that Google does not publish the information on Google Maps to the world at large must be rejected.<sup>4</sup> As Plaintiff concedes, it necessarily follows that her negligence claims should therefore be dismissed with prejudice.

**II. The Policy Considerations Identified In Plaintiff’s Opposition Establish That Google Owes No Duty To Everyone Who Obtains Directions From Google Maps**

“[Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” *DeBry v. Valley Mortgage Co.*, 835 P.2d 1000, 1003-04 (Utah Ct. App. 1992) (brackets in original). Even if Google were not protected as a publisher – and, as shown, it is – these policy considerations would still preclude imposing a duty on Google toward those who obtain walking directions from Google Maps and are injured in traffic accidents during their trip.

Indeed, the factors for determining the existence of a legal duty in Utah, set forth in the

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<sup>4</sup> Plaintiff also errs in suggesting Google should not be treated as a publisher because, she contends, Google is the author of the information it published. Opp. 9. Publishers do not lose First Amendment protection merely because they collected or created the content. In addition to refusing to hold publishers liable in negligence for misrepresentations on the ground that the publisher did not have a duty to investigate the accuracy of content created by another, as in *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1991), many courts have also refused to impose liability on authors or on publishers who also created the work in question. *See, e.g., Bailey v. Huggins*, 952 P.2d 768, 773 (Colo. Ct. App. 1997) (“in light of First Amendment implications, it has been concluded that no duty of due care is owed by an author to a reader”); *Brandt v. The Weather Channel, Inc.*, 42 F. Supp. 2d 1344, 1345-46 (S.D. Fla. 1999) (no duty owed by The Weather Channel to viewers injured in reliance on its forecast); *Yanase v. Automobile Club of Southern Ca.*, 212 Cal. App. 3d 468, 471-76 (1989) (no duty owed by Auto Club to readers of guidebooks prepared by its field representatives); *Sanders v. Acclaim Enter., Inc.*, 188 F. Supp. 2d 1264, 1274-75 (D. Colo. 2002) (First Amendment forbids imposing duty on makers of movies and video games to viewers and players based on the works’ content).

case Plaintiff cites, do not permit the imposition of a duty on Google in this case. *Normandean v. Hanson Equipment, Inc.*, 2009 UT 44, ¶ 19, 215 P.3d 152, 158. As to the legal relationship of the parties, Plaintiff does not allege that Google had any special relationship with her. Rather, Google simply provided her with a subset of the same geographic information it provides to all of the millions of users of Google Maps. *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 16, 143 P.3d 283, 286 (“A relationship that is highly attenuated is less likely to be accompanied by a duty than one, for example, in which parties are in privity of contract.”). As to foreseeability of injury, it is not reasonably foreseeable that someone who obtains a suggested walking route from Google Maps will abandon common sense and walk in front of oncoming traffic while inebriated. As to likelihood of injury, in the absence of such a lapse of care by the pedestrian herself, no injury is likely to result from following a walking route. Finally, as to public policy considerations of who should bear the loss, it is the pedestrian who must bear the responsibility of using ordinary care in walking near traffic, as s/he alone can guard his or her safety, and no walking route is safe for a pedestrian who fails to do so. Because it is impossible for a provider of walking routes to ensure that users are not injured in the course of their walk, imposing a duty would curtail such services. Pedestrians will be no safer, but the public will have less information at its disposal. All of these policy considerations dictate that no duty be imposed.<sup>5</sup>

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<sup>5</sup> Plaintiff asserts that Utah’s negligent misrepresentation cases establish that “when someone provides a service to a particular individual, courts hold the provider of that service to a duty of care,” Opp. 12, but this is not an accurate statement of the law. The elements of Utah’s negligent misrepresentation tort are far narrower. *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302, 305 (Utah 1983) (“Where (1) one having a pecuniary interest in a transaction, (2) is in a superior position to know material facts, and (3) carelessly or negligently makes a false representation concerning them, (4) expecting the other party to rely and act thereon, and (5) the other party reasonably does so and (6) suffers loss in that transaction, the representor can be held responsible.”). Plaintiff has not – and cannot – allege facts satisfying all these elements. For example, unlike the sales representative in *Galloway v. Afco Dev. Corp.*, 777 P.2d 506, 508 (Utah 1989), who earned a commission from the transaction at issue, Google had no pecuniary

CONCLUSION

Both parties agree that if Google is the publisher of the information she obtained from Google Maps, Plaintiff's claims must fail. Plaintiff's attempts to cast Google as her expert advisor rather than a provider of information to the world at large are utterly implausible and unavailing, as even providers of one-to-one advice are subject to liability only in situations bearing no resemblance to this case. Where, as here, the law imposes no duty, dismissal is appropriate, *see, e.g., Webb v. Univ. of Utah*, 2005 UT 80, ¶ 27, 125 P.3d 906, 912 (reversing imposition of liability where professor's directive to traverse icy sidewalk was insufficient to create a legal duty to injured student because, *inter alia*, the professor's directive did not require student to "abandoned all internal signals of peril to take a particular potentially hazardous route"); *Doe v. Corp. of the Pres.*, 2004 UT App 274, ¶ 15, 98 P.3d 429, 433 (affirming dismissal where there was no special relationship between plaintiffs and defendant and thus no duty), and, in this case, is also necessary to avoid the chilling effect that would result from exposing information providers like Google to protracted litigation over meritless claims. Accordingly, Defendant Google Inc. respectfully asks the Court to grant its motion and dismiss with prejudice each of Plaintiff's claims against it.

DATED this 28<sup>th</sup> day of January, 2011.

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Attorneys for Defendant Google Inc.

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interest in the route Plaintiff chose. And unlike the escrow agent who was engaged to keep track of real estate lots but provided an inaccurate list, *Christenson*, 666 P.2d at 305-06, Google was not in a superior position to know the conditions of the road when Plaintiff was injured. *Only* Plaintiff could have judged the safety of the crossing. Nor could Plaintiff satisfy other elements of the tort, including that it was reasonable for her to step in front of a car because she learned from Google it was possible to reach her destination by following a particular path.

**CERTIFICATE OF SERVICE**

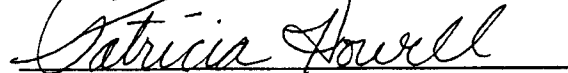
I hereby certify that on the 28<sup>th</sup> day of January, 2011, I caused to be served a true and correct copy of the foregoing, in the manner and upon those addressed below:

- U.S. Mail, postage prepaid
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