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E-FILED on 3/17/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROBERT ANTHONY, individually and on
behalf of others similarly situated,

Plaintiff,

v.

YAHOO! INC., a Delaware corporation,

Defendant.

No. C-05-04175 RMW

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

[Re Docket No. 31]

Robert Anthony ("Anthony") has sued Yahoo! Inc. ("Yahoo!") for (1) breach of contract, (2) fraud, (3) negligent misrepresentation, (4) and deceptive and unfair practices under Florida Stat. § 501.204 *et seq.* ("FDUTPA"), (5) unjust enrichment, and (6) restitution.¹ Yahoo! moves to dismiss all of Anthony's claims. Anthony opposes the motion. The court has read the moving and responding papers and considered counsels' arguments. For the reasons set forth below, the court grants in part and denies in part Yahoo!'s motion.

I. BACKGROUND

Anthony alleges that Yahoo! offers two on-line dating services: Yahoo! Personals and Yahoo! Premier. First Amended Complaint ("FAC") ¶ 13. The former is "for dates and fun," while

¹ Recognizing that unjust enrichment and restitution are not substantive causes of action, Anthony voluntarily dismisses these claims but seeks leave to add them as potential remedies for his breach of contract claim. *See* Opp. Mot. Dism. at 2 n.1.

1 the latter caters to people looking for "loving, lasting relationships." *Id.* at ¶¶ 14-16. Yahoo!
2 represents that both services "will help the subscriber find better first dates and more second dates."
3 *Id.* at ¶ 17. Yahoo! advises users to be truthful and reserves the right to remove deceptive profiles,
4 thus "giv[ing] all subscribers and potential subscribers a sense of confidence in the authenticity of
5 the images displayed on [its] website[.]" *Id.* at ¶ 18. However, Anthony claims, Yahoo!
6 "deliberately and intentionally[] originates, creates, and perpetuates false and/or non-existent
7 profiles on its site" to trick people like Anthony into joining the service and renewing their
8 memberships. *Id.* at ¶¶ 19-20. In addition, Anthony asserts, when a subscription nears its end date,
9 Yahoo! sends the subscriber a fake profile, heralding it as a "potential 'new match.'" *Id.* at ¶ 24.
10 Anthony provides twenty-three examples of these "false and/or non-existent profiles," which include
11 (1) "[u]sing recurrent phrases for multiple images with such unique dictation and vernacular that
12 such a random occurrence would not be possible" and (2) "[i]dential images [with] multiple
13 'identities.'" *Id.* at ¶ 28. Finally, Anthony alleges that Yahoo! continues to circulate profiles of
14 "actual, legitimate former subscribers whose subscriptions had expired," thus giving the misleading
15 impression that these individuals are still available for dates. *Id.* at ¶ 33. Anthony claims to
16 represent two nationwide subclasses: (1) current members of Yahoo!'s dating services and (2) former
17 members who subscribed after January 1, 2001. *Id.* at ¶ 9.

18 II. ANALYSIS

19 A. Motion to Dismiss

20 Dismissal under Rule 12(b)(6) is proper only when a complaint exhibits either a "lack of a
21 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."
22 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). The court must accept the
23 facts alleged in the complaint as true. *Id.* "A complaint should not be dismissed 'unless it appears
24 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle
25 him to relief.'" *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997) (quoting *Conley v.*
26 *Gibson*, 355 U.S. 41, 45-46 (1957)).

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1 **B. Breach of Contract**

2 Anthony alleges that subscribers must agree to Yahoo!'s Terms of Service, Personals
3 Additional Terms of Service, and Personals Guidelines. FAC ¶ 35. He asserts that (1) "Yahoo!
4 entered into a valid, fully integrated contract . . . representing its online dating services as genuine,"
5 (2)"[a]ll parties to the contract understood the nature of the contract was intended to provide each
6 paying subscriber with access to a legitimate and genuine online dating service," and (3) Yahoo!
7 "breached the aforementioned contract by . . . creating and forwarding false and/or nonexistent
8 profiles[.]" *Id.* at ¶¶ 36-37. "[T]he elements of [a breach of contract] cause of action are the
9 existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the
10 defendant and damages." *First Comm. Mortgage Co. v. Reece*, 89 Cal. App.4th 731, 745 (2001).
11 Courts may dismiss breach of contract claims when the agreement is not reasonably susceptible to
12 any meaning that could support the plaintiff's legal theories. *See Martinez v. Socoma Companies,*
13 *Inc.*, 11 Cal.3d 394, 397 (1974).

14 Anthony cannot identify any contractual term that requires Yahoo! not to create or forward
15 false profiles. First, he asserts that Yahoo! breached its Personals Guidelines, which provide that
16 "Yahoo! Personals gives Yahoo! users a way to find and interact with other people who may share
17 their interests and goals. Just like a real community, different people may have different opinions
18 and personalities in Yahoo! Personals." *Opp. Mot. Dism.* at 8:12-15 (quoting Yahoo! Personals
19 Guidelines, FAC Ex. A, at 16).² He argues that Yahoo! violated this clause by creating and
20 forwarding profiles "that do not represent other people who may share their interests and goals and
21 are not part of a 'real community.'" *Id.* at 8:16-18. However, the language upon which Anthony
22 relies merely describes Yahoo!'s dating service and does not commit Yahoo! to performing or not
23 performing any particular action. *See, e.g., Rest. (2d) Contracts* § 2 ("[a] promise is a manifestation
24 of intention to act or refrain from acting in a specified way, so made as to justify a promisee in
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28 ² Anthony attached several documents as Exhibit A to his original complaint. He inadvertently failed to attach these documents as Exhibit A to the FAC. The parties have stipulated to incorporate the documents as if Anthony had attached them to the FAC. *See* Docket No. 43.

1 understanding that a commitment has been made"). Anthony cannot predicate a breach of contract
2 claim upon it.³

3 Second, Anthony asserts that Yahoo! breached its Terms of Service by allegedly sending
4 expired profiles to existing subscribers. He alleges that many individuals whose expired profiles
5 Yahoo! forwarded had "specifically directed" Yahoo! to remove their profiles. FAC ¶ 33.
6 According to Anthony, Yahoo!'s conduct violates a provision of the Personals Terms of Service that
7 grants Yahoo! a broad license:

8 [W]ith respect to Content you submit or make available for inclusion on publicly
9 accessible areas of the Service, you grant Yahoo! the following world-wide, royalty
free and non-exclusive license(s), as applicable:

10 ● With respect to Content you submit or make available for inclusion on publicly
11 accessible areas of Yahoo! Groups, the license to use, distribute, reproduce, modify,
12 adapt, publicly perform and publicly display such Content on the Service *This
license exists only for as long as you elect to continue to include such Content on the
Service and will terminate at the time you remove or Yahoo! removes such Content
from the Service.*

13 ● With respect to photos, graphics, audio or video you submit or make available for
14 inclusion on publicly accessible area[s] of the Service other than Yahoo! Groups, the
15 license to use, distribute, reproduce, modify, adapt, publicly perform and publicly
display such Content on the Service *This license exists only for as long as you
elect to continue to include such Content on the Service and will terminate at the
time you remove or Yahoo! removes such Content from the Service.*

16 Opp. Mot. Dism. at 8: 23-9:14 (quoting Yahoo! Personals Terms of Service, FAC Ex. A, at ¶ 8)
17 (emphasis supplied by Anthony). Anthony argues that "[u]pon being directed by a subscriber to
18 remove a profile, YAHOO is contractually bound to do such that its failure not to do so constitutes a
19 breach of its contractual obligations[.]" *Id.* at 9:14-18. However, the license provision does not
20 specifically require Yahoo! to remove profiles.

21 Third, Anthony notes that Yahoo!'s Community Guidelines state that "[y]ou'll be happy to
22 know that we do not allow spam, information gathering, or escort services." Hopkins Decl. Supp.
23 Mot. Dism. ("Hopkins Decl.") Ex. D. He argues that Yahoo!'s forwarding of false profiles
24 contravenes its "contractual obligation not to allow spam." Opp. Mot. Dism. at 10:6-7. Yet this

25 ³ Anthony makes two other similar arguments that fail for the same reason. First, he
26 asserts that Yahoo! violates "the entire purpose" of its Personals service, where "[s]ingle people go
27 to find dates, romantic partners, and long-term relationships." Opp. Mot. Dism. at 9:19-20 (quoting
Hopkins Decl. Ex. D). Second, he claims that "the entire premise of the service" is that it "allows
28 paid subscribers to get in touch with anyone on Yahoo! Personals." *Id.* at 10:8-12 (quoting Yahoo!
Personals Terms of Service, FAC Ex. A, at ¶ 2.1). These representations are not binding promises to
refrain from creating and forwarding false profiles.

1 sentence appears in a section entitled "Guidelines for Posting Your Profile." Hopkins Decl. Ex. D.
 2 Viewed in context, it restricts what subscribers — not Yahoo! — can do on the site. In any event,
 3 the Terms of Service permit Yahoo! to contact subscribers by e-mail. *See* Yahoo! Personals Terms
 4 of Service, FAC Ex. A, at ¶ 22 ("Yahoo! may provide you with notices . . . by either regular mail, e-
 5 mail, or by postings on the Service").⁴

6 Finally, Anthony asserts that "if the Court determines that no express provision of the
 7 contract was violated by [Yahoo!'s] conduct, [Anthony] may still nonetheless maintain an action . . .
 8 for breach of the [implied] covenant of good faith and fair dealing." Opp. Mot. Dism. at 11:16-18.
 9 He then requests leave to amend such a theory. The court permits him to do so.

10 C. Fraud and Negligent Misrepresentation

11 Anthony's second and third causes of action are for fraud and negligent misrepresentation.
 12 *See* FAC ¶¶ 42-58. "The elements of fraud . . . are: a representation, usually of fact, which is false,
 13 knowledge of its falsity, intent to defraud, justifiable reliance upon the misrepresentation, and
 14 damage resulting from that justifiable reliance." *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 72-73
 15 (1990). "[N]egligent misrepresentation [is] very similar [but] . . . lacks the element of intent to
 16 deceive." *Intrieri v. Sup. Court*, 117 Cal. App. 4th 72, 85-86 (2004).

17 1. The Communications Decency Act

18 Yahoo! argues that the Communications Decency Act ("CDA") bars Anthony's fraud and
 19 negligent misrepresentation claims. The CDA provides that (1) "[n]o provider or user of an
 20 interactive computer service shall be treated as the publisher or speaker of any information provided
 21 by another information content provider" and (2) "[n]o cause of action may be brought and no
 22 liability may be imposed under any State or local rule that is inconsistent with this section." 47
 23 U.S.C. §§ 230(c)(1) & (e)(3). Section 230(f)(2) defines "interactive computer service" as "any
 24 information service, system, or access software provider that provides or enables computer access by
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26 ⁴ Yahoo!'s agreements also contain broad disclaimers of "all warranties of any kind."
 27 *See, e.g.*, Yahoo! Personals Terms of Service, FAC Ex. A, at ¶ 27(a). Anthony contends that these
 28 clauses are unconscionable under California Civil Code § 1670.5 and unenforceable as a contract
 that "exempt[s] anyone from responsibility for his own fraud" under California Civil Code § 1668.
 Because the court determines that Yahoo! need not rely on its disclaimers to defeat Anthony's
 contract cause of action, it need not address the issue.

1 multiple users to a computer service, including specifically a service or system that provides access
 2 to the Internet[.]” An “information content provider” is “any person or entity that is responsible, in
 3 whole or in part, for the creation or development of information provided through the Internet or any
 4 other interactive computer service.” 47 U.S.C. § 230(f)(3). “Congress clearly enacted § 230 to
 5 forbid the imposition of publisher liability on a service provider for the exercise of its editorial and
 6 self-regulatory functions.” *Ben Ezra, Weinstein, & Company, Inc. v. America Online Inc.*, 206 F.3d
 7 980, 986 (10th Cir. 2000). Yahoo! contends that it cannot be liable “based on profile content” under
 8 the CDA. Mot. Dism. at 5:20.

9 Yahoo's assertion sweeps too broadly. Anthony alleges that Yahoo! *creates* false profiles,
 10 not merely fails to delete them. See FAC ¶ 19 (Yahoo! “deliberately and intentionally originates,
 11 creates, and perpetuates false and/or non-existent profiles”). In addition, Anthony claims that
 12 Yahoo! sends users false profiles for the purpose of luring them into renewing their subscriptions.
 13 See *id.* at ¶ 32 (“With actual knowledge of the fraudulent nature of the profiles and images, YAHOO
 14 would send such false profiles and images to, among others, subscribers whose subscriptions to the
 15 service were about to expire in an effort to convince them to renew their subscriptions”).⁵ No case
 16 of which this court is aware has immunized a defendant from allegations that *it* created tortious
 17 content. Compare *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997) (CDA applies
 18 to defamation claim against AOL for failing to remove offensive material from bulletin board);
 19 *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D. D.C. 1998) (CDA applies to defamation claim
 20 against AOL for sponsoring on-line gossip column); *Lars Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816,
 21 831 (2002) (CDA applies to negligence and unfair competition claims against eBay stemming from
 22 third party's sale of forged autographs); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124
 23 (9th Cir. 2003) (CDA applies to invasion of privacy, misappropriation of the right of publicity,
 24 defamation and negligence claims against internet dating service relating to third party's creation of
 25 false profile using plaintiff's identity). In fact, these cases have acknowledged that the CDA “would

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 27 ⁵ Yahoo!'s contention that Anthony “does not make clear whether [he] alleges that
 28 Yahoo! creates the allegedly ‘false and/or non-existent’ profiles or whether Yahoo! simply fails to
 verify and remove allegedly ‘false and/or non-existent’ profiles from its site,” Mot. Dism. at 2:9-11,
 misinterprets his complaint.

1 not immunize [an 'interactive computer service' provider] with respect to any information [it]
 2 developed or created entirely by itself" *Blumenthal*, 992 F. Supp. at 50. One need look no
 3 further than the face of the statute to see why. The CDA only immunizes "information provided by
 4 *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). If, as Anthony
 5 claims, Yahoo! manufactured false profiles, then it is an "information content provider" itself and
 6 the CDA does not shield it from tort liability.⁶

7 In addition, the CDA does not defeat Anthony's allegations that Yahoo! sent "profiles of
 8 actual, legitimate former subscribers whose subscriptions had expired and who were no longer
 9 members of the service, to current members of the service." FAC ¶ 33. Admittedly, third parties
 10 created these profiles. Nevertheless, the CDA only entitles Yahoo! not to be "the publisher or
 11 speaker" of the profiles. It does not absolve Yahoo! from liability for any accompanying
 12 misrepresentations. Because Anthony posits that Yahoo!'s manner of presenting the profiles — not
 13 the underlying profiles themselves — constitute fraud, the CDA does not apply.

14 2. Federal Rule of Civil Procedure 9(b)

15 Yahoo! next argues that Anthony has failed to plead fraud and negligent misrepresentation
 16 with the requisite specificity. Federal Rule of Civil Procedure 9(b) requires that "[i]n all averments
 17 of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with
 18 particularity." "Rule 9(b) demands that, when averments of fraud are made, the circumstances
 19 constituting the alleged fraud be specific enough to give defendants notice of the particular
 20 misconduct . . . so that they can defend against the charge and not just deny that they have done
 21 anything wrong." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal
 22 quotation marks and citations omitted). Although "[t]he complaint must specify such facts as the
 23 times, dates, places, benefits received, and other details of the alleged fraudulent activity," this rule
 24 "may be relaxed with respect to matters within the opposing party's knowledge." *Neubronner v.*
 25 *Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

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 27 ⁶ Yahoo! may simultaneously be both an "information content provider" and an
 28 "interactive computer service" provider. *See Gentry*, 99 Cal. App. 4th at 833 ("It is not inconsistent
 for eBay to be an interactive service provider and also an information content provider; the
 categories are not mutually exclusive. The critical issue is whether eBay acted as an information
 content provider with respect to the information that appellants claim is false or misleading.").

1 Yahoo! admits that Anthony has "identifie[d] certain profiles he alleges are 'false and/or non-
 2 existent' and, to some extent, even the basis for his belief," but contends that he does not "allege that
 3 he specifically viewed, responded to, attempted to contact, or otherwise relied on any of these
 4 purportedly false profiles." Mot. Dism. at 13:17-21. There are two problems with this argument.
 5 For one, it misconstrues Anthony's complaint. Contrary to Yahoo!'s claim, Anthony asserts that he
 6 "and other members of the Class viewed, attempted to respond to and relied on such false and/or
 7 non-existent profiles and images causing [them] to continue to subscribe to the service." FAC ¶ 25.⁷
 8 Second, Yahoo!'s contention, at bottom, is that Anthony does not plead the reliance element of his
 9 claims in accordance with Rule 9(b)'s heightened standards. He need not do so. *See Indiana Bell*
 10 *Telephone Co. v. Ward*, 2002 WL 32067296 *3 (S.D. Ind. 2002) ("Rule 9(b) applies to the specifics
 11 of alleged misrepresentations, but the notice pleading requirements of Rule 8 apply to other aspects
 12 of the plaintiff's complaint, such as damages, reliance, or a defendant's state of mind"). Anthony
 13 lists twenty-three concrete examples of false profiles, including user names and excerpts from each
 14 posting. *See* FAC ¶ 28 (alleging that some have the same picture but different identities and some
 15 have the same identities but different pictures). He claims that Yahoo! created and forwarded these
 16 profiles to trick new members into joining and stop current members from leaving. *Id.* at ¶¶ 19, 24.
 17 These detailed allegations satisfy Rule 9(b) because they place Yahoo! on notice of the alleged
 18 misrepresentations that form the basis of Anthony's claims. The court therefore denies Yahoo!'s
 19 motion to dismiss Anthony's fraud and negligent misrepresentation causes of action.

20 **D. FDUTPA**

21 Anthony's fourth cause of action alleges that Yahoo! violated the FDUTPA. FAC ¶¶ 59-65.
 22 That statute outlaws "[u]nfair methods of competition and unfair or deceptive acts or practices in the
 23 conduct of any trade or commerce." Fla. Stat. § 501.204(1). To state a claim under the statute, a
 24 plaintiff must allege that the defendant "engaged in 'unfair or deceptive acts or practices.'" *Tuckish*

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 26 ⁷ In its reply brief, Yahoo! argues that although Anthony "alleges that Yahoo!
 27 Personals has 'millions of subscribers' . . . the gravamen of his claim is that Yahoo! does not offer a
 28 legitimate on-line dating service." Rep. Supp. Mot. Dism. at 1:14-16. This argument has some
 merit: given the numerous potential "matches" on Yahoo!'s service, it may be difficult for Anthony
 to prove that he relied on a particular false profile when deciding either to join or not to cancel his
 membership. However, this fact-specific issue is not properly resolved on a motion to dismiss.

1 v. *Pompano Motor Co.*, 337 F. Supp. 2d 1313, 1320 (S.D. Fla. 2004). Yahoo! moves to dismiss this
2 cause of action on the narrow grounds that Anthony has failed to plead it with specificity and that
3 the CDA bars it. *See* Mot. Dism. at 15:6-16:5. As noted above, both contentions lack merit.
4 Accordingly, the court denies Yahoo!'s motion to dismiss Anthony's FDUTPA claim.⁸

5 **III. ORDER**

6 For the foregoing reasons, the court (1) dismisses Anthony's claims for breach of an express
7 contract, restitution, and unjust enrichment and (2) denies Yahoo!'s motion to dismiss Anthony's
8 claims for fraud, negligent misrepresentation, and FDUTPA violations. The court gives Anthony
9 twenty days leave to amend.

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12 DATED: 3/14/06

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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28 ⁸ Yahoo! reserves its right to raise choice-of-law issues relating to the FDUTPA later.
See Mot. Dism. at 15 n.4.

